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STANDARD ENCYCLOPÆDIA *of* PROCEDURE

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COUNTERFEITING

By ARTHUR E. DENNIS,
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CROSS-REFERENCES:

False Pretenses.

Forgery.

I. DEFINITION AND SCOPE. — The term counterfeiting is said to signify, both by its etymology and common intendment, the fabrication of a false image or representation.¹ It is, therefore, often synonymous with forgery, which has been defined as the false making of an instrument, which purports, on its face, to be good and valid for the purpose for which it was created, with a design to defraud any person or persons.²

Analogous Offenses. — The power of congress to define and punish counterfeiting is expressly conferred by the constitution.³ But in order more fully to protect the integrity of the currency, other acts preliminary to the crime of counterfeiting or closely connected therewith, and similarly affecting the integrity of the current mediums of exchange, have been denounced as crimes, both by the individual states and the United States. These analogous offenses are passing, or having in possession with intent to pass, counterfeit coins, obligations or securities;⁴ and making or having in possession molds, tools or instruments suitable for making such false, forged or counterfeit obligations,⁵ or paper similar to that adopted by the secretary of the treasury for the obligations and other securities of the United States.⁶

II. FEDERAL AND STATE JURISDICTION. — **A. FEDERAL JURISDICTION.** — The power to punish the making of counterfeits is expressly conferred on congress by the constitution,⁷ and extends by

1. United States v. Marigold, 9 How. (U. S.) 560, 13 L. ed. 257.

For matters of evidence see the title "Counterfeiting" in the *ENCYCLOPÆDIA OF EVIDENCE*.

A counterfeit "is an instrument falsely made in the similitude of a genuine instrument." United States v. Barrett, 111 Fed. 369.

2. United States v. Howell, 11 Wall. (U. S.) 432, 20 L. ed. 195; Jones & Palmer's Case, 1 Leach (Eng.) 366.

Forgery applies to the alteration of paper money only, but counterfeit, in the words of Bouvier [Bouv. Law. Dict. "Counterfeit"] "refers to imitations of coin or paper money."

Blackstone says it is "The fraudulent making and alteration of a writing to the prejudice of another man's right." Wm. Bl. Com. 247.

Nice distinctions between the import of the two terms is not, however, necessary in this connection, as the statute habitually joins both, the customary phrase being "false, forged and counterfeited."

As to forgery in general, see the title "Forgery."

3. United States Const., Art. I, §8.

4. U. S. Rev. Stat., §§5431, 5434. And see United States v. Bennett, 17 Blatchf. 356, 24 Fed. Cas. No. 14,572; United States v. Albert, 45 Fed. 552.

An indictment setting out an obligation which shows on its face that it is a note of a state bank, is *insufficient* under U. S. Rev. Stat., §5430, making it a crime to have in one's possession an obligation or security engraved or printed *after the similitude* of an obligation and security issued under the authority of the United States. United States v. Pitts, 112 Fed. 522; United States v. Connors, 111 Fed. 734.

5. U. S. Rev. St., §§5432, 5433.

Tools suitable for reproducing counterfeits have been legislated against as vigorously as the counterfeits themselves, and as to them also there are two distinct offenses: (1) making; and (2) having in possession. See U. S. Rev. St., §5457; Kaye v. United States, 177 Fed. 147, 100 C. C. A. 567. State v. Griffin, 18 Vt. 198.

6. Krakowski v. United States, 161 Fed. 88, 88 C. C. A. 252.

All of these offenses fall naturally under the title of "Counterfeiting," and are therefore included herein.

7. U. S. Const., Art. I, §8. United

implication to the passing and altering thereof,* and to the counterfeiting of the obligations of foreign countries.⁹

States v. Marigold, 9 How. (U. S.) 560, 13 L. ed. 257.

The revision of the United States Statutes of 1874 left out the clause of the statute of 1864, making the uttering of counterfeit United States notes a felony; hence an indictment thereunder need not charge that the act was feloniously committed, because "except those committed on the high seas and within the forts, arsenals, and other places exclusively within the jurisdiction of the United States, and except high treason, there are no common law offenses against the United States; and all crimes are statutory." *United States v. Shepherd*, 1 Hughes 520, 27 Fed. Cas. No. 16,274.

The federal jurisdiction is limited to the cognizance of those offenses expressly denounced by the statutes of the United States, since it has no common law, and therefore cannot take cognizance of the common law offense, as such. *United States v. Jolly*, 37 Fed. 108; *United States v. Shepherd*, 1 Hughes 520, 27 Fed. Cas. No. 16,274.

8. *United States v. Marigold*, 9 How. (U. S.) 560, 15 L. ed. 257.

"We trace both the offense (circulating spurious coin) and the authority to punish it to the power given by the constitution to coin money, and to the correspondent and necessary power and obligation to protect and to preserve in its purity this constitutional currency for the benefit of the nation." *United States v. Marigold*, 9 How. (U. S.) 560, 13 L. ed. 257.

Some dicta to the contrary are found in *Fox v. Ohio*, 5 How. (U. S.) 410, 12 L. ed. 213, but this case was explained and reconciled in *United States v. Marigold*, *supra*, wherein it was said: "The question, and the only one, brought up for the examination of this court (in *Fox v. Ohio*) was, whether this private cheat could be punished by the State authorities, on account of the immediate instrument of its perpetration having been a base coin, in the similitude of a dollar of the coinage of the United States."

The distinction between these two offenses is clearly drawn in *Fox v. Ohio*, 5 How. (U. S.) 410, 12 L. ed. 213, when it was said: "The imposture

of passing a false coin creates, produces, or alters nothing; it leaves the legal coin as it was—affects its intrinsic value in no wise whatsoever. The criminality of this act consists in the obtaining for a false representative of the true coin that for which the true coin alone is the equivalent. There exists an obvious difference, not only in the description of these offenses, but essentially also in their characters. The former is an offense directly against the government, by which individuals may be affected; the other is a private wrong, by which the government may be remotely, if it will in any degree, be reached. A material distinction has been recognized between the offenses of counterfeiting the coin and of passing base coin by a government which may be deemed sufficiently jealous of its authority; sufficiently vigorous, too, in its penal code. Thus, in England, the counterfeiting of the coin is made high treason, whether it be uttered or not, but those who barely utter false money, are neither guilty of treason nor of misprison of treason. 1 Hawkin's Pleas of the Crown, 20. Again (1 East's Crown Law, 178), if A, counterfeit the gold or silver coin, and by agreement before such counterfeiting B. is to receive and vent the money, he is an aider and abettor to the act itself of counterfeiting, and consequently a principal traitor within the law. But if he has merely vented the money for his own private benefit, knowing it to be false, in fraud of any person, he was only liable to be punished for a cheat and misdemeanor, etc. These citations from approved English treatises of criminal law are adduced to show, in addition to the obvious meaning of the words of the constitution, what has been the adjudged and established import of the phrase *counterfeiting the coin*, and to what description of acts that phrase is restricted."

9. *United States v. Arjona*, 120 U. S. 479, 7 Sup. Ct. 628, 30 L. ed. 728.

The authority for denouncing the counterfeiting of foreign coins or securities as a crime is based on Art. I.

B. STATE JURISDICTION.—The jurisdiction of the state courts is based on the common law offense of cheating, or obtaining money or goods under false pretenses.¹⁰ The same act may, therefore, be an offense against both federal and state governments and punishable by each under the laws thereof.¹¹ And although the states have no

sec. 8, clause 10, of the United States Constitution, giving Congress power "to define and punish . . . offences against the laws of nations."

In *United States v. Arjona*, *supra*, the court quotes, with approval, the language of Vattel, in his *Law of Nations*, (Phil. ed. 1876, Book I, chap. 10, p. 46) to the effect that, "From the principles thus laid down, it is easy to conclude, that if one nation counterfeits the money of another, or if she allows and protects false coiners who presume to do it, she does that nation an injury."

10. *United States v. Barrett*, 111 Fed. 369, *citing* *United States v. Wilson*, 44 Fed. 751; *United States v. Kuhl*, 85 Fed. 624; *Jett v. Com.*, 18 Gratt. (Va.) 933.

"The punishment of a cheat or misdemeanor practiced within the state, and against those whom she is bound to protect, is peculiarly and appropriately within her functions and duties." *Fox v. Ohio*, 5 How. (U. S.) 410, 12 L. ed. 213.

"This section (Rev. St. §5328, see *infra*), seems to mean that making them so punishable shall not prevent the states from taking hold of any offences which may be involved that are contrary to the state laws, and not cognizable under the United States laws, and punishing them. And taken in connection with the section (711) making the jurisdiction of the United States courts over offences cognizable under the authority of the United States wholly exclusive of the state courts, it must mean this. . . . The act of passing the counterfeited bills, made punishable under the statute of the state under which the relator was indicted, might, and often would, concur with others to constitute a cheat which would be punishable by laws of the state of long standing against obtaining money or goods by privy or false tokens." *Ex parte Houghton*, 8 Fed. 897.

Section 5328 of the Revised Statutes under the title of "Crimes"

reading: "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof," was originally enacted as §26 of the Act of 1825, 4 St. at Large 122, which contained the additional words "over offences made punishable by this act." Section 5328 has since been repealed (Act of March 4, 1909, ch. 321, §341) and re-enacted in 35 St. at L. 1151, 1909 Supp., p. 1487.

11. *U. S.*—*United States v. Marigold*, 9 How. 560, 13 L. ed. 257; *Fox v. Ohio*, 5 How. 410, 12 L. ed. 213; *Houston v. Moore*, 5 Wheat. 1, 5 L. ed. 19. *Ia.*—*State v. McPherson*, 9 Iowa 53. *Va.*—*Hendrick v. Com.*, 5 Leigh. 707; *Jett v. Com.*, 18 Gratt. 933.

"There are cases (the most familiar of which are those of making and uttering counterfeit money) in which the same act may be a violation of the laws of the state, as well as of the United States, and be punishable by the judiciary of either." *In re Loney*, 134 U. S. 372, 10 Sup. Ct. 584, 33 L. ed. 949, *citing* *Fox v. Ohio*, 5 How. (U. S.) 410, 12 L. ed. 213; *United States v. Marigold*, 9 How. (U. S.) 560, 13 L. ed. 257; *Moore v. People*, 14 How. (U. S.) 13, 14 L. ed. 306; *Ex parte Siebold*, 100 U. S. 371, 390, 25 L. ed. 717; *Cross v. North Carolina*, 132 U. S. 131, 10 Sup. Ct. 47, 33 L. ed. 287. And to similar effect is *Sexton v. California*, 189 U. S. 318, 23 Sup. Ct. 543, 47 L. ed. 833.

The distinction between the act and the offense, is pointed out by the court in *Jett v. Com.*, *supra*, in commenting on the opinion of Mr. Justice Washington in *Houston v. Moore*, 5 Wheat. (U. S.) 1, 5 L. ed. 19, saying: "It is obvious that the learned Judge construed the terms 'crimes and offenses,' in the eleventh section of the judiciary act, as signifying the acts by the doing of which crimes and offenses are committed. In this way he reached the conclusion that the act of Congress vests in the courts of the United States exclusive cognizance of those

authority to punish the violation of the federal laws, as such,¹² such laws are generally held not to deprive the state courts of the power to punish any offenses against their own laws involved therein,¹³ though

acts; and I apprehend it could be reached in no other way. But this is not the proper sense of these words. A crime or offense is the transgression of a law; and the same act may constitute several offenses. We have seen that the same act may be an offense against the United States, and at the same time an offense against the state. . . . The terms, 'crimes and offenses,' therefore, do not properly signify the acts by which the laws are violated, but they signify the violation of law, which those acts produce."

12. Revised Stat., §711 provides that "The jurisdiction vested in the courts of the United States, in the cases and proceedings hereinafter mentioned shall be exclusive of the courts of the several states: *First*. Of all crimes and offenses cognizable under the authority of the United States." "This provision," said the court in *Ex parte Houghton*, 8 Fed. '897, "was not in the statutes of the United States, anywhere before. . . . The language of the section quoted from the title on 'Crimes,' [§5328. "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof"], does not save the jurisdiction of the courts of the states over the offenses made punishable by that title, as section 26 of the Act of 1825 saved it over offenses made punishable by that act. [Sec. 26 read, 'Nothing in this act contained shall be construed to deprive the courts of the individual states of jurisdiction under the laws of the several states over offenses made punishable by this act. 4 St. at Large 122]. It says nothing of offenses, as such, to express or specify its application. . . . This section seems to mean that making them so punishable shall not prevent the states from taking hold of any offenses which may be involved that are contrary to the state laws, and not cognizable under the United States laws, and punishing them." After comparing the state and federal statutes and concluding that the offense punished by the former was "precisely the same offense made pun-

ishable by the laws of the United States." The court continued, "The relator, therefore, stands convicted in the state court of precisely an offense cognizable under the authority of the United States, and is restrained of his liberty 'under that conviction.' The court therefore concluded that 'this offense appears to be one over which the state court had no jurisdiction,' and the prisoner was ordered discharged.

13. Cal.—*People v. McDonnell*, 80 Cal. 285, 22 Pac. 190; *People v. White*, 34 Cal. 183. Ga.—*Gentry v. State*, 6 Ga. 503. Ind.—*Dashing v. State*, 78 Ind. 357; *Snoddy v. Howard*, 51 Ind. 411; *Chess v. State*, 1 Blackf. 198. Ia.—*State v. McPherson*, 9 Iowa 53. Mass.—*Com. v. Fuller*, 8 Mete. 313. Mich.—*Harlan v. People*, 1 Doug. 207. Ohio.—*Sutton v. State*, 9 Ohio 133. Pa.—*Com. v. Dale*, 3 Pa. Co. Ct. 30. S. C.—*State v. Tutt*, 2 Bailey 44. Tenn.—*Sizemore v. State*, 3 Head 26. Vt.—*State v. Randall*, 2 Aik. 89.

See also *In re Truman*, 44 Mo. 181, overruling *Matteson v. State*, 3 Mo. 421, which is said to have "ceased to be an authority of force on the constitutional question therein involved, since repeated contrary decisions by the Supreme Court of the United States, of a later date, have established an opposite doctrine. (*Fox v. State*, 5 How. 410; *Moore v. Illinois*, 14 How. 13.)"

"The twenty-sixth and last section of the act of [March 3,] 1825, (providing for the punishment of counterfeiting) declared: 'Nothing in this act shall be construed to deprive the courts of the individual states of jurisdiction of the laws of the several states over offenses, made punishable by this act.' This section is still in force, and appears, in substance, as section 5328 of the United States Revised Statutes. Conceding what is unquestionably well settled, that congress may exclude the jurisdiction of the courts of the states from offenses within the power of Congress to punish,—*Houston v. Moore*, 5 Wheat. 1; *The Moses Taylor*, 4 Wall. 411; *Martin v. Hunter*, 1 Wheat. 304;

a few early cases to the contrary will be found in the books.¹⁴

III. THE INDICTMENT. — A. NECESSARY ALLEGATIONS. — 1.

General Form. — All the elements necessary to constitute the crime should be plainly stated in the indictment.¹⁵ In setting out the tenor

Com. v. Fuller, 8 Mete. (Mass.) 313,—it appears in respect to the offenses of which the petitioner stands convicted (viz: passing counterfeit coin), not only that congress has not excluded, but on the contrary has expressly reserved and recognized, the jurisdiction of the state courts. The district court of Grayson county (Texas) had therefore jurisdiction to try and sentence the petitioner for the offense with which he was charged, and whereof he was convicted, and his imprisonment under such sentence is lawful. The petition for the writ of *habeas corpus* must therefore be denied.” *Ex parte Geisler*, 50 Fed. 411.

In *Jett v. Com.*, 18 Gratt. (Va.) 933, it is said that no such saving proviso is necessary to enable the courts of the states to exercise their jurisdiction over offenses against their own laws even though committed by the same act which constitutes an offense against the United States under an act of Congress. This case cited *Fox v. Ohio*, *supra*; *Moore v. People*, 14 How. (U.S.) 13, 14 L. ed. 306; *United States v. Amy*, 24 Fed. Cas. No. 14,445, and *Hendrick v. Com.*, 5 Leigh. (Va.) 707, as sustaining that conclusion.

“The power of the States in this instance (the making and passing of counterfeits), is not superseded; for the General Government has not, either expressly or impliedly by its statutes, prevented the punishment by the States. *Bishop’s Cr. Law*, §§613, 655, and the cases there cited; *Wharton’s Cr. Law*, 47, 349; *Act of Congress*, April 21, 1806, ch. 69, §4; *Act of March 3, 1823*, ch. 166; *March 3, 1825*, ch. 276.” *State v. McPherson*, 9 Iowa 53.

And see generally the title “**Federal Courts.**”

A cheat effected by a forged bill of a national bank may be punished under a state law, as well as one effected by a counterfeit coin of the United States (*Jett v. Com.*, 18 Gratt. (Va.) 933), or a counterfeited obligation of a foreign country (*United States v. Aryona*, 120 U. S. 479, 7

Sup. Ct. 628, 30 L. ed. 728). In the latter case, after asserting the power of the federal government to punish the counterfeiting of the obligations of foreign countries, the court proceeded: “This, however, does not prevent a state from providing for the punishment of the same thing; for here, as in the case of counterfeiting the coin of the United States, the act may be an offense against the authority of a state as well as that of the United States.”

14. *Ga.*—*Rouse v. State*, 4 Ga. 136. *Mo.*—*Matteson v. State*, 3 Mo. 421, overruled by *In re Truman*, *supra*. *Ore.* *State v. Brown*, 2 Ore. 221.

In *Rouse v. State*, *supra*, the indictment (for passing counterfeit coin) was held defective on other grounds, though the court said, in passing, “It would seem clear, therefore, that the States have no jurisdiction whatever over the offense of counterfeiting money, coined at the mint of the United States, or any of its branches. But whether an indictment lies in the State Courts, under State statutes, for counterfeiting any species of coin which is brought from foreign nations, or for passing counterfeit coin of any description, I forbear to express any opinion, as the point, although contained in the record, is not presented in the bill of exceptions.”

But the power of the state to punish the uttering of counterfeit coin was upheld in *Gentry v. State*, 6 Ga. 503.

15. *Wroclawsky v. United States*, 183 Fed. 312, 105 C. C. A. 524 (omission of averment that counterfeit molds were made “without authority from the Secretary of the Treasury of the United States or other proper officer” held a fatal defect); *United States v. Williams*, 4 Biss. 302, 28 Fed. Cas. No. 16,706 (“Nothing else is requisite to a good indictment”). *Ark.*—*Smith Bell v. State*, 10 Ark. 536.

III.—*Swain v. People*, 5 Ill. 178 (“this is all our law requires.”). *N. Y.*—*People v. Albow*, 140 N. Y. 130, 35 N. E. 438, citing *United States v. Hess*, 124 U. S. 483, 8 Sup. Ct. 571,

of the obligations the customary phrase is "in words and figures following,"¹⁶ or "as follows,"¹⁷ but "in substance as follows," has been held insufficient.¹⁸

Purport. — It is customary to allege that the notes "purported" to be good and duly authorized obligations,¹⁹ but this depends on the wording of the statute.²⁰

31 L. ed. 516. **Tenn.**—*Williams v. State*, 9 Humph. 80.

"Every material ingredient, constituting the description of the offense in the statute, whether an act done, knowledge had, intent or purpose entertained, or the existence of any collateral fact, must be affirmatively stated in plain, direct and intelligible language." *Edwards v. Com.*, 19 Pick. (Mass.) 124.

An indictment for having in possession at one time ten similar counterfeit bank bills was held not bad because the bills bore different dates, "on the authority of *Brown v. Com.*, 8 Mass. 59." *Com. v. Whitmarsh*, 4 Pick. (Mass.) 233.

It is not necessary to allege that the offense was committed within and upon territory within the jurisdiction of the United States. *Campbell v. United States*, 4 Fed. Cas. No. 2,373.

Thus, under a statute denouncing the selling or offering for sale of counterfeit money, or aiding therein, an indictment setting out certain acts of the defendant, but not averring that the scheme was to sell or exchange "counterfeit" money, or what purported to be such, is bad on demurrer, even though the jury might have so inferred if the facts stated were established. *People v. Albow*, 140 N. Y. 130, 35 N. E. 438.

An indictment charging the uttering of a counterfeit note in imitation of a true one, "which said note is of the tenor following," has been held not bad as charging the uttering of the true note because the plain meaning required that "said" should refer to the counterfeit note, not to the true one, although it was the next preceding. *Wilkinson v. State*, 10 Ind. 372.

Not Cured By Verdict.—A failure to state one of the essentials of the crime is not cured by verdict. *United States v. Otey*, 31 Fed. 68.

But a mere imperfection in the statutory description will be cured by ver-

dict if the offense is clearly described notwithstanding. *Townsend v. People*, 4 Ill. 326.

Misnomer of defendant cannot be reached by a motion to quash. It is only pleadable in abatement. *Gabe v. State*, 6 Ark. 519.

If the given name of the felon is unknown an indictment so alleging and charging him by his initials is good. *Jones v. State*, 11 Ind. 357.

Conclusion.—An indictment concluding "contrary to the form of the acts of congress in such case made and provided," is not bad although there was only one act. *United States v. Trout*, 4 Biss. 105, 28 Fed. Cas. No. 16,542. And see the title "Indictment and Information."

16. *United States v. Fisler*, 4 Biss. 59, 25 Fed. Cas. No. 15,105.

17. *United States v. Owens*, 37 Fed. 112; *United States v. Mason*, 12 Blatchf. 497, 26 Fed. Cas. No. 15,736, holding that "the words 'which is as follows' in these counts, are equivalent to the 'words and figures following,' and must be held to mean, that the tenor of the bill is given."

Tenor imports an exact copy. *Swain v. People*, 5 Ill. 178; *Griffin v. State*, 14 Ohio St. 55.

18. "There is nothing better settled than that the rule in such cases requires exact copies of forged instruments to be given, and to *purport* on the face of the indictment to be given. The indictment in such cases generally employs such language as this: 'to the tenor and effect following;' or, 'in the words and figures following;' and it will never do to say 'in substance as follows.' *State v. Atkins*, 5 Blackf. 458; *Wharton Cr. Law*, §§306, 308, 1468." *United States v. Fisler*, 4 Biss. 59, 25 Fed. Cas. No. 15,105.

19. *United States v. Sprague*, 48 Fed. 828; *United States v. Williams*, 14 Fed. 550; *United States v. Williams*, 4 Biss. 302, 28 Fed. Cas. No. 16,706.

20. *United States v. Howell*, 11 Wall. (U. S.) 432, 20 L. ed. 195, *dis-*

Similitude.—The averment that the counterfeit obligations are in the similitude of good and genuine obligations is not necessary under §5431,²¹ but it is otherwise under §5430, wherein it is an essential element of the offense,²² and should also be made in indictments for counterfeit coin.²³ It is not necessary to allege that genuine United States notes have been authorized and issued.²⁴

2. Knowledge of Falsity.—The indictment must allege that the person passing the counterfeits had knowledge of their falsity,²⁵ but such averment is not required in an indictment for counterfeiting.²⁶ Guilty knowledge is also the essence of the crime of possessing instruments for counterfeiting, and must be averred.²⁷

3. Currency.—The indictment should allege that the notes circulate as currency,²⁸ though it is held otherwise as to gold and silver coins because the courts take judicial notice that they so pass.²⁹

4. Intent.—a. *Counterfeiting.*—The intent or purpose with which counterfeit coins are made need not be averred,³⁰ as the fraudulent intent is implied from the false making.³¹

tinguishing United States v. Cantril, 4 Cranch 167, 2 L. ed. 584.

21. United States v. Howell, 64 Fed. 110 (quaere, but the indictment did not contain the allegation); United States v. Owens, 37 Fed. 112.

And it was so held under 13 St. 221. United States v. Trout, 4 Biss. 105, 28 Fed. Cas. No. 16,542.

22. United States v. Barrett, 111 Fed. 369; United States v. Kuhl, 85 Fed. 624; United States v. Stevens, 52 Fed. 120.

Under an early Georgia statute it was held unnecessary to allege that the counterfeit was "in imitation of" a genuine note. State v. Calvin, R. M. Charl. (Ga.) 151.

23. United States v. Trout, 4 Biss. 105, 28 Fed. Cas. No. 16,542; United States v. Burns, 5 McLean 23, 24 Fed. Cas. No. 14,691; Com. v. Stearns, 10 Mete. (Mass.) 256.

24. United States v. Owens, 37 Fed. 112.

25. United States v. Carll, 105 U. S. 611, 26 L. ed. 1135. And see Gallagher v. United States, 144 Fed. 87.

26. United States v. Otey, 31 Fed. 68, 70, *citing* United States v. Burns, 5 McLean 23, 24 Fed. Cas. No. 14,691; United States v. King, 5 McLean 208, and United States v. Abrams, 18 Fed. 823; United States v. Russell, 22 Fed. 390.

27. People v. State, 6 Blackf. (Ind.) 95; Chamberlain v. State, 5 Blackf. (Ind.) 573; Sutton v. State, 9 Ohio 133 ("secretly, as used in the indict-

ment [charging that the defendants *secretly* kept the instruments], implies the guilty knowledge").

28. State v. Keneston, 59 N. H. 36, but need not allege that they were current in the United States.

In Mathena v. State, 20 Ark. 70, the phrase "circulate as money" is said to be "essentially descriptive of the offense created by the statute" (§20) and must therefore be alleged.

29. State v. Shelton, 7 Humph. (Tenn.) 31.

30. Kaye v. United States, 177 Fed. 147, 100 C. C. A. 567, *citing* United States v. Russell, 22 Fed. 390; United States v. Peters, 2 Abb. 494, 27 Fed. Cas. No. 16,035; United States v. Noble, 5 Cranch C. C. 371, 27 Fed. Cas. No. 15,895.

"The only question is whether the accused did, in fact, forge or counterfeit such coins as charged against him in the indictment. If he did, he cannot excuse himself by showing what was his intention, or that he did not intend himself to use the coin he so made for fraudulent purposes, or that they should be so used by others. Nor can he be excused on account of his ignorance of the law,—that it did not allow him to do what he did." United States v. Russell, 22 Fed. 390. *Contra*, Under 4. St. at L. 121; United States v. Peters, 2 Abb. 494, 27 Fed. Cas. No. 16,035; United States v. King, 5 McLean 208, 26 Fed. Cas. No. 15,535.

31. United States v. Otey, 31 Fed. 68, *citing*, United States v. Burns, 5

b. *Instruments for Counterfeiting*.—The crime of making instruments for counterfeiting is also independent of the intent with which they were made,³² but an indictment for having such instruments in possession must charge the purpose to use them.³³

c. *Passing or Possessing*.—An indictment for passing counterfeit obligations or having them in possession is bad, however, unless alleged to be with unlawful intent.³⁴ But an intent to defraud is no part of the offense of having possession of an obligation or other security engraved after the similitude of those issued under the authority of the United States.³⁵

Intent to Pass.—An indictment for having in possession must gen-

McLean 23, 24 Fed. Cas. No. 14,691; *United States v. King*, 5 McLean 208, 26 Fed. Cas. No. 15,535; *United States v. Abrams*, 18 Fed. 823.

32. *Kaye v. United States*, 177 Fed. 147, 100 C. C. A. 567.

33. *Idaho*.—*People v. Page*, 1 Idaho 102. *Tenn.*—*Bradford v. State*, 3 Humph. 370. *Vt.*—*State v. Zadock & Baxter Bowman*, 6 Vt. 594.

Intent to defraud, in the sense of cheat in trade, is not an element of the offense of having counterfeit molds in possession. The unlawful use meant by §5457 is using them to make counterfeit coins. *Kaye v. United States*, *supra*.

Such fraudulent use must be averred, and the manner of use. *Smith Bell v. State*, 10 Ark. 536. "To constitute a good indictment for this offense, not only must the defendant be charged with the fraudulent use of such instruments, but the manner of the use,—how it was used,—must be charged, as that the defendant used it 'in making and counterfeiting money in the likeness and similitude of Spanish milled silver dollars, contrary to the statute,' etc."

34. See *United States Rev. St.*, §5431, and the following cases: *U. S. v. Provenzano*, 171 Fed. 675. *Mass.*—*Com. v. Stevens*, 1 Mass. 203. *N. H.*—*State v. Keneston*, 59 N. H. 36. *N. J.*—*Stone v. State*, 20 N. J. L. 404. *Tenn.*—*Williams v. State*, 9 Humph. 80; *Hooper v. State*, 8 Humph. 93.

"Section 10 of the Act of 1864 (which has since become sections 5414 and 5431 of the Revised Statutes, as already explained), deals with the subject of counterfeit instruments. To constitute the possession of such in-

struments a crime, the possessor must be actuated by a criminal intent in two particulars—First, he must have the intent to defraud; second, he must have the intent to pass, publish, utter, or sell the instrument." *United States v. Barrett*, 111 Fed. 369.

"Although the charter of the Bank of the United States expired on March 3, 1836, it has two years longer under the charter to settle and liquidate its affairs and would therefore be prejudiced by the utterance of counterfeits of its notes during such time. Hence an indictment charging defendant with having and passing counterfeit notes with intent to defraud such corporation is not bad." *United States v. Noble*, 5 Cranch C. C. 371, 27 Fed. Cas. No. 15,895.

Intent to pass in the state, need not be alleged. *Clark v. Com.*, 16 B. Mon. (Ky.) 206.

35. *U. S.*—*Rev. St.*, §5430, clause 4; *United States v. Barrett*, 111 Fed. 369; *United States v. Kuhl*, 85 Fed. 624.

"The first clause of section 5430 covers the unauthorized use of plates made and owned by the government for the printing and engraving of its obligations. Clauses 2 and 3 cover in general the unauthorized making, selling, or having in possession of plates in the similitude of those used by the government. Clause 4, the one in question in this suit, seems to cover only such instruments as are the product of the unauthorized use of the lawful plates of the government specified in clause 1, or of the unlawful plates specified in clauses 2 and 3. The earlier statutes on the same subject point plainly to this interpretation." *United States v. Barrett*, 111 Fed. 369.

erally allege that it was with an intent to pass,³⁶ and that the passing was with intent that the false note shall be received as true,³⁷ though it was otherwise under some statutes.³⁸

Whom Defrauded.—The indictment should allege that the intent was to defraud a certain named person,³⁹ or a person to the grand jurors unknown,⁴⁰ but under some statutes a general intent to defraud has been held sufficient without averring whom.⁴¹

Felonious Intent.—It is not necessary to allege that the acts were done feloniously where that is not made a part of the statutory description.⁴²

36. Gabe v. State 6 Ark. 519.

In Tennessee, however, by Act of 1842, ch. 48, §5, it was made unnecessary to allege an intent to pass in an indictment for fraudulently keeping in possession or having counterfeit money, thus changing the rule in *Fergus v. State*, 6 Yerg. 345; *Sizemore v. State*, 3 Head. (Tenn.) 26, *explaining Owen v. State*, 5 Sneed. (Tenn.) 493.

Contra, Under United States Rev. St., §5431; *United States v. Provenzano*, 171 Fed. 675.

Intent to pass within this commonwealth need not be averred because not part of the statutory description. *Com. v. Cone*, 2 Mass. 132.

37. U. S.—*United States v. Nelson*, 1 Abb. (N. S.) 135, 27 Fed. Cas. No. 15,861, Act Feb. 5, 1867; *United States v. Mitchell*, *Baldw.* 366, 26 Fed. Cas. No. 15,787. **Ark.**—*Gabe v. State*, 6 Ark. 519. **Mich.**—*People v. Stewart*, 4 Mich. 656. **Minn.**—*State v. Cody*, 65 Minn. 121, 67 N. W. 798.

Passing to one who knows them to be false would not be an offense against such a statute. *Hooper v. State*, 3 Humph. (Tenn.) 93.

But in *People v. Stewart*, *supra*, it is said that such an averment would have been supported by proof that the holder intended to dispose of them to another as counterfeit by the latter to be put in circulation as genuine.

And it is held that the indictment need not allege that the receiver of the note did not know that it was counterfeit. *Wilkinson v. State*, 10 Ind. 372.

38. United States v. Nelson, 1 Abb. (N. S.) 135, 27 Fed. Cas. No. 15,861.

The act of June 30, 1864, does not contain "the words 'as true or genuine,' or any equivalent words." *Hopkins v. Com.*, 3 Mete. (Mass.) 460; *State v. Wilkins*, 17 Vt. 151.

39. U. S.—*United States v. Shellmire*, *Baldw.* 370, 27 Fed. Cas. No. 16,271. **Ind.**—*Wilkinson v. State*, 10 Ind. 372, *quaere*, whether a general averment of intent to defraud would not be sufficient. **Va.**—*Brown v. Com.*, 2 Leigh. 769.

The indictment is not bad because the named person is the servant of another, who will be the one ultimately defrauded. *Com. v. Starr*, 4 Allen (Mass.) 301.

40. In Stone v. State, 20 N. J. L. 404, the indictment alleged an intent "to defraud the people of the State of New Jersey." "It is at least doubtful," said the court, "if this is a sufficient allegation of this intent."

41. State v. Calvin, R. M. Charl't. (Ga.) 151; *State v. Keneston*, 59 N. H. 36.

"I think the averment that the forged coin was passed with intent to defraud some person or persons, which is required to be made in an indictment under the United States statutes, is a substitute for an averment specifying the name of the person to whom the coin was passed." *United States v. Bejandio*, 1 Woods 294, 24 Fed. Cas. No. 14,561.

"To require both averments to be made, as that the coin was passed to A. B. to defraud A. B., or was passed to A. B. to defraud C. D., is requiring too great particularity." *United States v. Bejandio*, 1 Woods 294, 24 Fed. Cas. No. 14,561.

42. U. S.—*United States v. Shepherd*, 1 Hughes 520, 27 Fed. Cas. No. 16,274. **Ill.**—*Miller v. People*, 3 Ill. 233; *Quigley v. People*, 3 Ill. 301. **Ia.** *State v. Calendine*, 8 Iowa 288. **Tenn.** *Peek v. State*, 2 Humph. 78.

The indictment need not charge passing with felonious intent, even though the offense is a felony, under a statute

5. Time.—The time of the commission of the crime must be alleged with certainty,⁴³ and if the offense consists in having a certain number of counterfeits in possession "at the same time," this must be aptly alleged.⁴⁴

6. Existence of Bank.—Under the federal statute it is not necessary to allege that the bank whose notes are alleged to have been counterfeited is a body politic or corporate, since the courts will take judicial notice of such fact.⁴⁵ Nor is it necessary to allege that the notes purported to be those of a designated bank.⁴⁶ Under some state statutes, however, an averment of the existence⁴⁷ or incorporation of the bank⁴⁸ is held to be essential. But it is otherwise where such fact is not made an ingredient of the offense.⁴⁹

B. DESCRIPTION.—1. Of Coin.—The coin alleged to have been counterfeited should be described specifically by name and denomination in the indictment,⁵⁰ but matters of evidence as distinguished from the facts essential to the description of the offense need not be

(Act 1829, ch. 23, §33) merely requiring a fraudulent intent. *Perdue v. State*, 2 Humph. (Tenn.) 494.

43. *Nicholson v. State*, 18 Ala. 529; *Buckland v. Com.*, 8 Leigh. (Va.) 732.

44. An allegation of possession on the same day is not sufficient. *Scott v. Com.*, 14 Gratt. (Va.) 687.

Under a statute denouncing the possessing, etc., "at any one time, any number not less than ten" of such counterfeit bank bills, etc., an indictment charging that defendant had ten counterfeit bills in his possession on a named day, but not "then and there," was held bad. *Edwards v. Com.*, 19 Pick. (Mass.) 124.

45. *United States v. Williams*, 4 Biss. 302, 28 Fed. Cas. No. 16,706.

Allegation Requires Proof.—If an averment of charter or incorporation is made it must be established (*Ia. State v. Newland*, 7 Iowa 242. *Pa. Com. v. Smith*, 6 Serg. & R. 568. *R. I. State v. Brown*, 4 R. I. 528), though a question as to this is raised in *People v. Ah Sam*, 41 Cal. 685.

46. *United States v. Williams*, 4 Biss. 302, 28 Fed. Cas. No. 16,706.

47. *Minn.*—*Benson v. State*, 5 Minn. 19. *N. C.*—*State v. Ward*, 9 N. C. 443; *State v. Twitty*, 9 N. C. 248. *Tenn.*—*Fergus v. State*, 6 Yerg. 345.

48. *Ky.*—*Kennedy v. Com.*, 59 Ky. 36. *Mass.*—*Com. v. Simonds*, 11 Gray 306. *Mo.*—*Hobbs v. State*, 9 Mo. 855.

N. J.—*Stone v. State*, 20 N. J. L. 404. *Vt.*—*State v. Wilkins*, 17 Vt. 151.

49. *Del.*—*State v. Johnson*, 3 Har. 561. *Mass.*—*Com. v. Carey*, 2 Pick. 47.

N. J.—*State v. Weller*, 20 N. J. L. 521; *State v. Van Hart*, 17 N. J. L. 327. *Va.*—*Murry v. Com.*, 5 Leigh. 720.

50. *United States v. Burns*, 5 McLean 23, 24 Fed. Cas. No. 14,691; *Com. v. Stearns*, 10 Mete. (Mass.) 256.

"Fifty cent" and "twenty-five cent" pieces is a sufficient description, though the statute uses the words "half dollar," and "quarter dollars," because the names "are pertinent and of equivalent meaning." *United States v. Burns*, 5 McLean 23, 24 Fed. Cas. No. 14,691.

In *State v. Keneston*, 59 N. H. 36, the description of the coin as "certain pieces of false and counterfeit coin, in imitation of the silver coin current within the state by law and usage, to-wit, five pieces called twenty-five cent pieces, and five pieces called dimes," was held sufficient without adding that they were coins of the United States. This case cited *Com. v. Stearns*, 10 Mete. (Mass.) 256; *State v. Mahanna*, 48 N. H. 377; *Wharton Am. Cr. Law*, 363; 2 *Bish. Cr. Proc.* 265, 266, 704.

In *Com. v. Fields*, 5 Ky. L. Rep. 610, a description as "a counterfeit coin of the half dollar denomination" resembling "the coin (commonly called), half dollar of the United States of America," was held insufficient.

averred.⁵¹ In describing counterfeit coin it is usual to aver that it is made in the likeness and resemblance of the genuine.⁵²

2. Of Other Obligation or Security.—a. *In General.*—Greater detail is in general required in the description of written obligations or securities in order to identify them, owing to their variety and diversity.⁵³

b. *Copy of Instrument.*—An exact copy of all the material parts of the forged instrument should be set out.⁵⁴ This does not, however,

51. *Hauger v. United States*, 173 Fed. 54, holding that an indictment charging the counterfeiting of a coin of the United States "called a dollar," was good without alleging whether a gold or silver dollar was meant.

The language used in *Nicholson v. State*, 18 Ala. 529, would seem to indicate that that court considered such an allegation necessary, though the judgment was reversed on other grounds.

A Mexican dollar was held properly described as a coin "current within the said Commonwealth by the laws and usages thereof, called a dollar." *Com. v. Stearns*, 10 Pick. (Mass.) 256. To similar effect is *Peek v. State*, 2 Humph. (Tenn.) 78.

The materials of which the coins are made need not be averred. *State v. Griffin*, 18 Vt. 198, holding that if they are set forth they need not be strictly proved since not descriptive of the offense nor essential to the identity of the conviction.

52. *United States v. Trout*, 4 Biss. 105, 28 Fed. Cas. No. 16,542 ("though there are some English precedents to the contrary. Archb. Cr. Prac. & Pl. 571."); *United States v. Burns*, 5 McLean 23, 24 Fed. Cas. No. 14,691 ("this is undoubtedly one of the material allegations of the indictment"); *Com. v. Stearns*, 10 Mete. (Mass.) 256.

53. *State v. Calendine*, 8 Iowa 288 (indictment held bad because it did not give the letters preceding the numbers on the bills, nor set out a copy of them); *Com. v. Bailey*, 1 Mass. 62.

But it is not necessary that the indictment be so particular that the record will, upon its face, and without extrinsic evidence, identify the subject-matter of the charge. *United States v. Bennett*, 17 Blatchf. 357, 24 Fed. Cas. No. 14,572.

It is not necessary to describe the counterfeit as in the likeness and similitude of a genuine obligation of the United States. *United States v. Owens*, 37 Fed. 112. In this case the following indictment was held good: "That said defendant did feloniously utter, publish, and attempt to pass a certain false, forged, and counterfeited obligation of the United States, to-wit, a certain false, forged and counterfeited United States compound-interest treasury note of the denomination of fifty dollars, which said false, forged and counterfeited United States compound-interest treasury note is as follows, that is to say": (here followed a copy of the note).

54. *United States v. Owens*, 37 Fed. 112; *United States v. Williams*, 4 Biss. 302, 28 Fed. Cas. No. 16,706; *United States v. Mason*, 12 Blatchf. 497, 26 Fed. Cas. No. 15,736; *United States v. Fisler*, 4 Biss. 59, 24 Fed. Cas. No. 15,105.

But if the pleader professes to give the tenor of the bill he will be held to strict proof. *State v. Smith*, 31 Mo. 120.

Pasting the original forged instrument on the indictment as a substitute for a copy is characterized as "a slovenly, unlaywerlike practice, not to be encouraged by courts. It is held good in England only by virtue of the Act of 7 Geo. IV., not in force here. *Rex v. Harris*, 7 Car. & P. 429." *United States v. Fisler*, 4 Biss. 59, 24 Fed. Cas. No. 15,105.

In *United States v. Cantril*, 4 Cranch (U. S.) 167, 2 L. ed. 584, the bill was inserted in the indictment but no exception was taken to that method of setting it out, nor was that fact noticed in the opinion of the court.

In *Indiana*, an indictment charging the counterfeiting of a note "of the following purport and effect, to-wit:" etc., was held bad on the ground that

require the setting out of the scrolls or marginal words or figures,⁵⁵ nor what is on the back of the instrument.⁵⁶ It is sufficient if the indictment sets forth so much of the note as contains the evidence of the contract.⁵⁷ But if other words or marks and numbers appearing on the note are set out they must be proved, as giving identity to the instrument.⁵⁸ By this rule, however, is not meant that a mere literal

“purport” implied that only the substance of the instrument was given, and that this was not sufficient. *State v. Atkins*, 5 Blackf. (Ind.) 458.

Under many statutes it is sufficient to give the purport of the bill or obligation. Ala.—*Johnson v. State*, 35 Ala. 370; *Bostick v. State*, 34 Ala. 266; *Lowenthal v. State*, 32 Ala. 589. Del.—*State v. Johnson*, 3 Har. 561. Mich.—*People v. Stewart*, 4 Mich. 655. It is not necessary to set out a copy of the instrument if it is described with sufficient detail to identify it. *Gabe v. State*, 6 Ark. 519.

In Michigan, by laws, 1855, p. 142, it is sufficient to describe the bills in such manner as would sustain an indictment for stealing the same, hence it is held unnecessary to set out a copy. *People v. Stewart*, 4 Mich. 655.

In Tennessee it is held that the false instrument must be set out in words and figures, if in existence. *Hooper v. State*, 8 Humph. (Tenn.) 93.

55. U. S.—*United States v. Bennett*, 17 Blatch. 357, 24 Fed. Cas. No. 14,572. Ark.—*Mathena v. State*, 20 Ark. 70. Mass.—*Com. v. Taylor*, 5 Cush. 605; *Com. v. Bailey*, 1 Mass. 62. Ohio.—*Griffin v. State*, 14 Ohio St. 55; *Thompson v. State*, 9 Ohio St. 354. Vt.—*State v. Wheeler*, 35 Vt. 261.

Date.—In *Com. v. Stevens*, 1 Mass. 203, the date of the bill was omitted, but the defendant consented to its insertion.

A copy of every word and figure both on the face and on the back of the bill was characterized as “absurd particularity,” in *United States v. Mason*, 12 Blatchf. 497, 26 Fed. Cas. No. 15,736.

“The failure to dot i’s and cross t’s” was said to be “an immaterial matter,” in *Buckland v. Com.*, 8 Leigh. (Va.) 732.

The Bill Number.—But a variance as to the bill number which is placed upon all bills for the purpose of identifying them, is fatal. *United States v. Mason*, 12 Blatchf. 497, 26 Fed.

Cas. No. 15,736; *State v. Calendine*, 8 Iowa 288.

56. When an instrument is set out in the indictment as purporting to be, etc., it refers to the face of the instrument. *United States v. Hinman*, Baldw. 292, 26 Fed. Cas. No. 15,370.

“The indictment does not charge that the matter set forth constituted all the matter on the back of the bill, nor was it necessary to set forth all the matter on the back of the bill. What is omitted is a mere notice required by law to be placed upon notes of this character, but which is no part of the contract. The allegation of the indictment that the bill was in the words and figures following does not mean that all the words and figures printed on the back of the bill, and forming no part of the contract set forth on the face of the bill, are stated. Where an instrument is set forth in the indictment by its purport, the allegation refers to what appears on the face of the instrument. *United States v. Hinman*, 1 Baldw. 292.” *United States v. Marcus*, 53 Fed. 784.

57. *Mathena v. State*, 20 Ark. 70; *Griffin v. State*, 14 Ohio St. 55, citing *Com. v. Bailey*, 1 Mass. 62; *Com. v. Stevens*, 1 Mass. 203; *People v. Franklin*, 3 Johns. Cas. (N. Y.) 297.

An indictment setting out a bank note alleged to be counterfeited is not bad because it omits the imprint of the seal of the treasury evidencing the fact that it was secured as required by statute, because such security is no part of the contract itself. *United States v. Bennett*, 17 Blatchf. 357, 24 Fed. Cas. No. 14,572.

58. U. S.—*United States v. Hall*, 4 Cranch C. C. 229, 26 Fed. Cas. No. 15,283 (notwithstanding the fact that in this case the notes were lost); *United States v. Mason*, 12 Blatchf. 497, 26 Fed. Cas. No. 15,736. Ky.—*Clark v. Com.*, 16 B. Mon. 206. Mass.—*Com. v. Clancy*, 7 Allen 537. Mo.—*State v. Smith*, 31 Mo. 120. Ohio.—*Grif-*

variance will be fatal,⁵⁹ and the rule is not as rigorously enforced in modern practice as it was formerly.⁶⁰

Designation Immaterial. — Where the note is set out by its tenor in the indictment a wrong designation of it is not a fatal variance,⁶¹ nor is the omission of any designation.⁶² In regard to the well-known public obligations of the United States a less minute description will

fin v. State, 14 Ohio St. 55. **Vt.**—*State v. Wilkins*, 17 Vt. 151.

59. **Literal variances** are said to be those "which do not make a word different in sense and grammar, which leave the sound and sense, in substance, the same." *United States v. Mason*, 12 Blatchf. 497, 26 Fed. Cas. No. 15,736; *United States v. Hinman*, Baldw. 292, 26 Fed. Cas. No. 15,370.

For example: "Undertood" for "understood." *Rex v. Beach*, Cowp. 229, 98 Eng. Reprint 1059. "Drown" for "Drown," and "Cashier" instead of "Cashr." *Com. v. Woods*, 10 Gray (Mass.) 477. "Keen" for "Keene," *Com. v. Riley*, Thatch. Cr. Cas. (Mass.) 67. "Thompson" for "Thompson." *State v. Wheeler*, 35 Vt. 261.

But if the addition, omission or change makes a word different in sense and grammar, the variance is fatal, as "King" for "Ring." *King v. Gibbs*, 1 East. 173, 180, note b2, 102 Eng. Reprint 68.

60. **U. S.**—*United States v. Mason*, 12 Blatchf. 497, 26 Fed. Cas. No. 15,736. **Mass.**—*Com. v. Hall*, 97 Mass. 570. **Ohio.**—*May v. State*, 14 Ohio 460.

The following variances have been held immaterial: "I promised" for "I promise" (*Com. v. Parmenter*, 5 Pick. (Mass.) 279); "to" omitted from the phrase "pay to bearer;" "counterfeited" for "counterfeit" (*United States v. Mason*, 12 Blatchf. 497, 26 Fed. Cas. No. 15,736); "P. E. Spinner" instead of "F. E. Spinner" on a national bank note (*Com. v. Hall*, 97 Mass. 570); "B. Aymar bearer" instead of "B. Aymar or bearer;" and the omission of a capital "C" on the bill (*Quigley v. People*, 3 Ill. 301).

In *Mathena v. State*, 20 Ark. 70, the indictment was upheld although the signature of the president of the bank on the bill as averred therein could not be clearly made out, owing to the handling of the bill after the indictment had been drawn.

In *United States v. Hinman*, Baldw. 292, 26 Fed. Cas. No. 15,370, an indictment charging the counterfeiting of a check drawn on the "cashier of the corporation of the president and directors of the bank of the United States" was held not bad, though the check omitted the words "of the corporation," on the ground that the sense was the same since the cashier of the bank was the cashier of the corporation.

61. *United States v. Marcus*, 53 Fed. 784 (*United States* note described as "treasury note"), *citing United States v. Bennett*, 17 Blatch. 357, 24 Fed. Cas. No. 14,572, and *distinguishing United States v. Mason*, 12 Blatchf. 497, 26 Fed. Cas. No. 15,736. "All that was said in the *Mason* case," said the court, "is that a wrong designation of the bill was a defect. It was not said to be a fatal defect, and the count was not held bad for that reason, but for other reasons stated."

If "the notes are set out at length in the indictment, and show, on their face, that they are circulating notes of a banking association organized under the laws of the United States, . . . the designation of their legal character, given in the indictment, becomes, then, immaterial. *Reg. v. Williams*, 2 Demson, Crown Cas. 61; *United States v. Trout* [Case No. 16,542]." *United States v. Bennett*, 17 Blatch. 357, 24 Fed. Cas. No. 14,572.

62. *United States v. Trout*, 4 Biss. 105, 28 Fed. Cas. No. 16,542.

"The copy, therefore, being in the indictment and being part and parcel of it, speaks for itself: . . . And the copy indicates its purport more certainly and satisfactorily than any mere allegation of its purport could possibly do. Of what use, then, could be an averment in the indictment that the forged instrument purported to be a national bank note? Certainly none at all." *United States v. Williams*, 4 Biss. 302, 28 Fed. Cas. No. 16,706.

suffice.⁶³ An indictment describing a bank-bill as a promissory note is good, since a bank-bill is a promissory note,⁶⁴ but the decisions are otherwise under some statutes.⁶⁵

c. *Failure To Insert Copy Excused.*—A more general description will also suffice if the obligations are not in possession of the prosecution, or have been lost or destroyed, without fault on its part, or are in the possession of the defendant.⁶⁶ But even in such cases the description must be sufficient to advise the defendant of the charge against him, and the reason for not giving a more particular description should be stated.⁶⁷

3. Of Instruments.—The indictment should give such a descrip-

63. "United States notes of the denomination of five dollars." *United States v. Howell*, 64 Fed. 110. "It must be remembered, in this connection," said the court, "that United States notes are not private, but they are public, obligations, provided for by acts of congress. They are what are commonly known as 'greenbacks,' a particular and distinct kind of obligation of the United States. The well-known public character of this obligation of the government would, it seems, not necessitate the specific description which private obligations ordinarily require."

64. *Stone v. State*, 20 N. J. L. 404, citing *Brown v. Com.*, 8 Mass. 59; *Com. v. Cary*, 2 Pick. (Mass.) 50.

65. An indictment under §2 of the statute charging the uttering of a counterfeit promissory note is bad, where the obligation was a bank note and the prosecution should, therefore, have been under §6, which expressly refers to bank notes, and hence excludes them from the operation of §2. *Com. v. Dole*, 2 Allen (Mass.) 165.

But the indictment was upheld in *Com. v. Simonds*, 80 Mass. 59, because it did not show on its face that it came under §6 of the statute. See, *State v. Hayden*, 15 N. H. 355.

And it was held otherwise under statutes which contained no provision respecting the forgery of bank notes. *Com. v. Carey*, 2 Pick. (Mass.) 47; *Com. v. Riley*, Thatch. Crim. Cas. (Mass.) 67; *Com. v. Woods*, 10 Gray (Mass.) 477.

66. *U. S.*—*United States v. Howell*, 64 Fed. 110, citing, *Com. v. Houghton*, 8 Mass. 107. *Ind.*—*Armitage v. State*, 13 Ind. 441. *Mass.*—*Com. v. Snell*, 3 Mass. 82. *N. J.*—*State v. Potts*, 9 N. J. L. 26; *State v. Gustin*, 5 N. J. L.

744. *N. Y.*—*People v. Kingsley*, 2 Cow. 522; *People v. Badgley*, 16 Wend. 53. *Vt.*—*State v. Parker*, 1 D. Chip. 298.

If parts of the instrument are unintelligible, the indictment should so state, to excuse their omission. As that the instrument is in the words and figures following, "except the printed notice and other parts which are mutilated, and to the grand jurors unintelligible," or "the remainder of the written and printed matter on said warrant being unintelligible to the grand jurors." *United States v. Albert*, 45 Fed. 552.

67. *State v. Calendine*, 8 Iowa 288; *Com. v. Houghton*, 8 Mass. 107.

"But although the prosecution, when a case presents facts coming within the recognized exceptions, is excused from setting out the instrument or writing in *haec verba*, yet it is still under an affirmative duty to the defendant, and in fact it may be stated that, to bring the case within the exceptions, there are two conditions inseparably connected therewith: (1) The reasons for not setting out the instrument or writing in *haec verba* must appear in the indictment itself, and these must be sufficient in law to excuse the failure to set out according to the tenor. (2) Even though the reasons for not setting out in *haec verba* or describing the instrument or writing more particularly may be legally sufficient, the indictment must still contain such a description of the forged and counterfeit instrument or writing as will sufficiently tend to identify and individualize it, or that the defendant may be advised of the charge against him." *United States v. Howell*, 64 Fed. 110.

tion of the instrument that it shall appear that it was one of which use is made in counterfeiting.⁶⁸

C. INDICTMENT IN THE WORDS OF THE STATUTE. — In accordance with the general rule if the words of the statute are descriptive of the offense it is sufficient if the indictment follows the words of the statute,⁶⁹ and it is good if it pursues the statute substantially,⁷⁰ and omission of part thereof is not bad if the offense is sufficiently designated without them.⁷¹ Nor will the addition of further description

68. *Chamberlain v. State*, 5 Blackf. (Ind.) 573; *Com. v. Scott*, 1 Rob. (Va.) 752.

69. Wharton's Am. Cr. Law 364, and the following cases: *United States v. Jolly*, 37 Fed. 108; *United States v. Williams*, 28 Fed. Cas. No. 16,706; *United States v. Peters*, 27 Fed. Cas. No. 16,035.

Ala.—*Bostick v. State*, 34 Ala. 266. Ill.—*Quigley v. People*, 3 Ill. 301; *Miller v. People*, 3 Ill. 233. Ia.—*State v. Calendine*, 8 Iowa 288. Mass.—*Com. v. Cone*, 2 Mass. 132. N. H.—*State v. Keneston*, 59 N. H. 36 (*citing State v. Goulding*, 44 N. H. 284; *State v. Gove*, 34 N. H. 510); *State v. Abbott*, 31 N. H. 434. Ohio.—*Sutton v. State*, 9 Ohio 133. Tex.—*Long v. State*, 10 Tex. App. 186, *citing McFain v. State*, 41 Tex. 385; *Bigby v. State*, 5 Tex. App. 101.

An indictment charging the prisoner with counterfeiting a die, hub or mold "unlawfully and feloniously," held insufficient under §1 of the Act of February 10, 1891 (ch. 127, 26 St. at L. 742 [U. S. Comp. St., 1901, p. 3686]), making such act punishable if done "without authority from the Secretary of the Treasury of the United States or other proper officer." *Wroclawsky v. United States*, 183 Fed. 312.

70. Ga.—*State v. Calvin*, R. M. Charl. (Ga.) 151. Mich.—*People v. Stewart*, 4 Mich. 655, bank "at Providence," instead of "established at Providence." Ohio.—*Van Valkenburg v. State*, 11 Ohio 405.

The indictment must bring the offense within all the material words of the statute. *Brown v. Com.*, 8 Mass. 59.

"It is sufficient to pursue the statute substantially; and this is done when the accused is charged with falsely making, forging and counterfeiting four pieces of the silver coinage of the United States, called a dollar. . . .

The phrase 'coinage of the United States,' is also the exact legal equivalent of the language of the statute regarding the coin that may be the subject of the crime,—that which is 'coined at the mints of the United States.'" *United States v. Otey*, 31 Fed. 68.

In *Mathena v. State*, 20 Ark. 70, it was objected that the indictment charged the passing of a "counterfeit bank note," instead of a "counterfeit resemblance or imitation;" but this objection was not noticed in the opinion.

But the phrase "the current silver coin of this state and of the United States, called half-dollars," has been held not equivalent to "which shall be made current by the laws of this or the United States." *State v. Bowman*, 6 Vt. 594.

In *State v. Shelton*, 7 Humph. (Tenn.) 31, it is said that the indictment must "strictly follow the statute." The indictment was therefore held bad because it did not allege that the notes counterfeited circulated as currency, on the ground that the court would not take judicial notice of the currency of paper money, though it was said it would of coin.

71. The words of the statute (§5457) "in resemblance or similitude" are a mere variation or exposition of the principal and preceding words thereof, "falsely make, forge or counterfeit," each of which means to make something in resemblance or similitude of another. . . . It may be admitted that, as these words are used in the statute defining the offense of counterfeiting, they may very properly be used in an indictment thereunder. . . . But, in my judgment, they are not necessary." *United States v. Otey*, 31 Fed. 68.

Although an allegation of the uttering of a "false note" is by implica-

consistent with the statute vitiate the indictment.⁷² On the other hand, a general statement in the statute must be supplemented by greater particularity in the indictment if necessary to fully describe the offense,⁷³ or the subject-matter.⁷⁴ If the offense is laid in the statute in the disjunctive, it may be charged in the indictment in the conjunctive, and it would be better to have a separate count on each word and intent.⁷⁵

D. JOINDER OF OFFENSES.—An indictment is not bad for misjoinder because different offenses are charged in the several counts thereof provided they are of the same character.⁷⁶

E. JOINDER OF DEFENDANTS.—An indictment will lie against several jointly whether all are principals⁷⁷ or some only accessories.⁷⁸

tion equivalent to a "forged paper in the similitude of a bank-note," it is an averment "which the best pleading . . . ought not to leave to implication." *United States v. Owens*, 37 Fed. 112.

72. *Stone v. State*, 20 N. J. L. 404; *Peek v. State*, 2 Humph. (Tenn.) 78.

73. *Smith & Bell v. State*, 10 Ark. 536; *Hooper v. State*, 8 Humph. (Tenn.) 93.

74. *Chamberlain v. State*, 5 Blackf. (Ind.) 573; *Com. v. Scott*, 1 Rob. (Va.) 752.

"It is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense." *United States v. Carll*, 105 U. S. 611, 26 L. ed. 1135.

75. *Stone v. State*, 20 N. J. L. 404 ("bank bill and note" instead of "bank bill or note"), *citing* *Rex v. Crowther*, 5 Car. & P. 316, 24 E. C. L. 337.

"But the contrary course has been too long sanctioned now to be abandoned but by force of legislation." *State v. Fitzsimmons*, 30 Mo. 236.

76. **U. S.**—Rev. St. §1024; *Wroclawsky v. United States*, 185 Fed. 312; *Kaye v. United States*, 177 Fed. 147; *United States v. Burns*, 5 McLean 23, 24 Fed. Cas. No. 14,691; *United States v. Bennett*, 17 Blatchf. 357, 24 Fed. Cas. No. 14,572. **Ala.**—*Johnson v. State*, 35 Ala. 370. **Ind.**—*McGregor v. State*, 16 Ind. 9. **Ia.**—*State v. McPherson*, 9 Iowa 53, *citing* *Whart. Cr. Law* 204, and the following cases: **U. S.**—*United States v. Dickinson*, 2 McLean 325, 25 Fed. Cas. No. 14,958; *The Santee*, 7 Blatchf. 186, 21 Fed.

Cas. No. 12,330. **Ind.**—*Engleman v. State*, 2 Ind. 91. **Mass.**—*Carlton v. Com.*, 5 Met. 532. **N. Y.**—*Kane v. Com.*, 8 Wend. 203. **Eng.**—*Rex v. Jones*, 8 Car. & P. 776, 34 E. C. L. 632; *Rex v. Trueman*, 8 Car. & P. 727, 34 E. C. L. 605.

It is no objection to an indictment that the punishment for one offense is positive and for the other discretionary. *Stone v. State*, 20 N. J. L. 404, *citing* 1 Chit. Cr. Law 255, and cases cited; *People v. Rynder*, 12 Wend. (N. Y.) 425; *Kane v. People*, 8 Wend. (N. Y.) 203.

On a motion to quash or to compel an election, whether the joinder was calculated to embarrass the prisoner, and, therefore, the offenses not "properly joined," within the meaning of the statute, was a question to be determined by the judge in his discretion. *United States v. Bennett*, 17 Blatchf. 357, 24 Fed. Cas. No. 14,572, *citing* *Com. v. Birdsall*, 69 Pa. 482.

77. **U. S.**—*United States v. Addatte*, 6 Blatchf. 76, 24 Fed. Cas. No. 14,422. **Cal.**—*People v. Ah Sam*, 41 Cal. 645. **Ohio.**—*Sutton v. State*, 9 Ohio 133; *Hess v. State*, 5 Ohio 5. **Vt.**—*State v. Bowman*, 6 Vt. 594.

"It is urged that their offense (selling counterfeit bank notes) is in its nature several, and that two cannot be jointly indicted and convicted. We do not see the force of this objection. Could not several persons have a joint possession of bank notes as well as a joint property? Cannot persons jointly possessing property jointly sell it?" *Hess v. State*, 5 Ohio 5.

78. **U. S.**—*United States v. White*, 25 Fed. 716. **Ga.**—*State v. Calvin*, R. M. Charl. 151. **Mo.**—*State v. Mix*, 15 Mo. 153.

But they may be tried severally at the option of the prosecutor.⁷⁹

IV. VERDICT.—A general verdict of guilty will sustain a sentence on each count of the indictment,⁸⁰ and if one count is good the verdict will not be disturbed because other counts are defective.⁸¹

79. **U. S.**—United States *v.* White, 25 Fed. 716; United States *v.* Addatte, 6 Blatchf. 76, 24 Fed. Cas. No. 14,422. **Cal.**—People *v.* Ah Sam, 41 Cal. 645. **Mo.**—State *v.* Mix, 15 Mo. 153. **Ohio.** Sutton *v.* State, 9 Ohio 133; Hess *v.* State, 5 Ohio 5.

80. *Kaye v. United States*, 177 Fed. 147.

81. **U. S.**—Selvester *v.* United States, 170 U. S. 262, 18 Sup. Ct. 580, 42 L. ed. 1029; United States *v.* Trout, 4 Biss. 105, 28 Fed. Cas. No. 16,542; United States *v.* Burns, 5 McLean 23, 24 Fed. Cas. No. 14,691; United States *v.* Bennett, 17 Blatchf. 357, 24 Fed. Cas. No. 14,572. **Mass.**—Brown *v.* Com., 8 Mass.

59. **Ohio.**—Sutton *v.* State, 9 Ohio 133.

Presence of Prisoner.—The prisoner need not be present when the verdict is rendered unless the state law so requires in prosecutions for felonies. "In such matters the practice in the courts of the state furnishes the rule of practice in this court." United States *v.* Shepherd, 1 Hughes 520, 27 Fed. Cas. No. 16,274.

Disagreement of Jury.—In Selvester *v.* United States, 170 U. S. 262, 18 Sup. Ct. 580, 42 L. ed. 1029, it was said that if the jury disagreed as to one count the defendant could be again tried as to it, but three of the judges dissented from this dictum.

COUNTIES. — See **Municipal Corporations.**

COUNT OR PARAGRAPH. — See **Declaration and Complaint.**

COURTS

By H. H. BRILL, Jr.,
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CROSS-REFERENCES:

Admiralty;
 Appearances;
 Bankruptcy Proceedings;
 Contempt;
 Continuances;
 Courts-Martial;

Deposit in Court;
 Equity Jurisdiction and Procedure;
 Federal Courts;
 Judges;
 Justices of the Peace.

I. DEFINITION AND DISTINCTIONS.—A court consists of persons officially assembled, under authority of law, at the appropriate time and place, for the administration of justice.¹ It is a tribunal which exercises functions of a strictly judicial character.²

Courts are to be distinguished from the judges thereof,³ and from executive or administrative boards exercising judicial or quasi-judicial functions.⁴

1. **Colo.**—*In re Allison*, 13 Colo. 525, 22 Pac. 820, 16 Am. St. Rep. 224, 10 L. R. A. 790. **Ind.**—Board of Comrs. v. Givin, 136 Ind. 562, 36 N. E. 237. **Ia.**—*Hobart v. Hobart*, 45 Iowa 501. **Ore.**—*Hanley v. City of Medford*, 56 Ore. 171, 108 Pac. 188; *Marsden v. Harlocker*, 48 Ore. 90, 85 Pac. 328, 120 Am. St. Rep. 786.

To constitute a court there must be a place appointed by law for the administration of justice, and some person authorized by law to administer justice at that place must be there for that purpose. *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54.

A court is a place where justice is judicially administered. *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54.

"A court is an incorporeal political being, which requires for its existence the presence of the judges, or of a competent number of them, and a clerk or prothonotary, at the time during which and at the place where it is by law authorized to be held, and the performance of some public act indicative of a design to perform the functions of a court." *State v. Judges Civil District Court*, 32 La. Ann. 1256.

For other definitions see the following cases: **Nev.**—*Ex parte Gardner*, 22 Nev. 280, 39 Pac. 570. **N. J.**—*Lewis v. Hoboken*, 42 N. J. L. 377. **N. Y.** *People v. Rotole*, 61 Misc. 579, 115 N. Y. Supp. 854. **Pa.**—*Huntingdon County Line*, 8 Pa. Super. Ct. 380.

2. *Chinn v. Superior Court*, 156 Cal. 478, 105 Pac. 580.

3. **Ark.**—*Dunn v. State*, 2 Ark. 229. **Ore.**—*Marsden v. Harlocker*, 48 Ore. 90, 85 Pac. 328, 120 Am. St. Rep. 786. **Wash.**—*Shephard v. Gove*, 26 Wash. 452, 67 Pac. 256; *Gunderson v. Cochran*, 3 Wash. 476, 28 Pac. 1105.

"By the court of chancery is not meant the chancellor, but the court of chancery at a term thereof known and fixed by law, when the chancellor and clerk would be present, and suitors are bound to attend." *Sturges v. Knapp*, 38 Vt. 540.

Powers conferred on the court cannot be exercised by the individual members thereof. *Carr v. State*, 93 Ark. 585, 122 S. W. 631.

A county court must speak by its records, and the county judge when off the bench, has no authority to bind the court, and anything he may say as an individual cannot militate against the judgment of the county court. *Smith v. Renshaw* (Ky.), 127 S. W. 753; *Renshaw v. Cook*, 129 Ky. 347, 111 S. W. 377.

4. A county board of supervisors was held not to be a court in *Inglis v. Hoppin*, 156 Cal. 483, 105 Pac. 582; *Chinn v. Superior Court*, 156 Cal. 478, 105 Pac. 580.

A county board of election canvassers was held not to be a court in *State v. Midgett*, 151 N. C. 1, 65 S. E. 441.

A committee on appeal, charged with the duty of reviewing the action of the board of supervisors in equalizing the valuation of property for taxation was held not to be a court, though it had power to summon witnesses, hear

Inferior courts are courts of limited jurisdiction, and that jurisdiction usually confined to specified territorial limits.⁵

In some jurisdictions it is held that there may be *de facto* courts, the legality of whose existence cannot be questioned except in a direct proceeding by the state for that purpose.⁶

On the admission of a territory as a state, Congress has power to provide that criminal cases, not of a federal nature, cognizable before the territorial courts, shall be tried by the state courts as successors of the same.⁷

The court survives the absence, removal, or death of the judge,⁸ but his presence is an indispensable prerequisite to the court being opened and beginning its session.⁹

The legality of a court cannot be questioned by a plea to the jurisdiction.¹⁰

II. PLACE OF HOLDING COURT. — A. GENERAL STATEMENT.

In the absence of a constitutional provision to the contrary, the legislature may establish or change the place for holding a court,¹¹ or confer power on the judges to do so.¹² In some jurisdictions the place may be changed by consent of parties.¹³

Power to adjourn to another place only authorizes an adjournment to a place where it would originally have been proper to hold the court.¹⁴

Courts must be held at the place designated by law,¹⁵ and a court

evidence, etc. *Zimmer v. Board of Supervisors*, 159 Mich. 213, 123 N. W. 899.

5. Such as police courts, municipal courts, and recorder's courts. *Chinn v. Superior Court*, 156 Cal. 478, 105 Pac. 580.

6. As where a court has been established by an act of the legislature apparently valid, and has gone into operation. *State v. Bailey*, 106 Minn. 138, 118 N. W. 676; *Burt v. Winona & St. P. R. Co.*, 31 Minn. 472. See also *Comstock v. Tracey*, 46 Fed. 162.

7. *Higgins v. Brown*, 20 Okla. 355, 94 Pac. 703.

8. *Territory v. Armijo*, 14 N. M. 205, 89 Pac. 267.

9. *Purdue v. State*, 134 Ga. 300, 67 S. E. 810.

10. Such a plea is subversive of itself. *State v. Hall*, 142 N. C. 710, 55 S. E. 806.

11. *Merchants' Nat. Bank v. McNaron* (Ala.), 55 So. 242; *Whallon v. Gridley*, 51 Mich. 503, 16 N. W. 876.

May divide the county into two judicial districts and prescribe places for holding court in each. *Trimble v. State*, 2 Greene (Ia.) 404.

12. Power conferred on the judges of a court cannot be exercised by one of them alone. *Northrup v. People*, 37 N. Y. 203.

13. *O'Hagen v. O'Hagen*, 14 Iowa 264.

14. *Northrup v. People*, 37 N. Y. 203.

15. **Ala.**—*Ex parte Branch & Co.*, 63 Ala. 383. **Ark.**—*Williams v. Reutzel*, 60 Ark. 155; *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54. **Cal.**—*Ross v. Anstall*, 2 Cal. 183. **Colo.**—*In re Al-lison*, 13 Colo. 525, 22 Pac. 820, 16 Am. St. Rep. 224, 10 L. R. A. 790. **Ia.**—*State v. Richards*, 126 Iowa 497, 102 N. W. 439; *Funk v. Carroll County*, 96 Iowa 158, 64 N. W. 768; *Hobart v. Hobart*, 45 Iowa 501. **Nev.**—*Wona-cott v. Rice*, 27 Nev. 102, 73 Pac. 661; *Ex parte Gardner*, 22 Nev. 280, 39 Pac. 570; *Dalton v. Libby*, 9 Nev. 192; *State v. Roberts*, 8 Nev. 239. **N. Y.**—*People v. Thorn*, 156 N. Y. 286, 50 N. E. 947, 42 L. R. A. 368. **Ore.**—*Hanley v. City of Medford*, 56 Ore. 171, 108 Pac. 188; *Marsden v. Harlocker*, 48 Ore. 90, 85 Pac. 328, 120 Am. St. Rep. 786. **Va.** *Com. v. Scott*, 10 Gratt. 749.

held at any other place is generally regarded as no court, and its proceedings as of no legal force whatever.¹⁶

B. TERRITORIAL LIMITS.—Ordinarily sessions of a court can be held only within the limits of the territory over which its jurisdiction extends,¹⁷ and all matters arising in a case must be heard within such territory.¹⁸ The legislature, however, may authorize judges to hold court outside of such territory in the absence of a constitutional prohibition.¹⁹

That a single court sits in two places in one county does not create two jurisdictions.²⁰

C. SEAT OF GOVERNMENT.—A court is ordinarily required to be held at the seat of government of the political subdivision over which its jurisdiction extends.²¹ Where the territorial jurisdiction of a court is limited to a particular county, its sessions are generally re-

16. Ala.—Patton *v.* State, 160 Ala. 111, 49 So. 809. Ark.—Williams *v.* Reutzell, 60 Ark. 155; McNair *v.* Williams, 28 Ark. 200. Colo.—Francis *v.* Wells, 4 Colo. 274. Ia.—Funk *v.* Carroll County, 96 Iowa 158, 64 N. W. 768. Me.—White *v.* Riggs, 27 Me. 114. Minn.—Bell *v.* Jarvis, 98 Minn. 109, 107 N. W. 547. Nev.—Wonacott *v.* Rice, 27 Nev. 102, 73 Pac. 661; Dalton *v.* Libby, 9 Nev. 192; State *v.* Roberts, 8 Nev. 239. N. J.—Hershoff *v.* Beverly, 43 N. J. L. 139. N. Y.—Northrup *v.* People, 37 N. Y. 203.

Violation of its order is not contempt. *Ex parte* Gardner, 22 Nev. 280, 39 Pac. 570.

A juror cannot collect fees for service in attendance on the same. Coulter *v.* Routt County, 9 Colo. 258, 11 Pac. 199.

17. City court. Hershoff *v.* Beverly, 43 N. J. L. 139.

The district court of one county cannot sit in another county in the same district. *Ex parte* Gardner, 22 Nev. 280, 39 Pac. 570.

A county was divided into two districts, the dividing line running through the center of the county court house. Afterwards the court house was destroyed by fire, and it was held that the commissioner's court might properly designate a building in one of said districts as the county court house, and that the district court of both districts might lawfully be held there. Wheeler *v.* Wheeler, 76 Tex. 489, 13 S. W. 305.

A county court cannot be held outside of the county. McIntosh *v.* Bowers, 143 Wis. 74, 126 N. W. 548.

18. Motion for change of venue cannot be made out of the district. Garrett & Co. *v.* Bear, 144 N. C. 23, 56 S. E. 479.

Under act March 7, 1901, §1 (Laws 1901, p. 76) a judge may not hear any matter outside of the county wherein the cause or proceeding is pending, except by consent of the parties.

Hearing a motion for a new trial outside of the county was held to be harmless error where it was properly denied and the case was heard *de novo* on appeal. Shaw *v.* Spencer, 57 Wash. 587, 107 Pac. 383.

19. It may authorize circuit judges to hold court outside of their circuits or districts. Waller *v.* Tully, 75 Ill. 576; Jones *v.* Albee, 70 Ill. 34.

20. Sparks *v.* Galena Nat. Bank, 68 Kan. 148, 74 Pac. 619.

21. Supreme court. State *v.* Tally, 102 Ala. 25, 15 So. 722.

Taking Testimony Elsewhere.—In State *v.* Tally, 102 Ala. 25, 15 So. 722, the supreme court, in an original proceeding, by consent of parties heard the evidence and arguments of counsel at a place other than the seat of government, but, in view of a constitutional provision requiring the court to be held at the latter place, in so doing sat as individual members of the court and not as the court itself, making only tentative and advisory rulings as to the admissibility of evidence, and receiving it subject to objection, striking out or ignoring such evidence as was inadmissible on deciding the case after return to the seat of government.

quired to be held at the county seat,²² and this though there is no express statutory provision on the subject.²³ Subject to constitutional limitations,²⁴ however, the legislature may authorize sessions to be held elsewhere,²⁵ and it has been held that they may be held elsewhere if it is impossible or unsafe to hold them at the county seat,²⁶ or if there is no courthouse or other suitable building there.²⁷

In most jurisdictions it is held that the question of what is the legal county seat cannot be raised in a collateral proceeding, and that a judgment rendered at a term held at the *de facto* county seat is valid though such place is not the county seat *de jure*.²⁸

D. PARTICULAR PLACE OR BUILDING.—The sessions of court are ordinarily required to be held in the court-house,²⁹ or some other build-

22. Colo.—*Jordan v. People*, 19 Colo. 417, 36 Pac. 218. Fla.—*Beville v. State*, 61 Fla. 8, 55 So. 854. Nev.—*State v. Roberts*, 8 Nev. 239.

Judgments rendered by the circuit court at any other place in the county are *coram non judge*. *McNair v. Williams*, 28 Ark. 200.

No authority to hold elsewhere except when expressly authorized by statute, or by consent of parties. *Bell v. Jarvis*, 98 Minn. 109, 107 N. W. 547, as to district courts.

23. Board of Comrs. *v. Givin*, 136 Ind. 562, 36 N. E. 237; *Selleck v. City of Janesville*, 100 Wis. 157, 75 N. W. 975, 69 Am. St. Rep. 506, 41 L. R. A. 563.

24. Where the constitution requires a court to be held at the county seat, the legislature cannot authorize it to be held elsewhere. *Whitener v. Belknap & Co.*, 89 Tex. 273, 34 S. W. 594.

Cannot, by special law, require the terms of the district court of a single county to be held every year at a place other than the county seat, in view of the constitutional prohibition against special legislation. *Coulter v. Routt County*, 9 Colo. 258, 11 Pac. 199.

A statute authorizing it to be held elsewhere without dividing the county into two or more districts was held to violate the express provisions of the constitution. *Wonacott v. Rice*, 27 Nev. 102, 73 Pac. 661.

Constitutional restrictions on the removal of county seats do not preclude the legislature from authorizing court to be held elsewhere. *Merchants' Nat. Bank v. McNaron* (Ala.), 55 So. 242; *Whallon v. Gridley*, 51 Mich. 503, 16 N. W. 876.

25. *Woods v. McCay*, 144 Ind. 316,

43 N. E. 269; *Cooper v. Mills County*, 69 Iowa 350, 28 N. W. 633.

A statute providing that in counties having a town of a certain size and larger than the county seat and not more than a certain distance therefrom the circuit court should be held alternately in the county seat and the larger town, was held not to change the county seat and to be valid. *Johnson v. City of Fulton*, 121 Ky. 594, 89 S. W. 672.

The judge of the county court has discretionary power to hold court in his office in another city. *Cody v. Cody*, 98 Wis. 445, 74 N. W. 217.

26. Because of its capture by the enemy in time of war. *Sevier v. Teal*, 16 Tex. 371.

27. As where all the buildings in the county seat were destroyed by fire. The judgment is not subject to collateral attack in such case. *Herdon v. Hawkins*, 65 Mo. 265.

On removal of the county seat the court is not obliged to remove to the new location until a suitable building for its use has been provided. *Herdon v. Hawkins*, 65 Mo. 265; *Bouldin v. Ewart*, 63 Mo. 330.

28. Colo.—*In re Allison*, 13 Colo. 525, 22 Pac. 820, 16 Am. St. Rep. 224, 10 L. R. A. 790. Ill.—*Robinson v. Moore*, 25 Ill. 118. N. M.—*Territory v. Clark*, 15 N. M. 35, 99 Pac. 697. Tex.—*Watts v. State*, 22 Tex. App. 572, 3 S. W. 769.

29. *Funk v. Carroll County*, 96 Iowa 158, 64 N. W. 768; *Baisley v. Baisley*, 15 Ore. 183, 13 Pac. 888.

It is usual and best to have a regular court house at the county seat for the holding of courts, etc. *Beville v. State*, 61 Fla. 8, 55 So. 854.

ing chosen in the manner prescribed by law.³⁰ If there is no court-house,³¹ or if the one provided is unfit for use,³² some other suitable place may be selected. In some jurisdictions it is held that the particular building in which the court is held is unimportant, so long as it is located at the county seat.³³

Room In Court-House.—It is not necessary that court be held in any particular room in the court-house.³⁴

Private Residence.—The authorities are in conflict as to the right to

The word "court house" as used in a statute requiring a court to be there held means that the court must be held in the public court house or public court houses provided by the authorities for the holding of court, and commonly known and designated to be used for such purpose. Such a statute does not require all civil business in the county to be transacted in a single court house, and a part of such business may be transacted in a separate court house known as the criminal court building. *Rutan v. Lagonda Nat. Bank*, 72 Ill. App. 35.

A statute authorized court to be held in the clerk's office and provided that the place where it was held for the time being should be deemed the court house. *Shull v. Kennon*, 12 Ind. 34.

30. A judgment was reversed, where the court did not sit at the court house and it did not appear that the place where it did sit had been properly selected or designated. *Baisley v. Baisley*, 15 Ore. 183, 13 Pac. 888.

Orders of the commissioners' court designating a place other than the court house as the place where court should be held were held valid. *Lane v. State*, 59 Tex. Crim. 595, 129 S. W. 353.

Moving from temporary quarters to new court house. *State v. Staley*, 45 W. Va. 792, 32 S. E. 198.

The probate court may be held at such place as the judge may appoint, as in a hotel. *Casey v. Stewart*, 60 Iowa 160, 14 N. W. 225.

31. If the county is temporarily without a regular court house, the courts may be regularly held in any building or in a tent. *Beville v. State*, 61 Fla. 8, 55 So. 854.

Where it is destroyed by fire. *Lee v. State*, 56 Ark. 4; *Wheeler v. Wheeler*, 76 Tex. 489, 13 S. W. 305.

Where the county seat is removed the court may designate another place

for holding its sessions until the court house is erected. It is not necessary in such case that court be held on the block conveyed for a court house. *Hudspeth v. State*, 55 Ark. 323.

32. A motion in arrest of judgment on the ground that the court was not held in the court house was held to have been properly overruled where court originally met there but adjourned to another place because of its dilapidated condition. *State v. Shelledy*, 8 Iowa 477.

33. *Jordan v. People*, 19 Colo. 417, 36 Pac. 218; *Beville v. State*, 61 Fla. 8, 55 So. 854.

A judicial sale at the door of a building other than the court house, but where, at the time, the court held its sessions, was held valid in *Bouldin v. Ewart*, 63 Mo. 330; *Kane v. McCown*, 55 Mo. 181.

34. The requirement that courts must be held at the place prescribed by law is complied with if the court be held in the building provided by law, though not in the room provided for that purpose. *State v. Richards*, 126 Iowa 497, 102 N. W. 439.

That defendant was sentenced in a room in the court house other than the usual public court room, in which another case was on trial at the time, was held not ground for reversal where no injury resulted and no legal or constitutional right of defendant was infringed. *Reed v. State*, 147 Ind. 41, 46 N. E. 135.

That court is held in the clerk's office does not render the judgment void. *Smith v. Jones*, 23 La. Ann. 43.

Where court was opened in its regular room in the court house it was held not to be error to adjourn to an office on the first floor of the same building for the purpose of impaneling the grand jury. *State v. Richards*, 126 Iowa 497, 102 N. W. 439.

hold court at the residence of a judge,³⁵ or of a witness who is ill,³⁶ the matter depending largely on the provisions of the constitutions and statutes of the various states.

Scene of Accident or Crime.—Court cannot legally be held at the scene of the accident,³⁷ or crime³⁸ involved in an action, but a view of the premises is not a part of the trial within this rule.³⁹

III. TIME OF HOLDING COURT.—A. GENERAL STATEMENT. Judicial power can only be exercised at the times prescribed by law,⁴⁰ and proceedings at a time not appointed by law for holding the court are void.⁴¹

35. New York.—Except as permitted by statute a judge of a court of record is not permitted, either for his own convenience or for any other purpose, to hold a term of court at his residence or at any other place than that so designated. *People v. Pisano*, 142 App. Div. 524, 127 N. Y. Supp. 204.

Vermont.—Where the particular place in the city where court was to be held was not designated it was held that it might be adjourned to the residence of one of the judges who was ill. *Bates v. Sabin*, 64 Vt. 511, 24 Atl. 1013.

For a full discussion of this question see the title "Trial."

36. Iowa.—Holding court in a private residence for the purpose of taking the testimony of a witness who was sick is reversible error. *Funk v. Carroll County*, 96 Iowa 158, 64 N. W. 768.

Kentucky.—Where a witness who has been subpoenaed is unable by reason of sudden illness to appear in court and give his testimony, the court has discretionary power, on motion, to permit the jury, accompanied by counsel, the parties, and the judge, to go to the place, if it be convenient, where the witness is and there permit the jury to receive his evidence. *Davis v. Com.*, 121 S. W. 429.

Wisconsin.—Taking plaintiff's testimony at her home in the presence of the jury and presiding judge, was held not to have deprived the court of jurisdiction, or to have nullified the judgment, but to have been a mere irregularity which was harmless in the particular case. *Selleck v. City of Janesville*, 100 Wis. 157, 75 N. W. 975, 69 Am. St. Rep. 506, 41 L. R. A. 563.

For a full discussion of this question see the title "Trial."

37. Judgment was reversed where

the jury, judge, parties and counsel went to the scene of the accident in question where defendant was permitted to conduct an experiment. *Moore v. Chicago, St. P. & K. C. R. Co.*, 93 Iowa 484, 61 N. W. 992.

38. An attempt to hold a session of court at the place where the shooting in question occurred was held to be harmless error. *People v. Pisano*, 142 App. Div. 524, 127 N. Y. Supp. 204.

49. *People v. Pisano*, 142 App. Div. 524, 127 N. Y. Supp. 204. See the title "Trial."

40. Ala.—*Ex parte Branch & Co.*, 63 Ala. 383. **Cal.**—*Norwood v. Kenfield*, 34 Cal. 329; *Ross v. Anstill*, 2 Cal. 183. **Ind.**—*Cain v. Goda*, 84 Ind. 209; *Courtney v. State*, 5 Ind. App. 356, 32 N. E. 335. **Mo.**—*Rhodes v. Bell*, 230 Mo. 138, 130 S. W. 465; *Rose v. Kansas City*, 128 Mo. 135, 30 S. W. 518. **Ore.**—*Hanley v. City of Medford*, 56 Ore. 171, 108 Pac. 188.

A meeting together of the judge and officers of the court at the place, but not at the time prescribed by law is not a court. *Myers v. East Bench Irr. Co.*, 32 Utah 215, 89 Pac. 1005.

41. U. S.—*Ex parte Harlan*, 180 Fed. 119. **Ala.**—*Norwood v. Louisville & N. R. Co.*, 149 Ala. 151, 42 So. 683; *Walker v. State*, 139 Ala. 56, 35 So. 1011; *Davis v. State*, 46 Ala. 80. **Ark.**—*Neal v. Shinn*, 49 Ark. 227; *Grimmett v. Askew*, 48 Ark. 151; *Ex parte Jones*, 27 Ark. 349; *Brumley v. State*, 20 Ark. 77; *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54. **Cal.**—*Bates v. Gage*, 40 Cal. 183; *Norwood v. Kenfield*, 34 Cal. 329; *Domingues v. Domingues*, 4 Cal. 186; *Smith v. Chichester*, 1 Cal. 409. **Colo.**—*Francis v. Wells*, 4 Colo. 274. **Ill.**—*Goodall v. People*, 123 Ill. 389, 15 N. E. 171. **Ind.**—*Batten v. State*, 80 Ind. 394; *Smithson v. Dillon*, 16 Ind.

B. TERMS AND SESSIONS.—1. Definitions and Distinctions.—A term of court is that period of time provided by, or in pursuance of, some public law within which the court may hold its sessions and transact its business.⁴² It is to be distinguished from a session,⁴³

169; *McCool v. State*, 7 Ind. 378. **Kan.** *In re McClasky*, 52 Kan. 34, 34 Pac. 459; *In re Terrill*, 52 Kan. 29, 34 Pac. 457. **Miss.**—*Arbour v. Yazoo & M. V. R. Co.*, 98 Miss. 714, 54 So. 158. **Mo.** *Rose v. Kansas City*, 128 Mo. 135, 30 S. W. 518. **Nev.**—*Dalton v. Libby*, 9 Nev. 192; *State v. Roberts*, 8 Nev. 239. **N. Y.**—*People v. Bradwell*, 2 Cow. 445. **Okla.**—*Collins v. State*, 5 Okla. Crim. 254, 114 Pac. 1127; *Wilson v. State*, 3 Okla. Crim. 714, 109 Pac. 289; *In re McClaskey*, 2 Okla. 568, 37 Pac. 854; *Irvin v. Irvin*, 2 Okla. 180, 37 Pac. 548. **Ore.**—*State v. Rutherford*, 85 Pac. 332; *Marsden v. Harlocker*, 48 Ore. 90, 85 Pac. 328, 120 Am. St. Rep. 786. **S. C.**—*Ex parte De Hay*, 3 S. C. 564. **Tenn.**—*Gregg v. Cooke*, Peck. 82. **Tex.** *Garza v. State*, 12 Tex. App. 261. **Utah.** *Myers v. East Bench Irr. Co.*, 32 Utah 215, 89 Pac. 1005.

May be attacked collaterally. *Wightman v. Karsner*, 20 Ala. 446.

May be set aside in a suit brought for that purpose. *Cain v. Goda*, 84 Ind. 209.

Where a defendant is indicted, tried, convicted and sentenced by a court sitting at a time not authorized by law, the whole proceeding is *coram non judge* and void, and the infirmity is not cured by an affirmance of the conviction by an appellate court, in which the trial is on the record and not *de novo*. *Ex parte Harlan*, 180 Fed. 119.

Injunction.—Equity will enjoin the enforcement of a judgment in condemnation proceedings rendered at a special term called without authority of law, since it is a cloud on title and there is a threatened trespass. *Hanley v. City of Medford*, 56 Ore. 171, 108 Pac. 188.

Appeal.—A judgment rendered at a time when the court is not legally in session will not support an appeal. **Ala.**—*McMillan v. City of Gadsden*, 39 So. 569; *Walker v. State*, 142 Ala. 625, 38 So. 241; *Kidd v. Burke*, 142 Ala. 625, 38 So. 241; *Johnson v. State*, 141 Ala. 7, 37 So. 421. **Miss.**—*Arbour v. Yazoo & M. V. R. Co.*, 98 Miss. 714, 54 So. 158. **Tex.**—*Campbell & Martin*

v. Chandler, 37 Tex. 32; *Rolser v. Bellmer*, 7 Tex. 1; *Doss v. Waggoner*, 3 Tex. 515.

Habeas Corpus.—A person convicted at a time when court is not legally in session will be discharged on habeas corpus. *In re Millington*, 24 Kan. 214; *Ex parte Thompson*, 57 Tex. Crim. 437, 123 S. W. 612.

In such case defendant is deprived of his liberty without due process of law. *Ex parte Harlan*, 180 Fed. 119.

42. **Ill.**—*Brown v. Leet*, 136 Ill. 203, 26 N. E. 639. **Ore.**—*State v. Maddock*, 115 Pac. 426; *State v. Edmunds*, 55 Ore. 236, 104 Pac. 430. **Tex.**—*Lipari v. State*, 19 Tex. App. 431.

“Terms of courts ‘are those times or seasons of the year which are set apart for the despatch of business in the superior courts of common law.’” *Tidd’s Prac.* 105. Quoted in *Horton & Hiel v. Miller*, 38 Pa. 270.

A term signifies the entire period from the first day of a term as fixed by law until its final close. *Hadley v. Bernero*, 97 Mo. App. 314.

It is not the same thing as the court itself, and is no more than a period of time within which, and then only, certain functions of the court can be exercised. *Territory v. Armijo*, 14 N. M. 205, 89 Pac. 267.

A “term of the court” as used in a statute providing for the discharge of a person in jail unless an indictment should be found against him before the end of the second term of the court, etc., was held to mean a “grand jury term” at which only an indictment could be found. *Jones v. Com.*, 19 Gratt. (Va.) 478.

“Term, session, or court” as used in a similar statute was held to mean a legally constituted one at which the defendant could be legally indicted or tried. *Clark v. Com.*, 29 Pa. 129; *Com. v. Brown*, 11 Phila. (Pa.) 370.

43. The words “session” and “term” are not synonymous, it being possible for there to be a term at which there is no session. *Lipari v. State*, 19 Tex. App. 431.

“Special session” and “special term” are not synonymous. *State v.*

though the word is sometimes used to mean the actual sitting of the court.⁴⁴

A session is the time during the term in which the court actually sits for the transaction of business.⁴⁵

A regular term is one held at stated times fixed by law.⁴⁶

Some courts have no terms, but are always open, as for example courts of equity,⁴⁷ and the federal district court sitting as a court of bank-

Edmunds, 55 Ore. 236, 104 Pac. 430.

If the court, by its own order, is closed for all purposes of business for an entire day, or for any given number of days, it is not in session on that day, or during those days, although the current term has not expired. *United States v. Pitman*, 147 U. S. 669, 13 Sup. Ct. 425, 37 L. ed. 324, *affirming* 45 Fed. 159; *McMullen v. United States*, 146 U. S. 360, 13 Sup. Ct. 127, 36 L. ed. 1007.

44. A confession of judgment before the clerk on the day fixed by law for the commencement of the term, but before the court actually began its session on that day, was held to be in vacation, and hence valid. *Brown v. Hume*, 16 Gratt. (Va.) 456.

45. **U. S.**—*United States v. Pitman*, 147 U. S. 669, 13 Sup. Ct. 425, 37 L. ed. 324, *affirming* 45 Fed. 159; *McMullen v. United States*, 146 U. S. 360, 13 Sup. Ct. 127, 36 L. ed. 1007. **Ore.** *State v. Edmunds*, 55 Ore. 236, 104 Pac. 430. **Tex.**—*Lipari v. State*, 19 Tex. App. 431.

Since a session cannot be held except during a term, it has been held that a statute requiring a special "session" of a court to be held on a specified day after an election necessarily included the legislative appointment of a term at that time for the special purposes of the act if there was no regular term at that time. *State v. Maddock* (Ore.), 115 Pac. 426.

In California a session of the superior court, which has no terms, has been defined to be the time during which the court is in fact engaged in business as a court. *Faltrick v. Sullivan*, 119 Cal. 613, 51 Pac. 947; *In re Gannon*, 69 Cal. 541, 11 Pac. 240.

The "sittings of the term" within the meaning of a rule requiring bills of exception to be submitted during the sittings of the term at which they are taken, means the regular sessions of the court commenced on the first day of the term and continued from day to day until all the cases on the

docket are disposed of, and does not include special sittings held after the discharge of the jury for the term for the purpose of keeping the court in session during the term for the transaction of such business as may arise from time to time after the regular sitting is ended and before final adjournment. *Hays v. Philadelphia, W. & B. R. Co.*, 99 Md. 413, 58 Atl. 439.

Court is actually in session within the meaning of the federal statutes relating to the compensation of court officers, not only when the court is present in person, but when in obedience to an order of the judge directing its adjournment to a certain day, the officers are present upon that day, and the journal is opened by the clerk, and the court is adjourned to another day by further order of the judge. *United States v. Pitman*, 147 U. S. 669, 13 Sup. Ct. 425, 37 L. ed. 324, *affirming* 45 Fed. 159.

46. *Wightman v. Karsner*, 20 Ala. 446; *Kingsley v. Bagbey*, 2 Kan. App. 23, 41 Pac. 991.

The mere fact that the law provides that a term may be held at a given time does not necessarily constitute that a regular term of said court. *State v. Fleming* (S. D.), 126 N. W. 565.

A term simply provided for by statute at which no jury is summoned is not a regular term within the meaning of a statute requiring the dismissal of a prosecution if defendant is not brought to trial at the next term after the indictment is found. *State v. Fleming* (N. D.), 126 N. W. 565; *State v. Foster*, 14 N. D. 561, 105 N. W. 938.

A statute requiring issues of fact in criminal actions to be tried at a "regular term" of court was held to mean a term at which jurors have been regularly drawn and summoned, and not a regular as distinguished from a special or called term. *State v. Boucher*, 8 N. D. 277, 78 N. W. 988.

47. *Allan v. Allan*, 101 Me. 153, 63 Atl. 654.

ruptcy.⁴⁸ By statute in many states certain of the *nisi prius* courts have no terms,⁴⁹ while in others it is provided that the court shall be regarded as always open except for the trial of issues of fact.⁵⁰

2. Term Regarded as a Single Day.—At common law, and ex-

Civ. Code 1895, §4864, providing that a court of equity is always open, is not intended to abolish the distinction between term time and vacation; but, where a court of equity has jurisdiction of the person and subject-matter, it is always open for the passage of administrative orders, interlocutory decrees, and orders for the sale of estates of minors within equity jurisdiction. *Webb v. Hicks*, 117 Ga. 335, 43 S. E. 738. And see *Mitchell v. Turner*, 117 Ga. 958, 44 S. E. 17. See also *United States v. Finnell*, 185 U. S. 236, 22 Sup. Ct. 633, 46 L. ed. 890; *Owen v. United States*, 41 Ct. Cl. 69.

See also the title "Equity."

In Vermont it is held that there is such a thing as vacation in chancery, though the court is always open for business for all purposes and does not in fact finally adjourn. *In re Murphy*, 73 Vt. 115, 50 At. 817; *Sturges v. Knapp*, 38 Vt. 540.

48. *United States v. Marvin*, 212 U. S. 275, 29 Sup. Ct. 297, 52 L. ed. 510, affirming 42 Ct. Cl. 542; *Sandusky v. First Nat. Bank*, 23 Wall. (U. S.) 289, 23 L. ed. 155; *In re First Nat. Bank*, 152 Fed. 64, 81 C. C. A. 260; *Lockman v. Lang*, 132 Fed. 1, 65 C. C. A. 621; *Marvin v. United States*, 45 Ct. Cl. 528; *Owen v. United States*, 41 Ct. Cl. 69.

See also the title "Bankruptcy Proceedings," IV, A, 4, Vol. 3, p. 941.

49. See the statutes of the various states and the following cases. Cal. Superior courts. Const. Art. 6, §5, Code Civ. Proc., §§73, 74. *San Luis Obispo County v. Simas* (Cal. App.), 81 Pac. 972; *Falltrick v. Sullivan*, 119 Cal. 613, 51 Pac. 947; *In re Gannon*, 69 Cal. 541, 11 Pac. 240; *Wiggin v. Superior Court*, 68 Cal. 398, 9 Pac. 646. Fla.—*McGee v. Ancrum*, 33 Fla. 499, 15 So. 231; *Myrick v. Merritt*, 21 Fla. 799.

In Louisiana there are no distinct terms of the district court, but they are in continuous session during ten months of the year. They are always open, and the proceedings are deemed to be in open court while the judge is on the bench. Const. 1898, Art. 117;

Act No. 163, p. 320, of 1898. *State v. Hincey*, 129 La. —, 56 So. 620; *State v. Thompson*, 121 La. 1051, 46 So. 1013; *State v. Freddy*, 118 La. 468, 43 So. 53.

Court held to have authority under the constitution to make its terms continuous for the trial of particular classes of cases by the adoption of a rule to that effect. *Succession of Hoyle*, 109 La. 623, 33 So. 625. See also *City of New Orleans v. New Orleans Jockey Club*, 129 La. —, 55 So. 711.

Nevada.—District court. *State v. Jackman*, 31 Nev. 511, 104 Pac. 13; *Horton v. New Pass Co.*, 21 Nev. 184, 27 Pac. 376, 1018.

In Oklahoma the county court is always open for the transaction of all probate business, the trial of cases triable under justice of the peace procedure, and for the purpose of taking and entering judgments by confession. *Snyder's Comp. Law*, §1999.

In Washington the courts have no terms. The court has the same power to enter judgment on one judicial day as on another, and its judgments, subject to the statutory power of vacation or modification, have the same finality when first entered as at any time thereafter. *State v. Steiner*, 58 Wash. 578, 109 Pac. 57.

50. See the statutes of the various states and the following cases: *State v. McDonald*, 26 Minn. 445, 4 N. W. 1107; *Laws 1895* (Wyo.), c. 21; *Jones v. Bowman*, 10 Wyo. 47, 65 Pac. 1002; *Anderson v. Matthews*, 8 Wyo. 307, 57 Pac. 156.

Under such a statute, an order made after a hearing brought on by a notice of motion or order to show cause before the "judge at chambers" is an order of the court, and must be so regarded, irrespective of the mode or manner adopted by the judge in appending his signature thereto. *Insurance Co. v. Weber*, 2 N. D. 239, 50 N. W. 703.

Except for Jury Trials.—Territory v. *Armijo*, 14 N. M. 205, 89 Pac. 267; *Herring v. Lincoln, Lucky & Lee Mining Co.*, 13 N. M. 384, 85 Pac. 1043.

cept as modified by statute, a term is regarded as but one day,⁵¹ and all business done during it is referred to its commencement,⁵² except such as is directed by law to be done on other days,⁵³ or where such a course would defeat the ends of justice.⁵⁴

51. **Conn.**—*Leavenworth v. Marshall*, 19 Conn. 1; *Hawley v. Parrott*, 10 Conn. 486; *Cutler v. Wadsworth*, 7 Conn. 6. **Ill.**—*Krieger v. Krieger*, 221 Ill. 479, 77 N. E. 909; *Brown v. Leet*, 136 Ill. 203, 26 N. E. 639; *Chimquy v. People*, 78 Ill. 570; *Richardson v. Beldam*, 18 Ill. App. 527. **Ia.**—*State v. Winebrenner*, 67 Iowa 230, 25 N. W. 146. **Kan.**—*Union Pac. R. Co. v. Hand*, 7 Kan. 380. **Ky.**—*Com. v. Howard*, 99 Ky. 542, 36 S. W. 556; *Dye v. Knox*, 1 Bibb. 573. **Mo.**—*State v. Jeffers*, 64 Mo. 376; *State v. Mitchell*, 127 Mo. App. 455, 105 S. W. 655; *Gormley v. Transit Co.*, 126 Mo. App. 405, 103 S. W. 1147; *Becker v. Schutte*, 85 Mo. App. 57; *Williams v. Walton*, 84 Mo. App. 433. **N. Y.**—*People v. Sullivan*, 115 N. Y. 185, 21 N. E. 1039. **Ohio.** *May v. State*, 14 Ohio 461; *Torbet v. Coffin*, 6 Ohio 33. **Pa.**—*Lance v. Bonnell*, 105 Pa. 46. **Eng.**—*Jacobs v. Miniconi*, 7 T. R. 31, 101 Eng. Reprint 840; *Anonymous*, 1 Salk. 8, 91 Eng. Reprint 8.

From the commencement until the end of the term there is, in contemplation of law, but one sitting, though there may be adjournments or recesses. *The Canary No. 2*, 22 Fed. 536.

For all general purposes the court is deemed to be in session from its commencement until its close. *Barrett v. State*, 1 Wis. 175.

Where a notice states that an application will be made to the court on a particular day of the term, it may be made on a subsequent day. *Chicago, B. & Q. R. Co. v. Chamberlain*, 84 Ill. 333; *Shoemate v. Lockridge*, 53 Ill. 503.

52. **Conn.**—*Leavenworth v. Marshall*, 19 Conn. 1; *Hawley v. Parrott*, 10 Conn. 486; *Cutler v. Wadsworth*, 7 Conn. 6. **Kan.**—*Union Pac. R. Co. v. Hand*, 7 Kan. 380. **N. Y.**—*People v. Sullivan*, 115 N. Y. 185, 21 N. E. 1039. **Eng.**—*Jacobs v. Miniconi*, 7 T. R. 31, 101 Eng. Reprint 840.

A judgment relates back to the first day of the term. *Shipwith's Exr. v. Cunningham*, 8 Leigh (Va.) 271, 31 Am. Dec. 242.

Judgments are to be deemed entered on the first day of the term, though court is not in fact opened until the second week of the term. *McNeill v. McDuffie*, 119 N. C. 336, 25 S. E. 871; *Norwood v. Thorp*, 64 N. C. 682.

A judgment signed in any part of the term on the subsequent vacation relates back to the first day of the term, notwithstanding the death of the defendant before judgment actually signed. *Bragner v. Langmead*, 7 T. R. 20, 101 Eng. Reprint 834.

53. *People v. Sullivan*, 115 N. Y. 185, 21 N. E. 1039.

As to them the term is divisible. *Barrett v. State*, 1 Wis. 175.

For the purpose of the section of the practice act relating to the filing of transcripts on appeal the term is made to consist of days, and in that connection the word day is used in its popular sense. *Brown v. Leet*, 136 Ill. 203, 26 N. E. 639.

54. *Lyttleton v. Cross*, 3 B. & C. 316, 107 Eng. Reprint 751.

The true time when any legal proceedings took place may be shown, where justice requires it. *Leavenworth v. Marshall*, 19 Conn. 1; *Hawley v. Parrott*, 10 Conn. 486; *Cutler v. Wadsworth*, 7 Conn. 6.

A judgment will relate back to the day at which the court actually commenced its session, where that day was later than the one fixed by law for its commencement. *Shipwith's Exr. v. Cunningham*, 8 Leigh (Va.) 271, 31 Am. Dec. 242.

The rule will not be applied to antedate the judicial rejection of a claim so as to render operative a grant which would otherwise be without effect (*Newhall v. Sanger*, 92 U. S. 761, 23 L. ed. 769), or so as to render an indictment void as having been found before the offense was committed (*People v. Beatty*, 14 Cal. 566; *May v. State*, 14 Ohio 461).

Where a declaration in slander was entitled to a particular term generally and the words relied on were proved to have been spoken on the second day of the term, it was held that the peti-

3. Number of Terms and Time of Holding Same. — Terms must be held at the times fixed by law.⁵⁵ Subject to constitutional limitations,⁵⁶ the number of terms of the courts of a state,⁵⁷ and the times of holding the same,⁵⁸ are discretionary with the legislature. It may confer on the court or judge power to fix the number of terms,⁵⁹ and the times when they shall be held,⁶⁰ or to change the date as fixed by statute,⁶¹ but in the absence of statutory authority the judge has no such power.⁶²

4. Commencement, Duration, and Ending. — The time of the commencement of a term is fixed by statute.⁶³

Ordinarily the first day of the term is the day fixed by law for its commencement,⁶⁴ though for some purposes it may be deemed to be

tion would not be regarded as filed on the first day of the term and therefore before the words were spoken, when such was not in fact the case. *De Wit v. Greenfield*, 5 Ohio 225.

55. *Batten v. State*, 80 Ind. 394; *Smithson v. Dillon*, 16 Ind. 169; *McCool v. State*, 7 Ind. 378.

56. That a court was designated as the court of "quarter sessions" by the constitution was held not to preclude the legislature from establishing more than four terms or sessions thereof each year, or from conferring on the court itself power to do so. *Com. v. Ramsey*, 42 Pa. Super. 25.

The holding of a designated number of terms each year has been held not to involve the jurisdiction, powers, proceedings, or practice of the court, within a constitutional provision requiring uniformity in those particulars. *Burge v. Mangum* (Ga.), 67 S. E. 857; *Mulherin v. Kennedy*, 120 Ga. 1080, 48 S. E. 437.

57. *Whallon v. Gridley*, 51 Mich. 503, 16 N. W. 876; *Rhodes v. Bell*, 230 Mo. 138, 130 S. W. 465.

May reduce the number. *Parker v. Sanders*, 46 Ark. 229.

May provide for special terms and for the appointment of special judges to preside over special or general terms. *State v. Davis*, 88 S. C. 204, 70 S. E. 417.

58. Ill.—*City of Mt. Vernon v. Evans & Howard Fire Brick Co.*, 204 Ill. 32, 68 N. E. 208. Ind.—*Rabb v. McAdams*, 160 Ind. 492, 67 N. E. 182. Mo.—*Rhodes v. Bell*, 230 Mo. 138, 130 S. W. 465.

The arrangement of terms is a matter for the legislature and not for the

courts. *Litteral v. Blair*, 139 Ky. 196, 129 S. W. 573.

59. *Com. v. Ramsey*, 42 Pa. Super. 25.

A statute authorizing the county judge to provide for holding monthly terms of the quarterly court was held not to contravene a constitutional provision creating quarterly courts and providing that their jurisdiction should be uniform and regulated by a general law. *Hamilton v. Spalding*, 25 Ky. L. Rep. 847, 76 S. W. 517.

60. *Com. v. Ramsey*, 42 Pa. Super. 25.

By conferring upon the circuit judge power to fix the time for holding terms of the circuit court, the legislature did not divest itself of power to change the times fixed by said judge. *Whallon v. Gridley*, 51 Mich. 503, 16 N. W. 876; *Ex parte Shean*, 25 Ohio St. 440.

61. *Adecock v. Lecompt*, 66 Mo. 40.

Such a statute is not void as conferring legislative power on the courts. *Rhodes v. Bell*, 230 Mo. 138, 130 S. W. 465.

62. He cannot change the times for holding regular terms. *Batten v. State*, 80 Ind. 394.

63. *Bronson v. Schulten*, 104 U. S. 410, 26 L. ed. 797. See the statutes of the various states.

Where the case is tried after the time fixed for the commencement of the term, the judgment is not void because a pretended court was by mistake, held the week before, and the first week of the term proper was regarded as the second week. *Garlick v. Dunn*, 42 Ala. 404.

64. The day fixed by law, rather than the day on which court actually opened, is to be deemed the first day

the day on which the court actually commences its session, where it may lawfully commence on a different day.⁶⁵

Where the law fixes no time during the day designated for the commencement of the term for the opening of court, it may be opened at any time during said day.⁶⁶

A term continues until finally adjourned,⁶⁷ or until it terminates by operation of law,⁶⁸ and this regardless of whether the court sits during the days comprising it or not.⁶⁹ In the absence of a statutory provision for a previous termination, or a previous final adjournment, it will ordinarily continue until the time fixed for the commencement of the next regular term.⁷⁰ In many jurisdictions it will not continue

of the term for the purpose of determining whether a notice that a motion for judgment will be made on the first day of the term is timely. *Tench v. Gray*, 102 Va. 215, 46 S. E. 287.

65. *Skipwith's Exr. v. Cunningham*, 8 Leigh (Va.) 271, 31 Am. Dec. 642.

Where the statute provided that a term was to commence on the 5th of a certain month, but the judge, exercising the right conferred on him by the statute, did not commence it until the seventh, it was held that an attachment issued on the sixth and returnable to the first day of the term was not invalid. *Mays v. Newlin*, 143 Fed. 574.

A confession of judgment made before the clerk on the day fixed by law for the beginning of the term, but before the court actually began its session on that day, was held to be in vacation and hence valid. *Brown v. Hume*, 16 Gratt. (Va.) 456.

66. *People v. Sanchez*, 24 Cal. 17.

After 12 o'clock of the night preceding and before 12 o'clock of the night of that day. *Perdue v. State*, 134 Ga. 300, 67 S. E. 810.

A statute required the county commissioners' court to order an election at the next term after the filing of a petition for that purpose. A petition was filed at 10:30 a. m. on the first day of the term. The court convened at 1:30 p. m. on that day, according to its custom, and ordered the holding of the election, and its action in so doing was held to be void. *Barlow v. State*, 47 Tex. Crim. 114, 80 S. W. 375.

67. **U. S.**—*Bronson v. Schulten*, 104 U. S. 410, 26 L. ed. 797. **Kan.**—*State v. Hargis*, 84 Kan. 150, 113 Pac. 401. **N. M.**—*Territory v. Armijo*, 14 N. M.

205, 89 Pac. 267. **Okla.**—*In re Dossett*, 2 Okla. 369, 37 Pac. 1066. **Ore.** *State v. Maddock*, 115 Pac. 426; *Deering & Co. v. Quivey*, 26 Ore. 556, 38 Pac. 710. **Tex.**—*Lobadie v. Dean*, 47 Tex. 90.

68. **Ala.**—*Norwood v. Louisville & N. R. Co.*, 149 Ala. 151, 42 So. 683; *Blake v. Harlan*, 75 Ala. 205. **Cal.** *Smith v. Chichester*, 1 Cal. 409. **Kan.** *State v. Hargis*, 84 Kan. 150, 113 Pac. 401. **N. M.**—*Territory v. Armijo*, 14 N. M. 205, 89 Pac. 267. **Okla.**—*In re Dossett*, 2 Okla. 369, 37 Pac. 1066. **Ore.**—*State v. Maddock*, 115 Pac. 426; *Deering & Co. v. Quivey*, 26 Ore. 556, 38 Pac. 710. **Tenn.**—*Gregg v. Cooke*, 7 Tenn. 82. **Tex.**—*Labadie v. Dean*, 47 Tex. 90.

An order for its continuance is not essential. *People v. Central City Bank*, 53 Barb. (N. Y.) 412.

A statute providing that a term shall continue "until" a specified day, will be held to include that day in the term. *Montgomery Traction Co. v. Knabe*, 158 Ala. 458, 48 So. 501, *overruling* *Johnson v. State*, 141 Ala. 7, 37 So. 421, 109 Am. St. Rep. 17.

69. In the computation of the term all adjournments from one day to another day of the same term are to be included. A day may be one of the days of the term though the court may not sit upon it, and though its failure to do so is due to the fact that it is *dies non*. *Brown v. Leet*, 136 Ill. 203, 26 N. E. 639.

70. **Ia.**—*State v. Stevens*, 67 Iowa 557, 25 N. W. 777. **Ore.**—*Deering & Co. v. Quivey*, 26 Ore. 556, 38 Pac. 710. **N. M.**—*Territory v. Armijo*, 14 N. M. 205, 89 Pac. 267.

Under a statute providing that court should be held on the fourth Wednes-

beyond that time,⁷¹ unless an adjournment is had,⁷² though in others a contrary rule prevails.⁷³

Ordinarily a case unfinished at the end of a term stands continued generally until the next term,⁷⁴ but by statute in some jurisdictions a term may be extended beyond the time fixed by law for its termination for the purpose of finishing the trial of a case then in progress,⁷⁵

day in April and the first Monday in May it was held that court might be held during all the time between those days though there were five Mondays in April. *McAfee v. State*, 31 Ga. 411.

71. *Ala.*—*Blake v. Harlan*, 75 Ala. 205. *Ark.*—*Roberts & Schaeffer Co. v. Jones*, 82 Ark. 188, 101 S. W. 165. *Kan.*—*In re Millington*, 24 Kan. 214. *Tenn.*—*Gregg v. Cooke, Peck*, 82.

Where the court failed to fix in the order of adjournment a time for reconvening, it was held that the term expired by operation of law by the commencement of a term in another county of the district. *Lookabaugh v. Okeene Hdw. & Imp. Co.*, 25 Okla. 474, 106 Pac. 844.

Where an order recited that a motion was heard on an adjourned day of the June term, being Jan. 3, which was the first day of the next term, and the record showed an adjournment *sine die* on that day, it would be presumed on appeal that the adjournment of the June term took place prior to entering upon the business of the new term. *Cooper v. Granger*, 129 Wis. 50, 108 N. W. 193.

In *Harris v. Nixon*, 27 App. Cas. (D. C.) 94, it was held that, under a statute providing that a court should hold a term on the first Monday of every month and continue the same from day to day as long as necessary for the transaction of its business, it was at least doubtful whether a term could be continued from month to month.

That the minutes recited that a judgment was rendered on the 18th of May, "the same being one of the regular judicial days of" the October term, when under the statute the May term began on that day, was held not to affect the jurisdiction of the court or to render the judgment void, but to be harmless error. *Smith v. King of Ariz. Min. & Mill. Co.*, 9 Ariz. 228, 80 Pac. 357.

72. See *infra*, III, 8.

73. *U. S.*—*United States v. Louis-*

ville & N. R. Co., 177 Fed. 780; *East Tenn. Iron & Coal Co. v. Wiggins*, 68 Fed. 446, 15 C. C. A. 510. *Ga.*—*Perdue v. State*, 134 Ga. 300, 67 S. E. 810; *King v. Sears*, 91 Ga. 577, 18 S. E. 830. *N. M.*—*Territory v. Armijo*, 14 N. M. 205, 89 Pac. 267.

Where no time is expressly fixed for the ending of a term, a judgment is not void because rendered after the last day for the commencement of another term in another county of the circuit. *First Nat. Bank v. Parsons*, 45 W. Va. 688, 32 S. E. 271. See III, B, 5.

74. Unless it is continued *nisi*. *Greenwood v. Bradford*, 128 Mass. 293. See also the title "Continuances."

75. *Burns' St.* 1908, §1658. Construed in *Watts v. Watts (Ind.)*, 95 N. E. 1107; *Sutherland v. State*, 150 Ind. 154, 49 N. E. 947; *Wayne Pike Co. v. Hammons*, 129 Ind. 368, 27 N. E. 487.

"Where a trial is commenced in the midst of a term, under the *bona fide* expectation and belief that it can be concluded before the day shall arrive when the judge is directed, but not imperatively required, to hold court in another county, he may remain and conclude that case, receive the verdict and pass judgment though this may happen to be done on a day, or at a time, when he would be opening or holding court in another county." *State v. Knight*, 19 Iowa 94. This case holds that the correctness of the decision in *Davis v. Fish*, 1 G. Gr. (Ia.) 406, and *Grabel v. State*, 2 G. Gr. (Ia.) 559, is doubtful, and in any event that the rule there laid down is no longer applicable in view of a change in the statute.

The session in one county may be extended beyond the time fixed for commencing of a term in another county at least for the first three days of the latter term during which the clerk is authorized to adjourn it if the judge does not attend. *Cook v. Smith*, 54 Iowa 636, 6 N. W. 259, 7 N. W. 16.

May be continued into and held dur-

or in case the business of the court has not then been completed.⁷⁶

Lapse of Term.—In the absence of a statutory provision to the contrary, a regular term will lapse if not opened by the judge at the time prescribed by law.⁷⁷ In some jurisdictions a similar rule obtains in regard to adjourned terms,⁷⁸ while others hold to the contrary.⁷⁹

ing term fixed for holding court in another county. *Tippy v. State*, 35 Neb. 368, 53 N. W. 208.

A trial begun on the last day of the term may be continued afterwards by adjournment from day to day. *Carroll v. Commonwealth*, 84 Pa. 107, citing *Briceland v. Com.*, 74 Pa. 463.

A special term may be so continued even though it is thereby prolonged beyond the day fixed for a regular term. *Gonzales v. Cunningham*, 164 U. S. 612, 17 Sup. Ct. 182, 41 L. ed. 572, affirming 8 N. M. 446, 46 Pac. 349.

Under North Carolina Code, §1229, in felony cases the term may be continued to conclude the trial or to receive the verdict, and Acts 1893, c. 226, extends the rule to civil cases except those begun after Thursday of the last week of the term. For construction of these statutes see *Bank v. Gilmer*, 116 N. C. 684, 22 S. E. 2; *State v. Adair*, 66 N. C. 298; *State v. Bullock*, 63 N. C. 570.

A constitutional provision that terms were "to continue for two weeks" was held not to render such a statute invalid. *State v. Adair*, 66 N. C. 298.

Where the statute authorized the continuance of a special term for the purpose of receiving the verdict of a jury which had not agreed, it was held that the parties were not prejudiced by the fact that the judge opened and conducted another term in the meantime. *National Bank v. Gilmer*, 116 N. C. 684, 22 S. E. 2.

A statute authorizing the continuance of the trial under such circumstances does not preclude an adjournment *sine die*, and where such an adjournment is had after a continuance of a case to a day in the next term, the jury is discharged and the court cannot proceed with the trial. *Johnson v. Pacific Cement Co.*, 50 Cal. 648.

At common law where a jury in a capital case did not agree during the term they were carried to the next court, where the business went on during their deliberations. *Bank v. Gilmer*, 116 N. C. 684, 22 S. E. 2; *State v. Bullock*, 63 N. C. 570.

76. South Carolina Code Civ. Proc. 1902, §27, provides that, in case the business of the court of general sessions is not completed at the time fixed by law for holding the court of common pleas, the presiding judge may adjourn the latter court until the court of general sessions shall have been concluded. Construed in *State v. Hasty*, 76 S. C. 105, 56 S. E. 669.

77. U. S.—*Ex parte* Harlan, 180 Fed. 119. Ala.—*Forbus v. State*, 158 Ala. 41, 48 So. 592. See also *Farr v. State*, 135 Ala. 71, 33 So. 660. Ind.—*Loesnitz v. Seelinger*, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887. Kan.—*In re McClasky*, 52 Kan. 34, 34 Pac. 459; *In re Terrill*, 52 Kan. 29, 34 Pac. 457, 39 Am. St. Rep. 327. Nev.—*State v. Roberts*, 8 Nev. 239. N. Y.—*People v. Sullivan*, 115 N. Y. 185, 21 N. E. 1039; *People v. Bradwell*, 2 Cow. 445. Okla.—*American Fire Ins. Co. v. Pappe*, 4 Okla. 110, 43 Pac. 1085; *In re McClasky*, 2 Okla. 568, 37 Pac. 854. See also *Collins v. State*, 5 Okla. Crim. 254, 114 Pac. 1127; *Wilson v. State*, 3 Okla. Crim. 714, 109 Pac. 289.

A showing that no business was transacted until some days after the time fixed for the beginning of the term does not show that the term lapsed, it not appearing that the judge was not present. *State v. Maddock (Ore.)*, 115 Pac. 426.

Effect on Pending Cases.—The failure of the judge to attend at a regular or special term does not operate to dismiss pending cases, but they are continued until the next term. *Ex parte Driver*, 51 Ala. 41.

78. Ark.—*Street v. Reynolds*, 63 Ark. 1, 38 S. W. 150; *Butler v. Williams*, 48 Ark. 227, 2 S. W. 843. Cal.—*Norwood v. Kenfield*, 34 Cal. 329. Ill.—*Wight v. Wallbaum*, 39 Ill. 554. Ind.—*Loesnitz v. Seelinger*, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887.

Where the judge fails to appear and open court, and there is no adjournment by the clerk or sheriff as authorized by statute. *Myers v. East Bench Irr. Co.*, 32 Utah 215, 89 Pac. 1005.

79. U. S.—*Ex parte* Harlan, 180

Statutes in many states provide for an adjournment by the clerk or sheriff under such circumstances, or that court shall stand adjourned for a specified time by operation of law.⁸⁰

5. Simultaneous Sessions of Same Court.—In the absence of constitutional or statutory authority, not more than one court in the same circuit or district can be open at the same time.⁸¹ In some states it is held that, if the statute by mistake provides for two, it rests in the discretion of the judge which he will hold,⁸² but other courts hold to the contrary.⁸³

The rule is not violated by holding a session in one county during the adjournment of a term in another,⁸⁴ nor where one court is not opened until after the other has adjourned, though both are in session on the same day.⁸⁵

Fed. 119; *Schofield v. Horse Springs Cattle Co.*, 65 Fed. 433. **Kan.**—*Union Pac. R. Co. v. Hand*, 7 Kan. 380. **Miss.** *Palmer v. State*, 73 Miss. 780, 20 So. 156. **N. Y.**—*People v. Sullivan*, 115 N. Y. 185, 21 N. E. 1039, reversing 2 N. Y. Supp. 135. **Okla.**—*In re Dossett*, 2 Okla. 369, 37 Pac. 1066. **Tex.** *Labadie v. Dean*, 47 Tex. 90.

80. See the statutes of the various states and the following cases: **Ala.** *Forbus v. State*, 158 Ala. 41, 48 So. 592. **Cal.**—*People v. Sanchez*, 24 Cal. 7. **Colo.**—*May v. People*, 8 Colo. 210, 6 Pac. 816. **Fla.**—*Webster v. State*, 49 Fla. 131, 38 So. 514; *Bass v. State*, 17 Fla. 685. **Kan.**—*State v. Hargis*, 84 Kan. 150, 113 Pac. 401. **Miss.** *Palmer v. State*, 73 Miss. 780, 20 So. 156. **Okla.**—*Collins v. State*, 5 Okla. Crim. 254, 114 Pac. 1127; *Wilson v. State*, 3 Okla. Crim. 714, 109 Pac. 289. **Tex.**—*Garza v. State*, 12 Tex. App. 261. **Va.**—*Langhorne v. Waller's Exr.*, 76 Va. 213.

Where the statute provided that if the judge did not attend on the first day the court should stand adjourned to the second day, and the judge had power to order the court adjourned to such time as he might appoint, it was held that the premature adjournment by order of the judge on the first day until the third day did not cause the term to lapse. *Webster v. State*, 49 Fla. 131, 38 So. 514.

Will lapse unless adjourned by the sheriff or clerk in the manner prescribed by statute. *State v. Roberts*, 8 Nev. 239.

Though the statute makes it the duty of the sheriff to adjourn the court until the next term if the judge does

not appear on the fourth day, the term will not lapse if the sheriff does not in fact do so. *McNeill v. McDuffie*, 119 N. C. 336, 25 S. E. 871; *Norwood v. Thorp*, 64 N. C. 682.

81. **Ark.**—*Roberts & Schaeffer Co. v. Jones*, 82 Ark. 188, 101 S. W. 165; *Ex parte Williams*, 69 Ark. 457, 65 S. W. 711; *Ex parte Jones*, 49 Ark. 110, 4 S. W. 639; *Butler v. Williams*, 48 Ark. 227, 2 S. W. 843; *Parker v. Sanders*, 46 Ark. 229. **Fla.**—*Brock v. Gale*, 14 Fla. 523. **Ind.**—*Batten v. State*, 80 Ind. 394. **Ia.**—*Grable v. State*, 2 G. Gr. 559. **Kan.**—*In re Millington*, 24 Kan. 214. **Ore.**—*Baisley v. Baisley*, 15 Ore. 183, 13 Pac. 888.

82. *Carland v. County of Custer*, 5 Mont. 579, 6 Pac. 24. See also *Brock v. Gale*, 14 Fla. 523, 14 Am. Rep. 356.

83. *Batten v. State*, 80 Ind. 394.

84. *In re Dossett*, 2 Okla. 369, 37 Pac. 1066.

Where the circuit court began its term on October 20, and, though allowed to continue in session for two weeks, adjourned on the 27th, it was held that a term of the common pleas commenced on the latter date was not illegal as held within the period allowed by law for holding the circuit court. *Swails v. Coverdill*, 21 Ind. 271.

On appeal it will be presumed in favor of a judgment rendered in one county after the time fixed for the commencement of a term in another that the latter term was adjourned. *Weaver v. Cooledge*, 15 Iowa 244. See also *infra*, III, B, 8.

85. Session on the same day. Per-

It is now generally provided that simultaneous sessions may be held where there is more than one judge authorized to hold the same.⁸⁶

6. Business That May Be Transacted.—The business that may be transacted at a particular general⁸⁷ or special⁸⁸ term depends entirely on the statutes and rules of court of the various states.

7. Special Terms.—a. *Definition and Nature.*—A special term is one that is called at an unusual time for the transaction of some particular business.⁸⁹ It is a distinct entity within itself.⁹⁰ In some states the regular terms in each county of each circuit are made special terms for all the other counties in the circuit.⁹¹

due *v. State*, 134 Ga. 300, 67 S. E. 810.

86. See the constitutions and statutes of the various states and the following cases: **U. S.**—United States *v. Louisville & N. R. Co.*, 177 Fed. 780; *In re Stevenson*, 125 Fed. 843; *East Tenn. Iron & Coal Co. v. Wiggin*, 15 C. C. A. 510, 68 Fed. 446. **Ga.**—Perdue *v. State*, 134 Ga. 300, 67 S. E. 810; *King v. Sears*, 91 Ga. 577, 18 S. E. 830; *Bone v. State*, 86 Ga. 108, 12 S. E. 205. **Ill.**—Wadhams *v. Hotchkiss*, 80 Ill. 437. **Mont.**—Carland *v. County of Custer*, 5 Mont. 579, 6 Pac. 24. **Neb.** *Tippy v. State*, 35 Neb. 368, 53 N. W. 208. **N. M.**—Territory *v. Armijo*, 14 N. M. 205, 89 Pac. 267. **N. Y.**—People *v. Warden of City Prison*, 117 App. Div. 154, 102 N. Y. Supp. 374. **Pa.**—Carroll *v. Com.*, 84 Pa. 107. **Wash.**—Hindman *v. Boyd*, 42 Wash. 17, 84 Pac. 609. **W. Va.**—First Nat. Bank *v. Parsons*, 45 W. Va. 688, 32 S. E. 271.

A special judge appointed to try a particular case and the regular judge may hold court at the same time. *Courtney v. State*, 5 Ind. App. 356, 32 N. E. 335.

A statute authorizing a judge of the district court to call in a judge of another district, and providing that both may hold their sessions in different rooms at the same time is not unconstitutional. *Bigerstaff v. People*, 30 Colo. 298, 70 Pac. 417.

A constitutional provision that terms should be held by "one or more of the judges" of a certain court of a specified county was held to authorize a statute providing that two or more of the judges of said court might each hold a different branch thereof at the same time. *Cahill v. People*, 106 Ill. 621.

87. See the statutes of the various states.

At a general term both civil and criminal business may be disposed of. *Smedley v. Com.*, 138 Ky. 1, 129 S. W. 547, *modifying* 139 Ky. 767, 127 S. W. 485.

Kentucky St. 1903, §964, limiting criminal and penal cases to three terms a year, does not prevent the hearing of civil cases at any term. Though no rule or order in conflict with the statute can be enforced over the objection of a party, a party acquiescing in an order that only criminal cases shall be heard at certain terms and only civil cases at certain other terms cannot thereafter object to such a course. *Hill's Admr. v. Penn Mut. Life Ins. Co.*, 120 Ky. 190, 85 S. W. 759.

A judgment rendered against an absconding defendant at a term at which the case could not be tried without his consent was held to be merely irregular and not to be void on collateral attack. *Horrigan v. Savannah Grocery Co.*, 126 Ga. 127, 54 S. E. 961.

88. See III, B, 7, C, *infra*.

89. A term appointed by the presiding officer or officers, held at an unusual time, for the transaction of particular business. *Wightman v. Karsner*, 20 Ala. 446.

One that is called by the judge under the power conferred on him by the statute. *Kingsley v. Bagby*, 2 Kan. App. 23, 41 Pac. 991.

90. *Peoples v. State*, 46 Fla. 101, 35 So. 223.

Though held in a recess between a regular and an adjourned term. *Worthington v. State*, 134 Ga. 261, 67 S. E. 805.

91. Wisconsin St. 1898, §2424, as amended by Laws 1905, ch. 6, p. 8, construed in *Emerson v. Huss*, 127 Wis.

b. *Power To Call.*—Subject to constitutional limitations, the legislature may provide for the holding of special terms,⁹² and may confer power on the court or judge to call them.⁹³ It is usual to confer such power on the judge or the court,⁹⁴ or on the governor of the state.⁹⁵

c. *Object and Purposes of Special Terms, and Business That May Be Transacted Thereat.*—The purposes for which a special term may be called, and the business that may then be transacted thereat depend upon the statutes of the various states.⁹⁶

215, 106 N. W. 518; *State v. Bardon*, 103 Wis. 297, 79 N. W. 226.

Two separate general terms held successively in each of two counties are separate and distinct special terms in a third county. *Emerson v. Huss*, 127 Wis. 215, 106 N. W. 518.

92. *State v. Davis*, 38 S. C. 204, 70 S. E. 417; *State v. Gallman*, 60 S. C. 229, 60 S. E. 682.

See the statutes of the various states.

93. **Fla.**—*Bass v. State*, 17 Fla. 685; *Barber v. State*, 13 Fla. 675. **Ohio.** *Merchant v. North*, 10 Ohio St. 251. **Tex.**—*Hardin v. State*, 38 Tex. 598.

Such a statute is not a delegation of legislative power to the courts. *McIntosh v. State*, 56 Tex. Crim. 134, 120 S. W. 455; *Ex parte Boyd*, 50 Tex. Crim. 309, 96 S. W. 1079.

94. See the statutes of the various states and the following cases: **Ill.** *Mattingly v. Darwin*, 23 Ill. 618. **Kan.** *Durand v. Higgins*, 67 Kan. 110, 72 Pac. 567. **Ky.**—*Banks v. Com.*, 145 Ky. 800, 141 S. W. 380; *Penman v. Com.*, 141 Ky. 660, 133 S. W. 540. **S. D.**—*In re Nelson*, 19 S. D. 214, 102 N. W. 885.

Power conferred on the court to call special terms does not authorize the judge in vacation to do so. *Carter v. Carter* (Mo.), 141 S. W. 873.

95. See the statutes of the various states and the following cases: **People v. Neff**, 191 N. Y. 210, 83 N. E. 970; **People v. Gillette**, 191 N. Y. 107, 83 N. E. 680; **People v. Shea**, 147 N. Y. 78, 41 N. E. 505; **People v. Valentine**, 131 N. Y. Supp. 733.

The power of the governor to order special terms is not restricted to instances where there is an accumulation of business, nor when such fact is recited as a reason in the commission is the power of the judge restricted to the trial of indictments found before that term. *Code* (N. C.) §913; *State*

v. Register, 133 N. C. 746, 46 S. E. 213; *State v. Turner*, 119 N. C. 841, 25 S. E. 810. See also *State v. Lewis*, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247, 11 L. R. A. 105.

96. See the statutes of the various states and the following cases: **U. S.** *In re Stevenson*, 125 Fed. 843. **Ky.** *Penman v. Com.*, 141 Ky. 660, 133 S. W. 540. **Mo.**—*State v. Fulton*, 152 Mo. App. 345, 133 S. W. 95.

The county court at special term may vacate the office of sheriff for his failure to give bond. *Renshaw v. Cook*, 129 Ky. 347, 111 S. W. 377.

When Necessary.—Power to appoint special terms when necessary to the prompt and efficient administration of justice makes the judge on whom it is conferred the judge of such necessity, and his decision cannot be collaterally attacked. *Mattingly v. Darwin*, 23 Ill. 618.

Where the public good requires it (*Sand. & H. Dig.* §1165), as where there is unfinished business, etc. (*Wilman v. Bordwell*, 73 Ark. 418, 84 S. W. 474).

Whenever the Business Requires it. *Kentucky St.* 1903, §964.

The transfer of two murder cases to a court by change of venue was held to be such an emergency as to justify the calling of a special term to try them. *White v. Com.*, 120 Ky. 178, 85 S. W. 753.

The court of appeals will not interfere with the judgment of the judge as to the necessity of calling a special term. *Banks v. Com.*, 145 Ky. 800, 141 S. W. 380.

The record need not show why the calling of the term was necessary. *Banks v. Com.*, 145 Ky. 800, 141 S. W. 380.

For the Trial of Issues of Fact in Criminal Cases.—*State v. Boucher*, 8 N. D. 277, 78 N. W. 988.

For the Trial of Persons Confined in Jail.—*Kirby's Dig.* (Ark.) §1532; *Beard*

In some states proceedings had at a special term held during the pendency of a regular term, in an action the trial of which was commenced at such regular term, will be deemed to have been had at or during the latter.⁹⁷

d. *Time of Holding and Duration.*—A special term may ordinarily be held during a recess of the general term and before the latter has been finally adjourned,⁹⁸ and, in some jurisdictions, may be held during the pendency of a regular term,⁹⁹ or after it has intervened.¹

Lapse.—This subject has been treated in a previous section.²

e. *Manner of Calling.*—Statutory provisions as to the manner of calling special terms must of course be complied with,³ including those

v. State, 79 Ark. 293, 95 S. W. 995, 97 S. W. 667.

For the Purpose of Sentencing One Convicted of Crime.—May be called in vacation for that sole purpose. *Ex parte Boyd*, 50 Tex. Crim. 309, 96 S. W. 1079; *Ex parte Young*, 49 Tex. Crim. 536, 95 S. W. 98.

That the execution of the defendant's sentence is thereby hastened does not make the calling of a term for such purpose invalid as being *ex post facto* as to him. It relates to matters of remedy and procedure only. *Ex parte Boyd*, 50 Tex. Crim. 309, 96 S. W. 1079.

97. *American States Security Co. v. Milwaukee N. R. Co.*, 139 Wis. 199, 120 N. W. 844, citing *Frost v. Meyer*, 137 Wis. 255, 118 N. W. 811.

98. *State v. Mitchell*, 127 Mo. App. 455, 105 S. W. 655.

A judge authorized to call special terms may recess a regular term in one county of his district and hold a special term in an adjoining county thereof. *Elliott v. State*, 58 Tex. Crim. 200, 125 S. W. 568; *McIntosh v. State*, 56 Tex. Crim. 134, 120 S. W. 455.

99. *Williams v. State*, 147 Ala. 10, 41 So. 992.

That a special term was organized at a period covered by the regular one was held not to necessarily render it invalid. *Young v. State*, 170 Ala. 71, 54 So. 166.

The governor may call an extraordinary court of oyer and terminer to be held on the same day as the regular court, there being no limitation as to time in the statute conferring the power on him. *People v. Shea*, 147 N. Y. 78, 41 N. E. 505.

Where there is more than one judge, a special term may be held though a

regular term is in session in the same district. *In re Stevenson*, 125 Fed. 843; *Mumzesheimer v. Fairbanks & Co.*, 82 Tex. 351, 18 S. W. 697.

A judge holding a regular term in one county in his district may call in another judge to hold a special term in another county of said district at the same time. *Mumzesheimer v. Fairbanks & Co.*, 82 Tex. 351, 18 S. W. 697.

For the purpose of completing the trial of a pending case the court may order a special term to be held at a time fixed for the commencement of a regular term, notwithstanding a statutory provision that special terms shall not interfere with regular ones. *Samuels v. State*, 3 Mo. 68.

1. May appoint a special term beyond the regular term. *Mattingly v. Darwin*, 23 Ill. 618.

A special term was not void as held at the time fixed for the holding of court in another county, where the statute required the latter court to be held the week before the special term was held and it had adjourned before the special term met. *Peoples v. State*, 46 Fla. 101, 35 So. 223.

On appeal it will be presumed in support of a judgment of conviction at a special term held after the time fixed for holding a regular term in another county that the latter had been adjourned before the former was held. *Williams v. State*, 147 Ala. 10, 41 So. 992.

2. See III, B, 4, *supra*.

3. See the statutes of the various states and the following cases: *State v. Myers*, 198 Mo. 225, 94 S. W. 242; *State v. Fulton*, 152 Mo. App. 345, 133 S. W. 95.

as to the form and contents of the order,⁴ and the necessity and manner of giving notice.⁵ In the absence of statute no particular form or manner is essential,⁶ and any form of words indicating the purpose of the judge to call such a term and clearly conveying that idea is sufficient.⁷

A misnomer in such case is immaterial and does not affect the validity of the term, or deprive it of its character as a special one.⁸

8. Adjournment and Adjourned Terms.—a. *Definition and Nature.*—To constitute an adjourned term there must be either a regular or a special term in session, and the business of that term delayed, postponed, or put off until some more convenient time.⁹ An adjourned term can have no higher legality than the original term of which it is an incident.¹⁰

Adjourned sessions or terms are continuations and parcel of the regular term,¹¹ and the proceedings then had will be considered as

4. See the statutes of the various states and the cases hereunder. *Toler v. Com.*, 94 Ky. 529, 23 S. W. 347. So. 223; *Mattingly v. Darwin*, 23 Ill. 618.

The order must recite every jurisdictional fact authorizing the calling of a special term. *Beard v. State*, 79 Ark. 293, 95 S. W. 995, 97 S. W. 667.

Proceedings at a special term which was held without the proper order being entered upon the record were held to be *coram non judice* and void. *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54.

In the absence of competent evidence to the contrary, on appeal from a judgment of conviction every presumption will be indulged in favor of the regularity and validity of the order for a special term. *White v. Com.*, 120 Ky. 178, 85 S. W. 753.

5. See the statutes of the various states and the following cases: *Mason v. State*, 163 Ala. 48, 53 So. 153; *McMillan v. City of Gadsden*, 39 So. 569; *Penman v. Com.*, 141 Ky. 660, 133 S. W. 540.

In Kentucky a special term may be called in vacation by notice signed by the judge and posted at the court house door for 10 days before the special term is held. Ky. St. 1903, §964. *Jett v. Com.* (Ky.), 85 S. W. 1179; *White v. Com.*, 120 Ky. 178, 85 S. W. 753.

6. *Adjourning to a day certain* on the termination of the term is tantamount to ordering a special session on that day, though no formal order calling such session is made. *In re Stevenson*, 125 Fed. 843.

7. *Peoples v. State*, 46 Fla. 101, 35

8. Calling it an adjourned, or postponed, or regular term. *Peoples v. State*, 46 Fla. 101, 53 So. 223; *Mattingly v. Darwin*, 23 Ill. 618.

9. *Kingsley v. Bagby*, 2 Kan. App. 23, 41 Pac. 991.

Where the sheriff announced the opening of court, and the presiding judge immediately announced that no term of court would be held, it was held that the court had not met and adjourned, but that it had never convened. *Farr v. State*, 135 Ala. 71, 33 So. 660.

10. Where at a regular term an adjournment was taken until a specified date, and before said date the statute authorizing the regular term was repealed, it was held that such adjourned term could not be legally held at the time fixed. *Domingues v. Domingues*, 4 Cal. 186.

11. U. S.—*Mechanics' Bank v. Withers*, 6 Wheat. 106, 5 L. ed. 217; *State v. Charlotte Harbor Phosphate Co.*, 70 Fed. 883, 17 C. C. A. 472. Ala.—*Emrich v. Gilbert Mfg. Co.*, 138 Ala. 316, 35 So. 322; *Hundley v. Yonge*, 69 Ala. 89; *Van Dyke v. State*, 22 Ala. 57. Cal.—*People v. Ah Ying*, 42 Cal. 18. Conn.—*Leavenworth v. Marshall*, 19 Conn. 1. Ia.—*State v. Peterson*, 67 Iowa 564, 25 N. W. 780. Kan.—*State v. Montgomery*, 8 Kan. 351; *Kingsley v. Bagby*, 2 Kan. App. 23, 41 Pac. 991. Ky.—*Wilson v. Linville*, 93 Ky. 254, 19 S. W. 739. Mass. *Com. v. Sessions of Norfolk*, 5

the proceedings of the term so adjourned.¹² An adjournment stops the business of the court, but does not necessarily abridge the term.¹³

b. *Power To Adjourn*.—Except as modified or abridged by statute,¹⁴ all courts have power to adjourn their sittings from day to day, or to a distant day.¹⁵

In the absence of a statutory provision to the contrary,¹⁶ a regular

Mass. 435. **Mo.**—*Rose v. Kansas City*, 128 Mo. 135, 30 S. W. 518; *State v. Hannibal & St. J. R. Co.*, 101 Mo. 136, 13 S. W. 505; *Higgins v. Ransdall*, 13 Mo. 205; *State v. Mitchell*, 127 Mo. App. 455, 105 S. W. 655; *Fannon v. Plummer*, 30 Mo. App. 25. **Ohio**.—*Harris v. Gest*, 4 Ohio St. 470. **Okla.**—*In re Dossett*, 2 Okla. 369, 37 Pac. 1066. **Utah**.—*Myers v. East Bench Irr. Co.*, 32 Utah 215, 89 Pac. 1005.

Where the chancellor directed the clerk on the opening of the regular term to adjourn the court until a specified day, the term held on the latter date pursuant to such adjournment was an adjourned and not a special term. *First Nat. Bank v. Bloch & Co.*, 82 Miss. 197, 33 So. 849.

Where the business to be transacted is not limited by the order of adjournment, the court has the same authority and jurisdiction as if no adjournment had been had. *Hundley v. Yonge*, 69 Ala. 89.

The same is true where the sheriff adjourns the term under order of court. *Nickey v. Leader*, 235 Mo. 30, 138 S. W. 18.

12. *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54.

13. *Batten v. State*, 80 Ind. 394.

14. A statute providing that the supreme court should fix the times when terms of the district should be held was held not to deprive the latter court of power to hold adjourned sessions. *Bidwell v. Love*, 24 Okla. 549, 98 Pac. 425; *In re Dossett*, 2 Okla. 369, 37 Pac. 1066.

A statute authorizing an adjournment from day to day does not prevent an adjournment to a distant day. *Mann v. Mercer County Court*, 58 W. Va. 651, 52 S. E. 776.

15. **U. S.**—*Mechanics' Bank v. Withers*, 6 Wheat. 106, 5 L. ed. 217; *State v. Charlotte Harbor Phosphate Co.*, 70 Fed. 883, 17 C. C. A. 472. **Ala.**—*Hundley v. Yonge*, 69 Ala. 89. **Ark.**—*Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54.

Ga.—*Buchanan v. State*, 118 Ga. 751, 45 S. E. 607; *Cribb v. State*, 118 Ga. 316, 45 S. E. 396. **Ia.**—*In re Hunter's Estate*, 84 Iowa 388, 51 N. W. 20. **Kan.**—*Kingsley v. Bagby*, 2 Kan. App. 23, 41 Pac. 991. **Ky.**—*Wilson v. Linville*, 93 Ky. 254, 19 S. W. 739. **La.**—*Brown v. Louisiana & N. W. Co.*, 118 La. 87, 42 So. 656. **Mo.**—*Higgins v. Ransdall*, 13 Mo. 205; *State v. Mitchell*, 127 Mo. App. 455, 105 S. W. 655. **Neb.**—*Russell v. State*, 77 Neb. 519, 110 N. W. 380. **Ohio**.—*Harris v. Gest*, 4 Ohio St. 470. **Pa.**—*Horton & Heil v. Miller*, 38 Pa. 270. **W. Va.**—*Mann v. Mercer County Court*, 58 W. Va. 651, 52 S. E. 776.

A court has inherent power to adjourn from day to day as long as it is necessary to finish the business legitimately before it, unless by some statute its existence is sooner brought to a close. *People v. Sullivan*, 115 N. Y. 185, 21 N. E. 1039; *People v. Warden of City Prison*, 102 N. Y. Supp. 374.

16. Where the statute authorized the judge, for sufficient cause, to adjourn a term before it was begun, it was held that such an adjournment for the purpose of completing the trial of a criminal case or disposing of the business before the court in another county was proper. *State v. Peterson*, 67 Iowa 564, 25 N. W. 780; *State v. Stevens*, 67 Iowa 557, 25 N. W. 777.

The death of a prominent member of the bar is not such a cause as will legally authorize the judge in vacation to adjourn the term of court. *Civ. Code (Ga.)* 1895, §§4342, 4344; *Frank & Co. v. Horkan*, 122 Ga. 38, 49 S. E. 800.

A regular term of the superior court cannot be adjourned by the judge in vacation, by an order which fails to show that the adjournment is rendered necessary by the sickness of himself or his family, or other unavoidable cause. *Martin v. Scott*, 118 Ga. 149, 44 S. E. 974; *Hoye v. State*, 39 Ga. 718.

term cannot be adjourned or postponed before the time fixed by law for its commencement.¹⁷

Who May Exercise.—The opening and adjournment of court are judicial functions which cannot be exercised by ministerial officers of the court,¹⁸ in the absence of statutory authority.¹⁹

c. Time to Which Adjournment May Be Taken.—The question as to when and for how long a particular term will be adjourned is largely discretionary with the judge, and his action will not be interfered with except on a clear showing of abuse.²⁰

In most jurisdictions an adjournment may be taken over an intervening regular term, or to a time beyond that fixed for its commencement.²¹ In some states, however, such an adjournment is not per-

17. Mattingly v. Darwin, 23 Ill. 618.

Where the judge, by an order that is illegal because made in vacation, adjourns the regular term, he has no power to compel any party to go to trial before him. In a civil case the irregularity is waived by going to trial without objection, but in a criminal case the contrary is true, and it may be taken advantage of even after verdict. *Martin v. Scott*, 118 Ga. 149, 44 S. E. 974; *Hoye v. State*, 39 Ga. 718.

18. U. S.—See *Ex parte Harlan*, 180 Fed. 119. **Kan.**—*In re McClaskey*, 52 Kan. 34, 34 Pac. 459; *In re Terrill*, 52 Kan. 29, 34 Pac. 457. **Okla.**—*Lookabaugh v. Okeene Hardware & Implement Co.*, 25 Okla. 474, 106 Pac. 844; *In re McClaskey*, 2 Okla. 568, 37 Pac. 854. **Wis.**—*State v. McBain*, 102 Wis. 431, 78 N. W. 602.

The judge cannot confer such power on the clerk and the sheriff. *Wight v. Wallbaum*, 39 Ill. 554.

19. See the statutes of the various states and the following cases:

Cal.—*People v. Sanchez*, 24 Cal. 17; *Thomas v. Fogarty*, 19 Cal. 644. **Kan.** *Union Pac. R. Co. v. Hand*, 7 Kan. 380. **Mo.**—*Stovall v. Emerson*, 20 Mo. App. 322. **Wis.**—*State v. McBain*, 102 Wis. 431, 78 N. W. 602.

The district judge of the federal court in the Indian Territory in case of sickness or for other sufficient reason was held to have power, under his general authority to fix the times for holding court in his district, to direct the marshal to open and adjourn any regular term of court to such reasonable time as should seem to such judge proper. *Gardner v. United States*, 5 Ind. Ter. 150, 82 S. W. 704.

20. The sessions or sittings of a court during term are entirely within the discretion and control of the court, and its orders with respect thereto may be altered, revoked or annulled from time to time as the exigencies of the business to be transacted may require. *Labadie v. Dean*, 47 Tex. 90.

“After the term of a court has been regularly opened upon the day provided by law, the question how long it shall remain open, to what day it shall be adjourned, and whether and how often it shall be opened for incidental business after the regular business of the term has been concluded, is a matter which rests in the discretion of the presiding judge.” *United State v. Pitman*, 147 U. S. 669, 13 Sup. Ct. 425, 37 L. ed. 324; *Marvin v. United States*, 45 Ct. Cl. 528; *Owen v. United States*, 41 Ct. Cl. 69.

Mandamus was refused to compel a judge to reconvene a term adjourned without trying a pending case. *Stockwell v. Crawford* (N. D.), 130 N. W. 225.

21. U. S.—*Walker v. Moser*, 117 Fed. 230, 54 C. C. A. 262; *State v. Charlotte Harbor Phosphate Co.*, 70 Fed. 883, 17 C. C. A. 472. **Ark.**—*Galbreath v. Mitchell*, 32 Ark. 278. **Cal.** *Talbert v. Hopper*, 42 Cal. 397; *People v. Ah Ying*, 42 Cal. 18. **Ia.**—*In re Hunter's Estate*, 84 Iowa 388, 51 N. W. 20. **Kan.**—*State v. Crilly*, 69 Kan. 802, 77 Pac. 701; *State v. Rogers*, 56 Kan. 362, 43 Pac. 256; *State v. Montgomery*, 8 Kan. 351. **Neb.**—*Tippy v. State*, 35 Neb. 368, 53 N. W. 208. **Okla.**—*Bidwell v. Love*, 24 Okla. 549, 98 Pac. 425; *Logan v. Brown*, 20 Okla. 334, 95 Pac. 441; *In re Dossett*, 2 Okla. 369, 37 Pac. 1066. **Tenn.**—*Cheek v. Mer-*

mitted,²² or is not permitted where the two terms are of like character.²³

d. *Manner of Effecting Adjournment.*—An adjournment is ordinarily effected by an announcement to that effect by the court from the bench and an entry of the fact of adjournment in the record.²⁴

Whether Final or Temporary.—In some jurisdictions an adjournment is deemed a final adjournment for the term unless there is some provision in the order itself, or by statute, that the court shall reconvene for the transaction of business.²⁵ In others an adjournment will not be deemed final unless the order contains words showing that such

chants Nat. Bank, 9 Heisk. 489. **Wyo.** *In re MacDonald*, 4 Wyo. 150, 33 Pac. 18; *Stirling v. Wagner*, 4 Wyo. 5, 31 Pac. 1032, 32 Pac. 1128.

A judge assigned to hold terms of court in two counties may adjourn court in the first to a time after that fixed for the convening of the second and then adjourn the second to a time after that fixed for holding the adjourned term in the first. *State v. Van Anken*, 98 Iowa 674, 68 N. W. 454.

“Where a judge having statutory authority to appoint an adjourned term of court, does make an order in term-time for holding an adjourned term, causes notice of such adjourned term to be given, appears at the time appointed and opens court, the proceedings at such an adjourned term are not void, although held at a time when another court of the same circuit might have been in session under the statute, and was in session, presided over by a special judge.” In such case “the failure of defendant to object at the trial was a waiver of all questions as to the regularity of the proceedings at the adjourned term.” *Snurr v. State*, 105 Ind. 125, 4 N. E. 445.

Failure to object at the time the order for holding the adjourned term was made is a waiver of the objection, there being color of authority for holding the adjourned term. *Louisville, N. A. & C. R. Co. v. Power*, 119 Ind. 269, 21 N. E. 751. See also *infra*, III, 5.

22. Cannot adjourn to the day fixed for the commencement of the regular term in another county in the same district, and such attempted adjournment is void though a judge *pro tem.* is chosen to preside over the regular term. *In re Millington*, 24 Kan. 214.

23. Where the regular terms are

fixed by statute to commence at definite times, and all cases continued in the court go from one term to another in regular succession, the court cannot, except by consent, adjourn to a time beyond the commencement of another term of the same character in the same county. A criminal term may, however, be continued beyond and be in existence after the commencement of a regular civil term in the same county, and vice versa. *Jaques v. Bridgeport Horse R. Co.*, 43 Conn. 32. See also III, B, 5, *supra*.

24. *Worthington v. State*, 134 Ga. 261, 67 S. E. 805.

The judge may fix the date of the adjourned session by oral order in open court. It is the duty of the clerk to note such oral order on the minutes, but his failure to do so does not invalidate the adjourned session, and the minutes may be corrected *nunc pro tunc*. *Buchanan v. State*, 118 Ga. 751, 48 S. E. 607; *Cribb v. State*, 118 Ga. 316, 45 S. E. 396.

25. Where the order fixes no time for reconvening. *Baker v. Newton*, 27 Okla. 436, 112 Pac. 1034; *Irwin v. Irwin*, 2 Okla. 180, 37 Pac. 548.

A recital in the record that court “continued in session during the day when it adjourned,” was held to show a final adjournment. *Marengo Savings Bank v. Byington*, 135 Iowa 151, 112 N. W. 192.

An adjournment “subject to call” is a final adjournment. *Myers v. East Bench Irr. Co.*, 32 Utah 215, 89 Pac. 1005.

In California the superior courts have no terms, and the statute specifically provides that adjournments of that court from day to day or time to time are to be construed as recesses, and shall not prevent the court from sitting at any time. Code Civ. Proc.,

was the intention,²⁶ and a mere failure to fix the time for reconvening does not put an end to the term,²⁷ an unbroken chain of adjournments not being essential.²⁸

That an intervening special term is adjourned *sine die* does not operate to adjourn *sine die* a regular term previously adjourned to a particular day.²⁹

e. *Reconvening After Adjournment*.—That court is opened on the day to which adjournment is taken before the hour fixed in the order of adjournment has been held not to vitiate the proceedings, in the absence of a showing of prejudice.³⁰

C. RECESS.—Recesses of a court which has no terms are the times when it is not actually engaged in business.³¹

A court cannot take a recess until after it has been organized.³²

A recess,³³ or adjournment from day to day during the term, for

§74. *In re Gannon*, 69 Cal. 541, 11 Pac. 240.

26. In the absence of the words "*sine die*," or other equivalent expression in an order of adjournment, it will be presumed in favor of a court of general jurisdiction that the term continued until the time appointed by law for the holding of the next term. *Ex parte Harrell*, 57 Ore. 95, 110 Pac. 493; *Deering v. Quivey*, 26 Ore. 556, 38 Pac. 710.

In view of a statutory provision that the courts should be always in session except for jury trials it was held that an order "that the court do now adjourn until court in course" was an adjournment of the court and not of the term, though the judge probably intended the contrary, and that to adjourn the term it was necessary to particularly mention it, or at least definitely indicate it in the order of adjournment. *Henry v. Lincoln, Lucky & Lee Mining Co. (N. M.)*, 85 Pac. 1043.

27. Does not forfeit the right to reconvene at any time. *Ex parte Harlan*, 180 Fed. 119.

When legally opened, a term continues until terminated by an affirmative act or by the commencement of a new term. *Ex parte Harrell*, 57 Ore. 95, 110 Pac. 493.

The Wisconsin statute (Rev. St. 1898, §2572) declares that no omission to adjourn from day to day previous to final adjournment shall vitiate any proceedings in court. Under this it has been held that a term does not end by failure to adjourn to a specific time, but once commenced it continues

until terminated by an affirmative judicial act or the commencement of a new term. *Cooper v. Granger*, 129 Wis. 50, 108 N. W. 193, citing *State ex rel. Barber v. McBain*, 102 Wis. 431, 78 N. W. 602.

Holding the Term Open.—An order may be made that the term be "held open," the effect being merely that the adjournment is to a time to be fixed in the future according to the exigencies of business. *State v. McBain*, 102 Wis. 431, 78 N. W. 602.

28. *Ex parte Harlan*, 180 Fed. 119.

By Statute.—*State v. McBain*, 102 Wis. 431, 78 N. W. 602.

29. *State v. Riddle*, 179 Mo. 287, 78 S. W. 606.

30. Where court adjourned until 10 o'clock on a particular day, but on that day opened court and entered judgment before said time, it was held that such judgment was not void or so irregular as to be subject to be set aside in the absence of a showing of surprise or prejudice. *Richardson v. Beldam*, 18 Ill. App. 527.

31. *Falltrick v. Sullivan*, 119 Cal. 613, 51 Pac. 947; *In re Gannon*, 69 Cal. 541, 11 Pac. 240.

32. *Forbus v. State*, 158 Ala. 41, 48 So. 592.

33. A written order by a judge of a circuit court directing the clerk to enter judgment (Mayor, etc. of *Frostburg v. Tiddy*, 63 Md. 514), or denying a motion for a new trial (*Hays v. Philadelphia, W. & B. R. Co.*, 99 Md. 413, 58 Atl. 439), may be made in recess (Code Pub. Gen. Laws, art. 26, §37).

A motion for a new trial may be filed in the recess as well as in open

rest and refreshment,³⁴ does not altogether suspend the functions of the court.

D. VACATION.—1. Definition and Distinctions.—Vacation is the interval between the end of one term and the beginning of another,³⁵ and is to be distinguished from intervals during the term when the court is not in session.³⁶

2. Powers of Courts and Judges in Vacation.—Powers conferred on the court cannot be exercised by a judge in vacation,³⁷ and orders

court. *King v. Sears*, 91 Ga. 577, 18 S. E. 830.

34. The court may receive a verdict after adjournment for the day. *Barrett v. State*, 1 Wis. 175.

A bail-bond taken by the judge after adjournment for the day is valid. *State v. Eyermann*, 172 Mo. 294, 72 S. W. 539.

35. *Ala.*—*Ex parte Branch & Co.*, 63 Ala. 383; *Cullum v. Casey & Co.*, 1 Ala. 351. *Fla.*—*Peebles v. State*, 46 Fla. 101, 35 So. 223. *Mass.*—*Brayman v. Whitcomb*, 134 Mass. 525. *Mo.*—*Hadley v. Bernero*, 97 Mo. App. 314, 71 S. W. 451.

A confession of judgment before the clerk on the day fixed by law for the commencement of the term, but before the court actually began its session on that day was held to be in vacation and hence to be valid. *Brown v. Hume*, 16 Gratt. (Va.) 456.

In *State v. Derkum*, 27 Mo. App. 628, the word was construed as having this meaning, notwithstanding a statutory provision that the words "in vacation" should be construed to include any adjournment for more than one day unless such a construction would be plainly repugnant to the intent of the legislature.

36. *U. S.*—See *Harrison v. German-American Fire Ins. Co.*, 90 Fed. 758. *Mass.*—*Brayman v. Whitcomb*, 134 Mass. 525. *Mo.*—*Hadley v. Bernero*, 97 Mo. App. 314, 71 S. W. 451.

In *Conkling v. Ridgely & Co.*, 112 Ill. 36, it was held that though the word vacation, as used in a statute authorizing the confession of judgment in vacation, did not include all the time when the court was not in session, or the time of adjournment from day to day, it would include an interval of thirty-two days over which the court adjourned.

In Vermont there is a vacation in chancery, though the court is always

open for business for all purposes and does not in fact finally adjourn. *In re Murphy*, 73 Vt. 115, 50 Atl. 817; *Sturges v. Knapp*, 38 Vt. 540.

See also III, C, *supra*.

37. *Carr v. State*, 93 Ark. 585, 122 S. W. 631.

A justice in vacation is not the court. *Mitchell v. Emmons*, 104 Me. 76, 71 Atl. 321.

A statute authorizing "the court," upon overruling a motion for a new trial to enter a judgment as of a former term confers no authority upon a judge in vacation to do so, "the court" meaning the court held, whether by one or more judges, at a term established by law. *Greenwood v. Bradford*, 128 Mass. 296.

"A judge in vacation has no power to hear and determine any matter which the court only can hear. When, under the statute, he hears such matters in vacation, he sits as a court, and not as a judge in vacation or at chambers." *Hoskins v. Baxter*, 64 Minn. 226, 66 N. W. 969. See also *Betts v. Newman*, 91 Minn. 5, 97 N. W. 371.

"When a law authorizes or contemplates the doing of a judicial act, it is and must be understood that the court, in term-time, may or must do it, and the judge in vacation cannot, unless the power is expressly conferred." *Newman v. Hammond*, 46 Ind. 119; *Ferger v. Wesler*, 35 Ind. 53; *Courtney v. State*, 5 Ind. App. 356, 32 N. E. 335.

Where the constitution conferred power on the district court to hear contested elections, it was held to mean the court in session, and that the legislature had no power to require the judges of that court to hear such contests in vacation. *Ashford v. Goodwin* (Tex.), 131 S. W. 535.

During vacation the justices of a court have no power to meet as a

signed in vacation by the several members of the court are not orders of the court.³⁸

Except as authorized by statute, no acts of a judicial nature may be done in vacation.³⁹ Thus, in the absence of express statutory authority,⁴⁰ a session of court cannot be held,⁴¹ or a case tried,⁴² or

court, or to make and issue orders and decrees as a court. *State v. Behan*, 35 La. Ann. 1075.

Power given to a "court and the judges thereof" means the court when in session and the judges acting in vacation. *Thompson v. State*, 25 Okla. 741, 108 Pac. 398; *Thorne v. Moore*, 101 Tex. 205, 105 S. W. 985.

38. *Naeglin v. De Cordoba*, 171 U. S. 638, 19 Sup. Ct. 35, 43 L. ed. 315.

39. *Ala.*—*Norwood v. Louisville & N. R. Co.*, 149 Ala. 151, 42 So. 683; *Cullum v. Casey & Co.*, 1 Ala. 351. *Ga.* *Rogers v. Pace*, 75 Ga. 436. *Ill.*—*People v. McFall*, 124 Ill. 642, *affirming* 26 Ill. App. 319; *Devine v. People*, 100 Ill. 290; *Blair v. Reading*, 99 Ill. 600. *Ind.*—*Batten v. State*, 80 Ind. 394. *Ia.* *Whitlock v. Wade*, 117 Iowa 153, 90 N. W. 587; *Young v. Rann*, 111 Iowa 253, 82 N. W. 785. *Kan.*—*Reyburn v. Bassett*, 1 Kan. 514. *Me.*—*Powers v. Mitchell*, 75 Me. 364.

A judge at chambers before the commencement of the term was held to have no jurisdiction to adjourn the trial of a case set for that term to a subsequent day. *Norwood v. Kenfield*, 34 Cal. 329.

The judge of the superior court has no authority on petition in vacation to order a sale of the legal estate of minors, though the chancellor may under such circumstances order a sale of the trust estates of minors. *Mitchell v. Turner*, 117 Ga. 958, 44 S. E. 17; *Webb v. Hicks*, 117 Ga. 335, 43 S. E. 738.

Order granting a supersedeas and suspending a former order entered in term held void and annulled on certiorari. *Whitlock v. Wade*, 117 Iowa 153, 90 N. W. 587.

Removal Proceedings.—The federal court acquires no jurisdiction by removal proceedings if the petition and bond are filed with the clerk of the state court in vacation instead of presenting them to the judge at term. *Howard v. Southern R. Co.*, 122 N. C. 944, 29 S. E. 778. See also the title "Removal of Causes."

Contempt Proceedings.—A rule to show cause why one should not be pun-

ished for contempt cannot be awarded in vacation. *Dupoyster v. Clarke*, 28 Ky. L. Rep. 655, 90 S. W. 1. See also the title "Contempt."

Quo Warranto.—Anything done by a judge of a district court in a proceeding by information in the nature of quo warranto, in so far, at least, as it is treated as a civil case, is not invalid because done outside of a regular term of court. *Territory v. Armijo* (N. M.), 89 Pac. 267. See also the title "Quo Warranto."

Receivership Proceedings.—A receiver cannot be appointed, or his bond approved by the clerk, in vacation. *Newman v. Hammond*, 46 Ind. 119.

A judgment directing a receiver to pay over money in his hands cannot be entered in vacation. *Dupoyster v. Clarke*, 28 Ky. L. Rep. 655, 90 S. W. 1. See also the title "Receivers."

40. See the statutes of the various states and the following cases: *Ala.* *Falley v. Falley*, 163 Ala. 626, 50 So. 894. *Ga.*—*Glenn v. State*, 122 Ga. 593, 50 S. E. 371; *Gullatt v. Thrasher*, 42 Ga. 429; *Crawford v. Ross*, 39 Ga. 44. *La.*—*City of New Orleans v. New Orleans Jockey Club*, 129 La.—, 55 So. 711. *Minn.*—*Johnson v. Velve*, 86 Minn. 46, 90 N. W. 126; *Hoskins v. Baxter*, 64 Minn. 226, 66 N. W. 969.

Under a statute providing that demurrers may be heard and disposed of in vacation, and the judge may in vacation make any order in regard thereto and consequent upon his determination of the issues of law presented thereby it was held that, on sustaining a demurrer in vacation and where there was no proper application to amend or plead further, the proper judgment to be entered is a final judgment against defendant, and that where the action is one in which the clerk may assess the damages, a formal final judgment sustaining the demurrer and that damages be assessed should be entered upon the hearing upon the demurrer without waiting for a rule day. *L'Engle v. L'Engle*, 19 Fla. 714.

41. *State v. Maddock* (Ore.), 115 Pac. 426.

42. *Cal.*—*Norwood v. Kenfield*, 34

final judgment or decree rendered,⁴³ or motions decided,⁴⁴ or a grand jury organized⁴⁵ in vacation.

An order passed in term to hear a motion in vacation in effect keeps the term, relatively to that particular case, open until the expiration of the day to which the hearing of such motion has been

Cal. 329; *Wicks v. Ludwig*, 9 Cal. 173. Okla.—*Wilson v. State*, 3 Okla. Crim. 714, 109 Pac. 289. Wyo.—*Man v. Stoner*, 12 Wyo. 478, 76 Pac. 584.

Cannot force the trial of an expropriation case, it not being among those enumerated in the statute, and prohibition will lie to prevent it. *State v. St. Paul*, 109 La. 8, 33 So. 49.

43. Ala.—*Ex parte Branch & Co.*, 63 Ala. 383; *Cullum v. Casey & Co.*, 1 Ala. 351. Cal.—*Wicks v. Ludwig*, 9 Cal. 173. Colo.—*Francis v. Wells*, 4 Colo. 274; *Kirtley v. Marshall Silver Min. Co.*, 4 Colo. 111; *Filley v. Cody*, 4 Colo. 109. Ga.—*Rogers v. Pace*, 75 Ga. 436. Ill.—*Blair v. Reading*, 99 Ill. 600. Ia.—*Marengo Sav. Bank v. Byington*, 135 Iowa 151, 112 N. W. 192; *Townsley v. Morehead*, 9 Iowa 565. Mass.—*Greenwood v. Bradford*, 128 Mass. 296. Miss.—*Arbour v. Yazoo & M. V. R. Co.*, 54 So. 158. Nev.—*Dalton v. Libby*, 9 Nev. 192. Okla.—*American Fire Ins. Co. v. Pappe*, 4 Okla. 110, 43 Pac. 1085. Vt.—*Sturges v. Knapp*, 38 Vt. 540. Va.—*Tyson's Exrs. v. Glaize*, 23 Gratt. 799. W. Va.—*Gilmer v. Baker*, 24 W. Va. 72.

Such a judgment is not validated by being at the next term read, approved and signed by judge. *Townsley v. Morehead*, 9 Iowa 565.

Prohibition will lie to compel the chancellor to desist from exercising judicial power in vacation without authority of law. *Ex parte Branch & Co.*, 63 Ala. 383.

In South Dakota it has been held that, under a statute providing that the circuit courts are always open for the purpose of hearing and determining all actions except issues of fact, a judgment rendered after a trial of issues of fact at a time when there was no regular or special term of the court in session, was merely irregular or voidable, and that a motion to vacate it made after the right of appeal had been lost was properly denied. *Lockard v. Lockard*, 21 S. D. 134, 110 N. W. 104.

44. *Young v. Rann*, 111 Iowa 253, 82 N. W. 785.

Has no authority to dismiss a bill for want of equity upon its face in vacation. *Cain v. City of Wyoming*, 104 Ill. App. 538.

Motion for a New Trial.—Ala.—*Norwood v. Louisville & N. R. Co.*, 149 Ala. 151, 42 So. 683. Ind.—*Ferger v. Wesler*, 35 Ind. 53. Me.—*Mitchell v. Emmons*, 104 Me. 76, 71 Atl. 321.

Motion to set aside a judgment in a criminal case. *Chapman v. State*, 116 Ga. 598, 42 S. E. 999; *Haskens v. State*, 114 Ga. 837, 40 S. E. 997.

The decision of a motion for a new trial at a time when the court was not in session and entered of record as among "vacation entries" was held not to be void, where there had been no adjournment *sine die* at the end of the actual sitting of the court for the term, and the time fixed by statute for the commencement of the next term had not yet arrived. *Harrison v. German-American Fire Ins. Co.*, 90 Fed. 758.

Equity will not enjoin proceedings under a judgment and grant a new trial though the trial at which such judgment was rendered was held pursuant to an order granting a new trial made in vacation and therefore void. *Norwood v. Louisville & N. R. Co.*, 149 Ala. 151, 42 So. 683.

See also the title "New Trial."

Motion for change of venue cannot be made out of term. *Garrett & Co. v. Bear*, 144 N. C. 23, 56 S. E. 479. See also the title "Change of Venue."

Motion for Continuance.—Cannot continue the trial of a cause before the commencement of the term. *Norwood v. Kenfield*, 34 Cal. 329. See also the title "Continuances."

Motions Relating to Injunctions. Judge has authority to hear and determine a motion to dissolve an injunction in vacation. *Cain v. City of Wyoming*, 104 Ill. App. 538. See also the title "Injunctions."

45. *Forbus v. State*, 158 Ala. 41, 48 So. 592. See also the title "Grand Jury."

adjourned,⁴⁶ and such hearing may then be further adjourned from day to day.⁴⁷ In some jurisdictions, where a case is continued *nisi*, the court has jurisdiction thereof during the vacation following the close of the term.⁴⁸

Statutes in many states provide that, for certain specified purposes, the courts shall be deemed always open, and hence, as to those matters, proceedings may be had at any time.⁴⁹ Under such a statute the judge can exercise the same powers in vacation as if, at the time of applying to him, the court was in regular session,⁵⁰ and an order entered pursuant thereto is an order entered in open court, and as much an order of the court as any decision announced and entered in term time.⁵¹ It cannot, however, be considered as an order of the regular term.⁵² Nor does a statute authorizing judges to exercise in vacation any powers or jurisdiction they are authorized to exercise in term time operate to extend a term which has been adjourned, so as to permit the judge to then do acts which can only be done at such term,⁵³ but, in such case, acts done in vacation are regarded as having been done at a subsequent term to the last adjourned term.⁵⁴

Consent of Parties. — Unless the statute so provides,⁵⁵ it is generally

46. *Herz v. Frank*, 104 Ga. 638, 30 S. E. 797; *Stone v. Taylor*, 63 Ga. 309.

Where a motion for a new trial is made during a term, and by special order then made is postponed to a day during vacation, the court may hear and dispose of it on said day, and upon its being overruled the clerk may, under an order of the judge, enter judgment on the verdict on a day other than a rule day. *McGee v. Ancrum*, 33 Fla. 499, 15 So. 231.

At any time before midnight of the day to which the hearing has been adjourned the court has power to vacate an order on the motion previously made on said day. *Cole v. Illinois Sewing Mach. Co.*, 7 Ga. App. 338, 66 S. E. 979.

47. *Herz v. Frank*, 104 Ga. 638, 30 S. E. 797; *Stone v. Taylor*, 63 Ga. 309.

48. *Adams v. Adams*, 64 N. H. 224. See also *Powers v. Mitchell*, 75 Me. 364; *Greenwood v. Bradford*, 128 Mass. 296.

49. See III, B, 1, *supra*, and the statutes of the various states.

50. *McGee v. Ancrum*, 33 Fla. 499, 15 So. 231.

51. *Jones v. Bowman*, 10 Wyo. 47, 65 Pac. 1002; *Anderson v. Matthews*, 8 Wyo. 307, 57 Pac. 156.

52. *Schlessinger v. Cook*, 8 Wyo. 484, 58 Pac. 757.

53. *Myrick v. Merritt*, 21 Fla. 799.

54. The judge cannot at such time undo what he has already done at a previous term, since he would not have authority to do so at a subsequent term. *McGee v. Ancrum*, 33 Fla. 499, 15 So. 231; *Myrick v. Merritt*, 21 Fla. 799.

55. See the statutes of the various states.

Actions may be taken under advisement and decided and the judgment entered of record in vacation by consent. Iowa Code, §247. *Marengo Savings Bank v. Byington*, 135 Iowa 151, 112 N. W. 192; *State v. Hathaway*, 100 Iowa 225, 69 N. W. 449; *O'Hagen v. O'Hagen*, 14 Iowa 264; *Hattenback v. Hoskins*, 12 Iowa 109.

A defendant will be held to have consented to a modification of an order in vacation by appearing and submitting the question on the merits. *Landt v. Remley*, 113 Iowa 555, 85 N. W. 783.

held that parties cannot by consent confer jurisdiction to do acts in vacation,⁵⁶ though there is authority to the contrary.⁵⁷

IV. CALENDARS AND DOCKETS.—A. DEFINITIONS AND DISTINCTIONS.—A calendar is a list or enumeration of causes arranged for trial in court.⁵⁸ It may or may not be the same thing as a docket.⁵⁹

A docket is a book in which is put down an abstract, minute, or memoranda of orders of court made from time to time during the day.⁶⁰

A trial docket is a book containing cases which are liable to be tried at a specified term of the court.⁶¹

B. PARTICULAR CALENDARS AND DOCKETS.—All matters relating to calendars and dockets are regulated by the statutes of the various states and the rules of the various courts, to which reference should be had in every case.

In some states provision is made for separate calendars for jury cases,⁶² cases to be tried by the court without a jury,⁶³ and default

May try issues of fact by consent. *Mau v. Stoner*, 12 Wyo. 478, 76 Pac. 584.

56. *Cal.*—*Bates v. Gage*, 40 Cal. 183; *Norwood v. Kenfield*, 34 Cal. 329; *Wicks v. Ludwig*, 9 Cal. 173. *Colo.*—*Francis v. Wells*, 4 Colo. 274; *Kirtley v. Marshall Silver Min. Co.*, 4 Colo. 111; *Filley v. Cody*, 4 Colo. 109. *Okla.*—*Lookabaugh v. Okeene Hardware & Implement Co.*, 25 Okla. 474, 106 Pac. 844; *American Fire Ins. Co. v. Pappe*, 4 Okla. 110, 43 Pac. 1085. *Va.*—*Tyson's Exrs. v. Glaize*, 23 Gratt. 799. *W. Va.* *Gilmer v. Baker*, 24 W. Va. 72.

Appearance and proceeding to trial without objection is not a waiver. *Norwood v. Kenfield*, 34 Cal. 329; *Myers v. East Bench Irr. Co.*, 32 Utah 215, 89 Pac. 1005.

Not by appearance after adjournment by the sheriff on failure of judge to appear. *Cullum v. Casey & Co.*, 1 Ala. 351.

57. *City of New Orleans v. New Orleans Jockey Club*, 129 La. —, 55 So. 711; *Hayward v. Fisher*, 78 Neb. 364, 110 N. W. 984; *Hansen v. Bergquist*, 9 Neb. 269, 2 N. W. 858.

Where a petition for leave to enter and prosecute an appeal is heard in vacation by agreement of the parties, and the decision thereon is entered as of the last day of the term, the parties are concluded by such entry on the docket. *In re Gurdy*, 103 Me. 356, 69 Atl. 546, *distinguishing Powers v. Mitchell*, 75 Me. 364.

An agreement that a case may be heard in vacation cannot in any event become binding on the parties except in so far as it is executed with their consent and in strict conformity to its terms, and the court cannot go beyond such terms. *Blair v. Reading*, 99 Ill. 600.

Assent to the rendering of judgment in vacation is implied from the docket entry "with the court," made on final adjournment, but such entry imports merely that the case may be held for consideration and decision, as of the term, of matters heard at the term, and does not authorize the making and determination of a motion for a certified execution in vacation. *Yatter v. Miller*, 61 Vt. 147, 17 Atl. 850.

58. *Titley v. Kaehler*, 9 Ill. App. 537.

59. *Titley v. Kaehler*, 9 Ill. App. 537.

60. *Morgan Hastings Co. v. Gray Dental Co.*, 108 Ill. App. 98.

61. *Morgan Hastings Co. v. Gray Dental Co.*, 108 Ill. App. 98.

62. *Melchers v. Moore*, 62 S. C. 386, 40 S. E. 773.

63. Where defendant admitted all the facts alleged by plaintiff in an action on an open account, except that he claimed a reduction as to one item, which plaintiff agreed to allow, it was held that the case was properly placed on the calendar of cases to be passed on by the court without a jury. *Melch-*

cases.⁶⁴ The court is not concluded as to the character of a case by the act of counsel in placing it on a particular calendar,⁶⁵ and, when placed on the wrong one, may order it transferred to the proper one on motion.⁶⁶

The court may, by rule, provide for the transfer of cases to a stet docket after they have been on the trial docket for a specified number of terms, and for their abatement after they have remained there for a certain length of time.⁶⁷

Short Cause Calendars. — In some states provision is made for a short cause calendar on which are placed cases which will not take more than a certain length of time to try.⁶⁸

C. PLACING CASES ON THE CALENDAR OR TRIAL DOCKET. — All matters relating to notice of trial and notes of issue are treated in a separate article.⁶⁹

Ordinarily all cases pending in the court should be entered in the docket, and all orders made in it should be minuted under that entry.⁷⁰

ers v. Moore, 62 S. C. 386, 40 S. E. 773.

A cause redocketed after reversal and remandment with directions to amend the judgment in certain specified particulars is not a cause for hearing by the court, and need not be placed on the calendar of causes set down for a hearing. *South Chicago Brewing Co. v. Taylor*, 126 Ill. App. 498.

64. A case cannot properly be placed on the default calendar as long as an answer forms a part of the record of the case, even though it is insufficient. *Jones v. Garlington*, 44 S. C. 533, 22 S. E. 741.

65. *Shipley v. Boldue*, 93 Minn. 414, 101 N. W. 952.

66. As where a case properly triable by the court is placed on the jury calendar by counsel. *Shipley v. Boldue*, 93 Minn. 414, 101 N. W. 592.

67. A rule requiring the transfer to a stet docket of all cases that have been on the trial docket for four successive terms and for the abatement of cases that have been on the stet docket for four successive terms is reasonable and valid. *Laurel Canning Co. v. Baltimore & O. R. Co. (Md.)*, 81 Atl. 126.

68. In Illinois, a statute makes it the duty of the clerk of each court of record in the state to prepare a short cause calendar, and to place a cause thereon when any party or his agent or attorney files an affidavit that he verily believes that the trial thereof will not occupy more than one hour's time, and

gives the prescribed notice. *Hurd's Rev. St.*, 1909, ch. 110, §§27-31, p. 1698.

For cases construing the statute see: *McDonald v. State*, 222 Ill. 325, 78 N. E. 609; *Eggleston v. Royal Trust Co.*, 205 Ill. 170, 68 N. E. 709; *Highley v. Metzger*, 186 Ill. 253, 57 N. E. 811, *affirming* 86 Ill. App. 573; *Nelson v. Beidler & Co.*, 134 Ill. App. 655; *Christie v. Walker*, 126 Ill. App. 424.

In New York, rules of court provide for a short cause calendar in the supreme court, on which may be placed cases that may be tried in not more than two hours' time, and in the city court of the City of New York, on which may be placed cases that may be tried in not more than one hour's time.

For cases applying and construing these rules see: *Tillinger v. London*, 114 N. Y. Supp. 130; *Jaffe v. Mindlin*, 110 N. Y. Supp. 978; *Simmons Co. v. Shattuck*, 106 N. Y. Supp. 1032; *Eisenstein v. Old Dominion S. S. Co.*, 106 N. Y. Supp. 857; *Guerineau v. Weil*, 8 Misc. 94, 28 N. Y. Supp. 775.

The code provisions authorizing the giving of a preference to certain causes are not exclusive, and do not deprive the courts of power to appoint a short-cause calendar, and place cases thereon for trial out of their order upon the general calendar. *Weiss v. Morrell*, 7 Misc. 539, 28 N. Y. Supp. 59.

69. See the title "Trial."

70. *Russell v. Dyer*, 39 N. H. 528. Either party has the right to have a suit for divorce set down on the

In some jurisdictions it is held that the docketing of a case is a mere ministerial duty on the part of the clerk, and that his failure to perform it will not work a discontinuance.⁷¹ Each case should be separately docketed,⁷² in the name of the parties to the suit.⁷³

Cases must be docketed within the prescribed time,⁷⁴ but, in the absence of a statute or rule of court to that effect, a failure to do so will not *ipso facto* put the plaintiff out of court.⁷⁵ Defendant is ordinarily permitted to docket a case if plaintiff fails to do so within the prescribed time.⁷⁶

Cause Must Be at Issue. — In many jurisdictions a case cannot properly be placed upon the calendar until it is at issue,⁷⁷ but it has been held sufficient if it is substantially at issue.⁷⁸ The adding of a

ordinary docket of suits and tried in the ordinary way, under averments such as would authorize a judgment. *Donato v. Frillot*, 116 La. 199, 40 So. 634.

71. Rule held applicable where the defendant in a criminal case had been held to bail on preliminary trial before a justice of the peace to answer to an indictment at the ensuing term of the city court. *Ex parte The State*, 115 Ala. 123, 22 So. 115. See also, *Scott v. State*, 94 Ala. 80, 10 So. 505.

72. Where no cause of action was asserted against two garnishees jointly, it was held that the clerk had no authority to docket the two separate causes of action asserted in the application for garnishment as one suit. *Fidelity & Deposit Co. v. Seymour*, 29 Tex. Civ. App. 542, 66 S. W. 686.

73. On reversal and remand after trial of an issue between plaintiff and a garnishee it was held that a case was properly re-docketed in the name of the original parties. *State Bank v. Thweatt*, 111 Ill. App. 599.

74. In South Carolina, the docketing of the case by the clerk fourteen days before court is the notice of trial, and unless he so docketed it it does not stand for trial at that term. *Code Proc.*, §276; *Steffens v. Bulwinkle*, 48 S. C. 357, 26 S. E. 666.

75. *Pudigon v. Goblet*, 24 S. C. 476; *Hagood v. Riley*, 21 S. C. 143.

76. *Pudigon v. Goblet*, 24 S. C. 476; *Hagood v. Riley*, 21 S. C. 143.

77. *Kennedy v. Jarvis*, 126 App. Div. 551, 110 N. Y. Supp. 894; *Muglia v. Erie R. Co.*, 97 App. Div. 532, 90 N. Y. Supp. 216; *Coler v. Lamb*, 19 App. Div. 236, 46 N. Y. Supp. 117; *Sanders v. People's Co-operative Ice Co.*, 44 Misc. 171, 89 N. Y. Supp. 785.

It is error to force a cause to trial on the short cause calendar over defendant's objection and without his participation, where no replication has been filed to his plea of set-off. *Condon v. Cohn*, 88 Ill. App. 333.

Cases are not entitled to appear upon the trial term calendar until the last pleadings are served. *Leonard v. Faber*, 31 App. Div. 137, 52 N. Y. Supp. 772.

Where issue has been joined on all of defendant's pleas except one, but the case has not been put on the trial docket because of the pendency of a motion to strike that plea, the court has discretionary power, on granting said motion, to order such case placed on the docket for trial at such term. *Seaboard Air Line Ry. v. Scarborough*, 52 Fla. 425, 42 So. 706.

A provision of an order extending the time to answer that the issue shall be of the date of the service of the summons and complaint does not authorize the placing of the case on the calendar before such pleading is actually served. *Muglia v. Erie R. Co.*, 97 App. Div. 532, 90 N. Y. Supp. 216; *Coler v. Lamb*, 19 App. Div. 236, 46 N. Y. Supp. 117.

78. Where defendant pleaded the general issue, and afterwards specially pleaded a breach of the contract sued on, omitting to allege any sum as damages, it was held that the case was substantially at issue and that it was not error to refuse to strike it from the trial calendar at that stage, though defendant thereafter inserted the sum claimed as damages by amendment, and plaintiff then filed a replication trav-

similiter to a plea of the general issue,⁷⁹ the fact that issue has not been joined on immaterial pleas,⁸⁰ and the pendency of motions and demurrers to pleas which are bad or under which no proof could be admitted,⁸¹ have been held not to prevent the placing of causes on the calendar. A case will ordinarily be stricken from the calendar where, after it is placed thereon, the issues are changed,⁸² or new ones are added by the service of further pleadings,⁸³ or by amendment,⁸⁴ but leave to amend,⁸⁵ or to file supplemental pleadings⁸⁶ may be conditioned that the case retain its place on the calendar, as may an order requiring the filing of a reply.⁸⁷

Order in which Cases Should Be Entered. — Causes should ordinarily be entered on the calendar or docket in the order in which the issues are made up,⁸⁸ and attorneys cannot vary such order by stipulation.⁸⁹

ersing the plea. *Lincoln v. Schwartz*, 70 Ill. 134.

79. It is not error to refuse to strike a case from the short cause calendar because the similiter was added to the plea of the general issue. *Hefling v. Van Zandt*, 162 Ill. 162, 44 N. E. 424, *affirming*, 60 Ill. App. 662.

80. In an action on a bond, where issue had been taken on pleas of *non est factum* and *nil debet*, it was held that the cause was at issue though no replication had been filed to a third plea, since no form of other pleading would entitle plaintiff to recover without proof of the affirmative on the issues so taken, and all other pleas and replications were, therefore, useless verbiage. *Ryan v. People*, 165 Ill. 143, 46 N. E. 206, *affirming*, 62 Ill. App. 355.

81. That a demurrer to one plea and a motion to strike another plea were not disposed of at the time the cause was noted for trial on the short cause calendar was held not to prevent the case from being at issue, where the first plea was bad and no evidence could be admitted under the second, as the failure to dispose of such pleas did not affect the proof required of plaintiff to make out his cause of action, or the evidence admissible for defendants to defeat it. *McDonald v. People*, 222 Ill. 325, 78 N. E. 609.

82. Where the issue made by the original answer was destroyed by the filing of a new answer setting up a counterclaim, it was held that the case should have been stricken from the calendar, since it was not at issue until a reply had been served or the time for

serving it had expired. *Coler v. Lamb*, 19 App. Div. 236, 46 N. Y. Supp. 117.

83. By the service of a reply. *Grant v. Cananea Consol. Copper Co.*, 129 App. Div. 77, 113 N. Y. Supp. 502.

84. Where amended pleadings are filed a new notice of trial and note of issue are necessary. *Leonard v. Faber*, 31 App. Div. 137, 52 N. Y. Supp. 772; *McBride v. Langan*, 11 N. Y. Supp. 626.

Parties cannot change this rule by stipulation. *Leonard v. Faber*, 31 App. Div. 137, 52 N. Y. Supp. 772.

85. *Mossein v. Empire State Surety Co.*, 117 App. Div. 820, 102 N. Y. Supp. 1013; *McBride v. Langan*, 11 N. Y. Supp. 626.

86. *Myers v. Metropolitan El. R. Co.*, 12 N. Y. Supp. 2.

87. The court has power to impose as a condition for granting an order requiring plaintiff to reply that the case shall retain its place on the calendar and be tried without further notice of trial, but where such condition is not contained in the order, it cannot be imposed after the order has been granted and acted upon. *Grant v. Cananea Consol. Copper Co.*, 129 App. Div. 77, 113 N. Y. Supp. 502.

88. This is equally true of two cases in which the parties are the same. *McBride v. Ellis*, 8 Rich. (S. C.) 226.

Where the issues in two cases in which the parties are the same are joined at the same time, the directions of plaintiff's attorney as to which shall be docketed first should be regarded by the clerk, and in default of such direction the matter is left to the discretion of the clerk. *McBride v. Ellis*, 8 Rich. (S. C.) 226.

89. Attorneys have no power nor

Where several issues are joined at different times, the case is properly placed on the calendar according to the date of the first of them.⁹⁰

Effect of Errors and Omissions.—The court generally has power to make all necessary amendments and corrections.⁹¹

The right to hear matters not on the calendar depends on the statutes and rules of court of the various states.⁹² In some jurisdictions a case left off the docket will be brought forward upon the docket when either party desires to be heard on any motion in respect to it.⁹³

Cases improperly upon the docket or calendar may generally be stricken therefrom on motion.⁹⁴

Objections and Waiver Thereof.—The objection that a case is not properly on the docket or calendar is waived by a failure to object in apt time,⁹⁵ or by a general appearance,⁹⁶ or by proceeding to trial on the merits.⁹⁷ Failure to make proper docket entries is waived by a general appearance.⁹⁸

D. PRINTING AND POSTING.—The clerk is generally required to make up and print for distribution a calendar of pending cases.⁹⁹ Parties and counsel have a right to rely on the correctness of a calendar made and printed by the clerk pursuant to rule,¹ and changes therein should only be made on notice to those interested.² Cases at

control over the calendar, and cannot by stipulation give their cases a preference to which they are not entitled under the law. *Leonard v. Faber*, 31 App. Div. 137, 52 N. Y. Supp. 772.

90. *Allen v. Calhoun*, 6 Cow. (N. Y.) 32; *Griswold v. Stewart*, 3 Cow. (N. Y.) 16.

91. The correction of the circuit calendar belongs exclusively to the judge and his rules of practice in that regard will not be interfered with. *Allen v. Calhoun*, 6 Cow. (N. Y.) 32.

92. The court may hear contested motions though they are not placed on the contested motion calendar where the rules so provide. *Hunt v. Pronger*, 126 Ill. App. 403; *Manufacturers' Paper Co. v. Lindblom*, 80 Ill. App. 267.

93. *Russell v. Dyer*, 39 N. H. 528. See also, *Rice v. Holden*, 55 N. H. 398.

94. A case improperly upon the docket as a pending one may be erased therefrom on motion. *O'Dell v. Cowles*, 76 Conn. 293, 56 Atl. 519.

In *Bornstein v. Diskin*, 84 N. Y. Supp. 248, the court below was held to have properly refused to strike the case from its calendar, it not appearing from the moving papers that the attorney for the defendant who did appear and answer was the attorney for

the co-defendants, or that he knew that the latter had not been served, or that the case was not at issue by default.

95. *Christie v. Walker*, 126 Ill. App. 424; *Osborn v. Osborn*, 114 Mass. 515.

96. **By Appearing and Answering.** *McDermitt v. Newman*, 64 W. Va. 195, 61 S. E. 300.

That a claim against a decedent's estate was not filed and placed on the claim or appearance docket before being placed on the issue docket. *Frazer v. Boss*, 66 Ind. 1; *Morrison v. Kramer*, 58 Ind. 38; *Sanders v. Hartge*, 17 Ind. App. 243, 46 N. E. 604.

97. *Nelson v. Biedler & Co.*, 134 Ill. App. 655.

By consenting to a reference. *Allis v. Day*, 14 Minn. 516.

98. Failure of a justice to enter in his docket the place of adjournment, by an appearance at the time to which such adjournment is had and going to trial on the merits. *Steinhart v. Pitcher*, 20 Minn. 86; *Cron v. Krones*, 17 Wis. 401.

99. A rule of court requiring him to do so has the force of law. *Aaron v. Jefferson Ice Co.*, 129 Ill. App. 570.

1. *Aaron v. Jefferson Ice Co.*, 129 Ill. App. 570.

2. Where the clerk discovers a mis-

issue in time to be placed on a trial list under the rules, but after the list has been placed in the hands of the printer, may be added thereto with pen and ink.³

The posting of trial lists may be regulated by rules not inconsistent with the statute.⁴

A case omitted from the printed docket by mistake may be restored on motion.⁵

E. CALL OF THE CALENDAR AND SETTING CASES FOR TRIAL. — A case cannot properly be set for trial until it is at issue.⁶ As a general rule cases should be called and tried in the order in which they are docketed,⁷ but the matter rests to a large extent in the discretion of the trial judge, and his action in the premises will not ordinarily be interfered with unless abuse of such discretion is shown.⁸ He may call a case out of its regular order,⁹ especially where counsel con-

take he should apply to the court, upon notice to the parties in the case involved, for leave to correct the same. *Aaron v. Jefferson Ice Co.*, 129 Ill. App. 570.

3. Under a rule requiring the prothonotary to have the trial list in the hands of the bar twenty days before the convening of court, it was held that cases coming at issue either on pleading or demurrer at any time prior to said twenty days, but after the list had been placed in the hands of the printer should be added to said list by the prothonotary with pen and ink. *Wilcox v. Wilmington City R. Co.* (Del.), 41 Atl. 975.

4. As to a particular case the court may suspend a rule requiring the prothonotary to make out and post a trial list at least six weeks before the commencement of each term, where no prejudice results. *Stamey v. Barkley*, 211 Pa. 313, 60 Atl. 991.

5. *Rice v. Holden*, 55 N. H. 398.

6. Not when there is no answer on file nor any order of court requiring one to be filed by any particular time. *Smith v. Redmond*, 141 Iowa 105, 119 N. W. 271.

7. *Duggar v. Lackey*, 85 Ga. 631, 11 S. E. 1025; *Frost v. Pennington*, 6 Ga. App. 298, 65 S. E. 41; *McBride v. Ellis*, 8 Rich. (S. C.) 226.

8. The setting of causes for trial and their arrangement on the calendar is largely discretionary with the judge, and his action will not be interfered with unless a clear abuse of discretion is shown. *Frost v. Pennington*, 6 Ga. App. 298, 65 S. E. 41; *Stockwell v. Crawford* (N. D.), 130 N. W. 225.

Rules of the trial court regulating the assignment of causes and the making up of trial calendars will not be interfered with unless in the application thereof to a particular case manifest injustice has been done and the assignment of the case for trial was an abuse of discretion. *Frost v. Pennington*, 6 Ga. App. 298, 65 S. E. 41.

The court has the right to control its own docket or calendar, and the order in which cases shall be tried. *Merchants' Bank v. Greenhood*, 16 Mont. 395, 41 Pac. 250, 851; *Maretzek v. Cauldwell*, 4 Robt. (N. Y.) 666; *Rauchberger v. Interurban St. R. Co.*, 52 Misc. 518, 102 N. Y. Supp. 561. But it cannot make a rule in this regard in conflict with the statute. *Rauchberger v. Interurban St. R. Co.*, 52 Misc. 518, 102 N. Y. Supp. 561.

The action of the judge holding a special term for trials cannot be controlled by that of a judge holding a special term for motions in fixing the trial of a case for a certain day. *Martin v. Universal Trust Co.*, 76 App. Div. 320, 78 N. Y. Supp. 465.

A second case between the same parties as a previous one and involving the same facts ordered placed on the calendar next to the first one, so that, if deemed advisable, both might be tried before the same justice. *Maretzek v. Cauldwell*, 4 Robt. (N. Y.) 666.

9. The court has discretionary power to call a case out of its order on the docket for the purpose of giving facility and expedition to its proceedings or furthering the ends of justice. *Duggar v. Lackey*, 85 Ga. 631, 11 S. E. 1025.

sent,¹⁰ and where he does so, such case then stands before the court as one in order for final disposition, and not as a case out of order.¹¹ In some jurisdictions, upon a special cause shown, cases may be transferred to the heel of the entire docket.¹²

Error in calling for trial a case not on the calendar is not jurisdictional.¹³

A case may properly be stricken from the docket or dismissed if not ready for trial when reached on the trial call.¹⁴ The court ordinarily has discretionary power, for good cause shown, to reinstate a case so dismissed.¹⁵ Orders striking a case from the docket¹⁶ and refusing to reinstate it¹⁷ have been held not to be final judgments.

That a case is tried without having been placed on the trial calendar,¹⁸ or out of its regular order,¹⁹ is waived where it is tried at a time to which it has been postponed on motion of the objecting party.

V. RULES OF COURT.—A. DEFINITION AND NATURE.—A rule of court has been defined to be a regulation in practice applying to

He may require a case to be tried out of its order without reference to the consent of the parties, and while the exercise of such power is subject to revision on appeal, a party seeking revision of the court's action must show prejudice. *Missouri Pac. R. Co. v. Shuford*, 72 Tex. 165, 10 S. W. 408; *Allyn v. Willis*, 65 Tex. 65; *Rubrecht v. Powers*, 1 Tex. Civ. App. 282, 21 S. W. 318.

10. By consent of all counsel interested in the cases on the docket, the order in which they are entered may be varied for convenience. *Hines & Hobbs v. Brunswick & A. R. Co.*, 51 Ga. 218.

11. *Duggar v. Lackey*, 85 Ga. 631, 11 S. E. 1025.

12. *Hines & Hobbs v. Brunswick & A. R. Co.*, 51 Ga. 218.

13. *State Bank v. Thweatt*, 111 Ill. App. 599.

14. *Morgan Hastings Co. v. Gray Dental Co.*, 108 Ill. App. 98.

A rule providing for dismissal of appeals where neither party responds on the preliminary call of the calendar should be liberally construed to the end that causes may be tried on the merits. *Doppelt v. Blum*, 118 Ill. App. 64. Such a rule does not authorize a dismissal where one party responds and moves for a dismissal. *Doppelt v. Blum, supra*.

15. **Time.**—Under a rule that cases dismissed for want of prosecution when called for trial may be reinstated for good cause shown at any time within

ninety days, a case so dismissed cannot be reinstated after said time. *State Bank v. Thweatt*, 111 Ill. App. 599.

If the court has power to restore at a subsequent term a case previously discontinued, it cannot do so on oral motion without notice. *O'Dell v. Cowles*, 76 Conn. 293, 56 Atl. 519.

Cause.—Held that good cause was shown for reinstating an appeal dismissed where neither party responds on the preliminary call of the calendar. *Doppelt v. Blum*, 118 Ill. App. 64.

The dismissal of an appeal for failure to appear at the call of the calendar may properly be set aside where such failure was due to a mistake in the name of the case in the printed calendar prepared by the clerk pursuant to a rule of court. *Aaron v. Jefferson Ice Co.*, 129 Ill. App. 570.

Refusal to reinstate was held not to be an abuse of discretion where the declaration did not state a cause of action. *Nordstrom v. City of Chicago*, 119 Ill. App. 465.

16. *Morgan Hastings Co. v. Gray Dental Co.*, 108 Ill. App. 98.

17. Refusing to set aside an order striking a cause from the docket and to place it upon the trial calendar. *Morgan Hastings Co. v. Gray Dental Co.*, 108 Ill. App. 98.

18. *Union Surety Co. v. Tenney*, 200 Ill. 349, 65 N. E. 688.

19. *Union Surety Co. v. Tenney*, 200 Ill. 349, 65 N. E. 688.

all suitors, established and fixed, as much so as a statute itself, and known to all litigants and attorneys.²⁰ An order of court applying to a particular case only is not a rule, uniformity of application being essential.²¹

A rule is not a law,²² though it may have the force and effect of one.²³

B. POWER TO MAKE RULES AND LIMITATIONS THEREON.—1. The Power in General.—All courts of record have inherent power to make rules of practice which do not conflict with the law or impair the legal rights of the parties, and in addition thereto such power is generally specifically conferred on them by statute.²⁴

20. *Wilson v. Big Joe Block Coal Co.*, 135 Iowa 531, 113 N. W. 348.

21. *Spangler v. Atchison, T. & S. F. R. Co.*, 42 Fed. 305.

22. Because it is not prescribed by the supreme power. *Nichols v. Griffin*, 1 Wash. Ter. 374.

23. See *V. D. infra*.

24. **U. S.**—*Hudson v. Parker*, 156 U. S. 277, 15 Sup. Ct. 450, 39 L. ed. 424; *Ward v. Chamberlain*, 2 Black 430, 17 L. ed. 319; *Bank of United States v. Halstead*, 10 Wheat. 51, 6 L. ed. 264; *Wayman v. Southard*, 10 Wheat. 1, 6 L. ed. 253. **Ala.**—Code, 1907, §3227; *Lee v. Raiford*, 54 So. 543; *Stafford v. State*, 154 Ala. 71, 45 So. 673; *Ex parte Mayor & Aldermen of Birmingham*, 134 Ala. 609, 33 So. 13; *Cummings v. Bradley*, 57 Ala. 224. **Cal.**—*People v. McClellan*, 31 Cal. 101. **Colo.**—*People v. Court of Appeals*, 33 Colo. 264, 79 Pac. 1021. **Fla.**—Gen. St., 1906, §1740; *Morgan v. Eaton*, 59 Fla. 557, 51 So. 814. **Ill.**—*Lancaster v. Waukegan & S. W. R. Co.*, 132 Ill. 492, 24 N. E. 629; *Owens v. Ranstead*, 22 Ill. 161; *Koch v. Dickinson*, 152 Ill. App. 413; *Dille v. Rice*, 120 Ill. App. 353; *Hopper v. Mather*, 104 Ill. App. 309. **Ind.**—*Rooker v. Bruce*, 171 Ind. 86, 85 N. E. 351; *State v. Van Cleave*, 157 Ind. 608, 62 N. E. 446; *Magnuson v. Billings*, 152 Ind. 177, 52 N. E. 803; *Smith v. State*, 140 Ind. 340, 36 N. E. 708; *Advance Veneer Lumber Co. v. Hornaday* (Ind. App.), 96 N. E. 784. **La.**—*Conery v. His Creditors*, 118 La. 864, 43 So. 530. **Me.**—*Fox v. Conway Fire Ins. Co.*, 53 Me. 107. **Md.**—*Laurel Canning Co. v. Baltimore & O. R. Co.*, 81 Atl. 126. **Mo.**—*Pelz v. Bolinger*, 180 Mo. 252, 79 S. W. 146; *State v. Withrow*, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43; *Nutter v. Houston*, 42

Mo. App. 363. **Mont.**—*State v. Donlan*, 32 Mont. 256, 80 Pac. 244. **N. H.** *Carr v. Adams*, 70 N. H. 622, 45 Atl. 1084. **N. Y.**—*Stephens v. People*, 19 N. Y. 549. **N. C.**—*Lee v. Baird*, 146 N. C. 361, 59 S. E. 876. **Okla.**—*Goodwin v. Bickford*, 20 Okla. 91, 93 Pac. 548. **Ore.**—*Francis v. Mutual Life Ins. Co.*, 114 Pac. 921; *Zenske v. Zenske*, 55 Ore. 65, 105 Pac. 249, 103 Pac. 648; *State v. Birchard*, 35 Ore. 484, 59 Pac. 468; *Coyote, G. & S. M. Co. v. Ruble*, 9 Ore. 121; *Carney v. Barrett*, 4 Ore. 171. **Pa.**—*Helfrich v. Greenberg*, 206 Pa. 516, 56 Atl. 45; *McGreevy v. Kulp*, 126 Pa. 97, 17 Atl. 541. **Tenn.**—*Denton v. Woods*, 86 Tenn. 37, 5 S. W. 489. **Tex.** *Ashford v. Goodwin*, 103 Tex. 491, 131 S. W. 535; *Pendley v. Berry*, 95 Tex. 72, 65 S. W. 32. **Vt.**—*Jones v. Spear*, 21 Vt. 426. **Wyo.**—*Phillips v. Brill*, 15 Wyo. 521, 90 Pac. 443.

The federal supreme court has power to make rules governing the practice of the inferior courts in admiralty. *Meyer v. Tupper*, 1 Black (U. S.) 522, 17 L. ed. 180, citing, Acts of Cong., May 8 1792; Aug. 28, 1842.

A constitutional provision that the judges of a court might sit in general term for the purpose of making rules was held merely to confer power on general term to secure a uniformity of rules in the several divisions of the court, and not to confer any power to make rules, it already having inherent power to make them. *State v. Withrow*, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43.

Statutory authority to make rules "for the orderly disposition of business" before the court means rules relating to procedure and practice, and such rules are limited in their application to the disposition or transac-

Where power to prescribe its own rules is conferred on a court by the constitution, the legislature has no authority in the premises, and cannot change, alter, or repeal the rules so prescribed.²⁵ This has also been held to be true in regard to rules enacted pursuant to power belonging to the judicial, as distinguished from the legislative, branch of the government,²⁶ but the contrary is true where such power is conferred by statute,²⁷ or by the common law.²⁸

In the absence of a constitutional or statutory provision to the contrary, no court has power to make rules governing the procedure in any other court.²⁹ In many jurisdictions, however, power is con-

tion of business before the court for determination. It does not authorize a rule requiring the clerk to furnish a printed copy of the docket to each member of the bar. *Plaineader-Herald Pub. Co. v. County of Coles*, 149 Ill. App. 652.

Colorado.—Sess. Laws, 1891, p. 119, leaves it to the sound legal discretion of the judges of the court of appeals to determine how nearly similar to the procedure in the supreme court that adopted by them shall be. *People v. Court of Appeals*, 33 Colo. 264, 79 Pac. 1021.

The promulgation of a general rule by a court of equity is a decision that the power to make it exists, and it will not be held to have been unauthorized in a subsequent case unless want of power to make it clearly appears, especially where such a course would result in depriving an officer of fees already earned thereunder. *In re Du Pont*, 8 Del. Ch. 442, 68 Atl. 399.

While an appellate court will interfere if the trial court transcends or abuses its discretion in making rules, a very clear case of abuse must be made out to warrant it in doing so. *Pelz v. Bollinger*, 180 Mo. 252, 79 S. W. 146.

25. Under the constitution of 1863 the supreme court has exclusive power to regulate its own procedure, and is not bound by acts of the legislature attempting to regulate its rules of practice. *Calvert v. Carstarphen*, 133 N. C. 25, 45 S. E. 353; *Hendon v. Imperial Fire Ins. Co.*, 111 N. C. 384; *State v. Edwards*, 110 N. C. 511, 14 S. E. 741; *Horton v. Green*, 104 N. C. 400, 10 S. E. 470; *Rencher v. Anderson*, 93 N. C. 105. See also, *Laurel Canning Co. v. Baltimore & O. R. Co. (Md.)*, 81 Atl. 126.

26. A statute authorizing the admission to the bar of graduates of law

schools was held invalid as such an assumption by the legislature of judicial power as is prohibited by the constitution. *In re Day*, 181 Ill. 73, 54 N. E. 646.

A statute providing that transcripts on appeal might be printed or typewritten at the election of the appellant was held to be void and not to have repealed a rule of the supreme court requiring them to be printed. *Jordan v. Andrus*, 26 Mont. 37, 66 Pac. 502.

The judges of a circuit cannot by a general rule deprive the trial court of the right, in view of the particular circumstances of each case, to award costs to either party, where the statute makes such allowance discretionary with such court. *Voigt Brewing Co. v. Wayne Circuit Judge*, 108 Mich. 356, 66 N. W. 217.

27. *State v. Edwards*, 110 N. C. 511, 14 S. E. 741, *construing* North Carolina Code, §961, and saying that power so conferred is subject to legislative modification.

28. The legislature has power to divest the common law right of a court to prescribe such rules of practice as are simply convenient or beneficial, but not necessary, to the court in the exercise of its lawful jurisdiction. *State v. Call*, 39 Fla. 504, 22 So. 748.

29. *Smith v. Valentine*, 19 Minn. 452, where the supreme court was held to have no authority to make rules to bind the district court, so that such rules were not binding on the clerk of the latter court.

The power conferred on the judges of the district court to make rules gives them no authority to prescribe a rule of practice which will have the effect of depriving the supreme court of supervision and control over the records of the district court which are made

ferred on the court of last resort to make rules for all inferior courts.³⁰ Such provisions preclude the inferior courts from making rules inconsistent with those so adopted,³¹ but do not necessarily deprive them of power to make rules in respect to matters as to which the other court has taken no action,³² or necessary rules of a temporary or special application.³³ In some states general rules cannot be established by the inferior courts without the approval of the court of last resort.³⁴

with reference to a probable appeal to the supreme court, and which may result in incumbering the return on appeal with unnecessary and useless matter. *State v. Otis*, 71 Minn. 511, 74 N. W. 283.

30. See the statutes of the various states, and cases cited below.

California.—It is not the duty of the district court of appeal to formulate rules of practice, but authority to make rules for that court and the supreme court is vested in the supreme court by the constitution. *San Joaquin & K. R. C. & I. Co. v. Stevenson* (Cal. App.), 116 Pac. 378.

Florida.—The supreme court alone has power to prescribe rules for the government of the inferior courts as to all matters of practice and procedure of a general or permanent nature which are merely beneficial or convenient, the power of the inferior courts in this regard being limited to the making of necessary rules of a temporary or special application. *State v. Call*, 39 Fla. 504, 22 So. 748.

A rule of the supreme court relating to the form and contents of the *praeceipe* for process in personal actions must be taken as the construction by the supreme court of the power conferred on it to make rules, and a *praeceipe* in conformity therewith is sufficient. *Seaboard Air Line R. v. Rentz*, 60 Fla. 449, 54 So. 20.

Michigan.—A constitutional provision that the supreme court shall make rules of practice for the subordinate courts restricts the inherent power of the latter to make rules, and they are bound to be governed by the rules adopted by the supreme court. *Detroit, G. R. & W. R. Co. v. Eaton Circuit Judge*, 128 Mich. 495, 87 N. W. 641.

In **North Carolina.**—Code §961; *Calvert v. Carstarphen*, 133 N. C. 25, 45 S. E. 353; *Barnes v. Easton*, 98 N. C. 116, 3 S. E. 744.

31. *Detroit, G. R. & W. R. Co. v. Eaton Circuit Judge*, 128 Mich. 495, 87 N. W. 641; *Chester Traction Co. v. Philadelphia, W. & B. R. Co.*, 180 Pa. 432, 36 Atl. 916; *Green v. Prince Metallic Paint Co.*, 26 Pa. Super. 415.

The rules adopted by the federal supreme court to regulate the practice in the federal courts of equity are obligatory on such courts and they cannot adopt rules inconsistent therewith. *Gaines v. Relf*, 15 Pet. (U. S.) 9, 10 L. ed. 642; *Ex parte Whitney*, 13 Pet. (U. S.) 404, 10 L. ed. 221; *Story v. Livingston*, 13 Pet. (U. S.) 359, 10 L. ed. 200.

No practice inconsistent with such rules can control them. *Bank of United States v. White*, 8 Pet. (U. S.) 262, 8 L. ed. 938.

Such rules were not intended, however, to deprive such courts of power to mold their rules in relation to the time and manner of appearing and answering so as to prevent them from working injustice. *Poultney v. La Fayette*, 12 Pet. (U. S.) 472, 9 L. ed. 1161.

No federal circuit or district court has power to adopt a practice inconsistent with the rules promulgated by the supreme court pursuant to the statute. *Northwestern Mut. Life Ins. Co. v. Keith*, 77 Fed. 374, 23 C. C. A. 196.

32. *Jones v. Menefee*, 28 Kan. 436.

Where a statute does not require a rule for the dismissal of cases under specified circumstances, but is permissive only, so long as the supreme court adopts no such rule, it cannot be operative, and the circuit court cannot adopt one. *Detroit, G. R. & W. R. Co. v. Eaton Circuit Judge*, 128 Mich. 495, 87 N. W. 641.

33. *State v. Call*, 39 Fla. 504, 22 So. 748.

34. *Hurst v. Hawkins*, 40 Mich. 575; *Kegel v. Schrenkheisen*, 37 Mich. 174;

Power to make a rule of procedure in advance includes power to ratify a particular procedure followed in the absence of a rule.³⁵

The promulgation of a general rule does not exhaust the inherent power of the court to make a special order in a proper case to which the rule does not apply.³⁶

The federal conformity act is to be construed in connection with the statutes conferring on the various federal courts the power to make rules regulating their own practice.³⁷ It does not, in all cases, require the federal courts to change their rules to conform to state statutes subsequently adopted,³⁸ nor does it control the procedure in suits in equity to the exclusion of the rules of equity pleading and practice.³⁹

2. Must Be Consistent With the Law and Reasonable.—A rule which conflicts or is inconsistent with the constitution,⁴⁰ or a statute⁴¹ or

Wyandotte Rolling Mills Co. v. Robinson, 34 Mich. 428.

35. *Pieper v. Centinela Land Co.*, 56 Cal. 173.

36. *Wilds v. Wilds*, 8 Del. Ch. 363, 68 Atl. 447.

37. U. S. Rev. St., §§914 and 918 are to be construed together. *Mahr v. Union Pac. R. Co.*, 140 Fed. 921; *Importers' & Traders' Nat. Bank v. Lyons*, 134 Fed. 510; *Ewing v. Burnham*, 74 Fed. 384. See also *Bank of United States v. Halstead*, 10 Wheat. (U. S.) 51, 6 L. ed. 264; *Wayman v. Southard*, 10 Wheat. (U. S.) 1, 6 L. ed. 253; *Lowry v. Story*, 31 Fed. 769.

38. A summons issued pursuant to a rule of the federal court substantially in conformity with the state statute in force when it was adopted was held sufficient, though the state statute had since been changed. The intention was that the uniformity of procedure required by the conformity act should be reached often "largely through the discretion of the federal courts, exercised in the form of general rules, adopted from time to time, and so regulating their own practice as might be necessary or convenient for the advancement of justice and the prevention of delays in proceedings." *Shepherd v. Adams*, 168 U. S. 618, 18 Sup. Ct. 214, 42 L. ed. 602.

A rule of the district court as to when process should be returnable was held valid and in force notwithstanding an inconsistent state statute subsequently adopted. *Gokey v. Boston & M. R. Co.*, 130 Fed. 992; *Ewing v. Burnham*, 74 Fed. 384.

39. *Bryant Bros. v. Robinson*, 149 Fed. 321, 79 C. C. A. 259; *United Cig-*

arette Mach. Co. v. Wright, 132 Fed. 195. See also *Martindale v. Waas*, 11 Fed. 551.

40. III.—*Fisher v. National Bank of Commerce*, 73 Ill. 34. Md.—*Laurel Canning Co. v. Baltimore & O. R. Co.*, 81 Atl. 126. Tenn.—*Pawley v. McGimpsey*, 7 Yerg. 502. Vt.—*Jones v. Spear*, 21 Vt. 426.

A constitutional provision that the right to be heard in the court of last resort by appeal, error, or otherwise, shall not be denied does not prohibit the supreme court from prescribing such reasonable rules and regulations as are deemed essential in the prompt and orderly disposition of causes brought there, such as a rule providing for affirmance on motion in delay cases. *Schmidt v. Boyle*, 54 Neb. 387, 74 N. W. 964.

41. Colo.—*Cates v. Mack*, 6 Colo. 401. Ill.—*Gage v. Eddy*, 167 Ill. 102, 47 N. E. 200; *Rozier v. Williams*, 92 Ill. 187; *Benson v. Johnson*, 90 Ill. 94; *Fisher v. National Bank of Commerce*, 73 Ill. 34; *Linnemeyer v. Miller*, 70 Ill. 244; *Owens v. Ranstead*, 22 Ill. 161. Ind.—*Coffin v. McClure*, 23 Ind. 356. Ky.—*Petty v. Wilbur Stock Food Co.*, 128 Ky. 130, 107 S. W. 699; *Hill's Admr. v. Penn Mut. Life Ins. Co.*, 120 Ky. 190, 85 S. W. 759; *Kennedy & Bro. v. Cunningham*, 2 Mete. 538. La. *State v. Judge*, 109 La. 8, 33 So. 49. Md.—*Laurel Canning Co. v. Baltimore & O. R. Co.*, 81 Atl. 126. Mass.—*Thompson v. Hatch*, 3 Pick. 512. Mich.—*Ismond v. Seongale*, 119 Mich. 501, 78 N. W. 546. Minn.—*Fagenbank v. Fagenbank*, 9 Minn. 72. Miss.—*Bennett v. State*, 55 So. 482. Mo.—*State v. Withrow*, 133 Mo. 500, 34 S. W. 245,

which deprives a party of a constitutional⁴² or statutory⁴³ or common

36 S. W. 43; *State v. Underwood*, 75 Mo. 230; *Calhoun v. Crawford*, 50 Mo. 458. **Nev.**—*Twaddle v. Winters*, 29 Nev. 88, 89 Pac. 289, 85 Pac. 280. **N. J.** *Hinchly v. Machine*, 15 N. J. L. 476. **N. Y.**—*Gormerly v. McGlynn*, 84 N. Y. 284; *French v. Powers*, 80 N. Y. 146; *People v. Nichols*, 79 N. Y. 582; *Willner v. Mink Restaurant Co.*, 61 Misc. 73, 113 N. Y. Supp. 31, reversing 60 Misc. 358, 113 N. Y. Supp. 633; *Ranchberger v. Interurban St. R. Co.*, 52 Misc. 518, 102 N. Y. Supp. 561; *Schwartz v. Interurban St. R. Co.*, 108 N. Y. Supp. 651. **Ohio.**—*Van Ingen v. Berger*, 82 Ohio St. 255, 92 N. E. 433; *Hunt v. State*, 5 Ohio C. C. (N. S.) 621. **Pa.** *Hickernell v. First Nat. Bank*, 62 Pa. 146; *Reist v. Heilbrenner*, 11 Serg. & R. 131. **Vt.**—*Jones v. Spear*, 21 Vt. 426. **Va.**—*Suckley's Admr. v. Rotchford*, 12 Gratt. 60.

A rule which alters the rights of the parties as fixed by the statute is void. *In re Herefordshire Banking Co.*, L. R. 4 Eq. 250.

Cannot enlarge or abridge the rights conferred by statute. *Ackerman v. Ackerman*, 123 App. Div. 750, 108 N. Y. Supp. 534.

The supreme court cannot by rule make judgments or decrees for the payment of money a lien on land where no such charge is created by law, or displace any such right where the same is conferred or recognized by act of congress. *Ward v. Chamberlain*, 2 Black (U. S.) 430, 17 L. ed. 319.

A rule prescribing the form and manner of giving a statutory notice was held not to be contrary to such statute. *Van Aken v. Coldren*, 80 Iowa 254, 45 N. W. 873.

A rule providing that an attorney giving evidence on the merits in behalf of his client should not argue the case except by permission of the court was held not to violate a statute permitting a party to argue the case by himself or by counsel. *Voss v. Bender*, 32 Wash. 566, 73 Pac. 697.

A rule can never add to, diminish, or vary the provisions of a statute. "In making a rule of practice—(and courts cannot create a rule of law)—the first inquiry is, what is the law; and what are the rights of persons conferred or secured by the law, and

this being ascertained, the province of rules of court is to fix the mode and form of enforcing the law." *Beers v. Haughton*, 9 Pet. (U. S.) 329, 343, 9 L. ed. 145.

Iowa Code, §2599, permits the court to provide by general rule that the time for filing pleadings shall be different from that fixed by the code. *McGrew v. Downs*, 67 Iowa 687, 25 N. W. 880.

42. *Laurel Canning Co. v. Baltimore & O. R. Co.* (Md.), 81 Atl. 126.

A rule prohibiting more than one counsel on each side to examine witnesses was held void in so far as it prevented counsel for one of two defendants in a criminal case, who were tried together and had different counsel, from cross-examining witnesses. *State v. Bryant*, 55 Mo. 75.

43. **Cal.**—*People v. McClellan*, 31 Cal. 101. **La.**—*State v. Posey*, 17 La. Ann. 252. **Md.**—*Laurel Canning Co. v. Baltimore & O. R. Co.*, 81 Atl. 126. **Utah.**—*Westcott v. Eccles*, 3 Utah 258, 2 Pac. 525.

A rule having the effect of depriving a party of his statutory right to personally defend any action brought against him is void. *Gregson v. Allen*, 85 Ill. 478.

Effect of Appearance.—A rule of the federal circuit court providing that any party might, without leave, appear specially for any purpose for which leave to so appear could be granted, by agreeing that if the purpose for which he so appeared was not sanctioned or sustained he would appear generally, and that if he did not so agree his appearance should be deemed a general one, was held void in so far as it related to a special appearance to object to the court's jurisdiction, as impairing his right to appear specially and his statutory right to appeal from an adverse decision. *Davidson Bros. Marble Co. v. United States ex rel. Gibson*, 213 U. S. 10, 29 Sup. Ct. 324, 53 L. ed. 675.

Pleading.—A rule cannot abridge a statutory right of refusing to plead until the case is called (*Aaron v. Anderson*, 18 Ark. 268; *Cornish v. Sargent*, 18 Ark. 266; *Hixon v. Weaver*, 9 Ark. 133); nor shorten the statutory time for pleading (*Hurst v. Hawkins*, 40

law⁴⁴ right, or imposes upon him other and additional burdens than those imposed by law,⁴⁵ or which extends the jurisdiction of a court beyond that fixed by law,⁴⁶ or modifies the conditions imposed thereon,⁴⁷ or deprives a court of a discretionary power, conferred on it by law,⁴⁸ is to that extent void.

Rules must be reasonable.⁴⁹

3. Rules as to Particular Matters.—Among the different classes of rules that have been held to be valid are rules relating to the terms of court,⁵⁰ the distribution of business between the different

Mich. 575; Wyandotte Rolling Mills Co. v. Robinson, 34 Mich. 428).

Continuance.—The court cannot, by rule, deprive a party of a statutory right to a continuance. *Hayward v. Ramsey*, 74 Ill. 372.

44. Main v. Lynch, 54 Md. 658.

That an application to the court for the purpose of raising any jurisdictional question shall be deemed a general appearance. *Huff v. Shepard*, 58 Mo. 242.

45. Discovery.—Cannot provide for the production of articles not included in the statute relating to discovery and inspection. *Auerbach v. Delaware, L. & W. R. Co.*, 66 App. Div. 201, 73 N. Y. Supp. 118; *Pina Maya-Sisal Co. v. Squire Mfg. Co.*, 105 N. Y. Supp. 482.

Defaults.—Cannot impose upon parties not in default any conditions as to the exercise of their rights under the law that are not imposed by the law, as the payment of costs in advance. *City of Pekin v. Dunkelburg*, 40 Ill. App. 184.

Change of Venue.—Where an affidavit for a change of venue complies with the statute, it is not necessary for it to comply with additional requirements of a rule. *Krutz v. Howard*, 70 Ind. 174; *Krutz v. Griffith*, 68 Ind. 444.

Calendars.—Where the statute provides that where a case is properly placed on the calendar and is not tried at the term it shall remain thereon until disposed of without a new notice of trial or note of issue, a rule requiring a new note of issue is invalid. *Ranchberger v. Interurban St. R. Co.*, 52 Misc. 518, 102 N. Y. Supp. 561; *Schwartz v. Interurban St. R. Co.*, 108 N. Y. Supp. 651.

Subpoenas.—Prohibiting the clerks from issuing more than a certain number of subpoenas in a criminal case without an order of court, and requir-

ing an application under oath to obtain such order. *Aiken v. State*, 58 Ark. 544, 25 S. W. 840.

A rule providing that in criminal cases where the offense might be punishable by death, the defendant should be entitled as of right to fifteen subpoenas for witnesses, and no more, and requiring a motion and a certain showing to obtain additional ones was held void where the constitution imposed no limit. *State v. Gideon*, 119 Mo. 94, 24 S. W. 748.

Imposing additional burdens on the right to appeal, as by requiring the payment of fees or costs. **Colo.**—*People v. Quinn*, 12 Colo. 473, 12 Pac. 488. **Ill.**—*Dille v. Rice*, 120 Ill. App. 353. **Okla.**—*Stone v. Clogston*, 25 Okla. 162, 105 Pac. 642; *Holmes v. Offield*, 22 Okla. 552, 98 Pac. 341; *Nelson v. Lollar*, 20 Okla. 291, 94 Pac. 176; *Goodwin v. Bickford*, 20 Okla. 91, 93 Pac. 548.

46. Rozier v. Williams, 92 Ill. 187.

47. The Brig Hiram, 23 Ct. Cl. (U. S.) 431.

48. Adams Express Co. v. Trego, 35 Md. 47.

A rule restricting the discretion of the court as to the permission to recall a witness, which was unlimited at common law, was held beyond the power of the court. *De Lorne v. Pease*, 19 Ga. 220.

49. Ill.—*Gregson v. Allen*, 85 Ill. 478; *Prindeville v. People*, 42 Ill. 217; *Owens v. Ranstead*, 22 Ill. 161; *Royal Neighbors v. Simon*, 135 Ill. App. 593; *Chicago Title & Trust Co. v. Core*, 126 Ill. App. 272. **Ky.**—*Conrad Schopp Fruit Co. v. Bondurant*, 134 Ky. 568, 121 S. W. 482. **N. C.**—*State v. Edwards*, 110 N. C. 511, 14 S. E. 741.

For examples of particular rules that have been held to be reasonable or unreasonable see *infra*, V, B, 3.

50. Arranging the business of the term, and designating certain days or

departments of the court,⁵¹ and to the making up of trial calendars and the placing of cases thereon,⁵² rules requiring pleadings⁵³ and stipulations and agreements of counsel⁵⁴ to be in writing, rules fixing the time within which pleadings may be filed,⁵⁵ and amendments thereto may be made,⁵⁶ rules requiring cases to be tried within a reasonable time,⁵⁷ regulating the time within which applications for change of venue may be made,⁵⁸ regulating continuances,⁵⁹ requiring a demand for a jury trial to be made at a particular time, where a party is not absolutely entitled to such a trial,⁶⁰ fixing a time within which requests for findings must be made, requiring all the testimony to be produced before any question of law is raised,⁶¹ and rules limiting the time for the preparation and filing of the record on appeal,⁶² and

periods when different kinds of business shall be transacted. *In re McCandless Tp. Road*, 110 Pa. 605, 1 Atl. 594.

Making terms of court continuous for the trial of particular classes of cases. Succession of Hoyle, 109 La. 623, 33 So. 625.

51. *State v. Donlan*, 32 Mont. 256, 80 Pac. 244.

52. Requiring service of notice of trial, and the making up of a trial calendar, and providing that cases not placed upon the calendar according to the rule should not be heard except for good cause shown. *Riddle v. Quinn*, 32 Utah 341, 90 Pac. 893.

53. *Trammell v. Vane*, Calvert & Co., 62 Ala. 301.

54. *Jones v. Menefee*, 28 Kan. 436.

55. *Rooker v. Bruce*, 171 Ind. 86, 85 N. E. 351.

56. That after a case is set for trial, no change in pleadings will be allowed without good cause shown. *Royal Neighbors v. Simon*, 135 Ill. App. 599; *Chicago Title & Trust Co. v. Core*, 126 Ill. App. 272.

See also the title "Amendments and Joefails," Vol. I, pp. 844 *et seq.*

57. A rule providing for the transfer of cases from the trial and appeal dockets to the stet docket, if not disposed of within a reasonable time, and that cases remaining on the stet docket for four consecutive terms should abate was held to be reasonable, and not to violate provisions of the bill of rights giving every man a remedy for any injury and that a trial of facts is a security of the lives, etc., of the people. *Laurel Canning Co. v. Baltimore & O. R. Co.* (Md.), 81 Atl. 126. See also the title "Trial."

58. Requiring application to be made before issues are formed (*Perdue v. Gill*, 35 Ind. App. 99, 73 N. E. 844), or at least one day before the case is set for trial (*Advance Veneer & Lumb. Co. v. Hornaday* [Ind. App.], 96 N. E. 784).

An application made after the time so fixed may be denied on the ground that it is too late. *Moulder v. Kempff*, 115 Ind. 459, 17 N. E. 906.

A rule that such an application must be made at least one day before the case is set for trial is reasonable and valid. *Hays v. Morgan*, 87 Ind. 231; *Vail v. McKernan*, 21 Ind. 421. See also the title "Change of Venue."

59. That a case set down for trial shall not be reset or continued without the consent of the court and legal and sufficient reason shown. *Conrad Schopp Fruit Co. v. Bondurant*, 134 Ky. 568, 121 S. W. 482. See also the title "Continuances."

60. At the call of the docket. *Staford v. State* (Ala.), 45 So. 673. See also the title "Jury."

61. *Gist v. Drakely*, 2 Gill. (Md.) 330.

62. Limiting the time for noticing a case for settlement. *Jones v. Menefee*, 28 Kan. 436.

Requiring payment of fees and docketing of appeals within a specified time. *City v. Redwine*, 6 Utah 335, 23 Pac. 756.

Requiring the return on appeal to be docketed ten days before the term. *State v. Edwards*, 110 N. C. 511, 14 S. E. 741.

Providing for dismissal of an appeal unless the names of the attorneys are entered on the docket by a certain

providing a mode for the transmission of evidence to the appellate court.⁶³

As To Evidence.—A court may not, by rule, change the law of evidence,⁶⁴ but it may regulate the mode of giving evidence,⁶⁵ and may dispense with proof of matters not denied by affidavit,⁶⁶ or not included in the specification of defense,⁶⁷ or in the absence of a notice to the adverse party to prove them,⁶⁸ and may require an affidavit of defense.⁶⁹

As to Instructions.—The court may adopt a reasonable rule as to the time within which instructions must be presented,⁷⁰ but a hard

time. *Gregson v. Allen*, 85 Ill. 478. See also the title "**Appeals.**"

63. Where the statute prescribes no mode by which it shall be made to appear on appeal what papers were used on the hearing of a motion, the supreme court may prescribe a method by rule in order to make effectual the appeal given by law. *Pieper v. Centinela Land Co.*, 56 Cal. 173.

Providing for the submission and decision of appeals upon an abstract of the record. *Smith v. Guckenheimer & Sons*, 42 Fla. 1, 27 So. 900. See also the title "**Appeals.**"

64. *Mills v. Bank of United States*, 11 Wheat. (U. S.) 431, 6 L. ed. 512; *Roberts v. White*, 32 R. I. 185, 78 Atl. 497.

Cannot control the rights of the parties in matters of evidence, admissible by the general rules of law. *Patterson v. Winn*, 5 Pet. (U. S.) 233, 8 L. ed. 108.

A rule construed as requiring the exclusion of a deed, and of orders of which the court was bound to take judicial notice, for failure of plaintiff to file an abstract of title in an action involving title to realty, was held void. *Pelz v. Bollinger*, 180 Mo. 252, 79 S. W. 146.

65. *Baird v. King*, 31 New Bruns. 189.

Permitting office copies of deeds to be read in evidence without proof of their execution in certain cases. *Sellers v. Carpenter*, 27 Me. 497.

66. *Mills v. Bank of United States*, 11 Wheat. (U. S.) 431, 6 L. ed. 512; *Odenheimer v. Stokes*, 5 Watts & S. (Pa.) 175.

67. That persons filing specifications of the nature and grounds of defense shall be confined to the grounds set forth therein, and shall be deemed to

have admitted all allegations of the writ and declaration not specifically denied. *Fox v. Conway Fire Ins. Co.*, 53 Me. 107; *Day v. Frye*, 41 Me. 326.

68. A rule dispensing with proof by plaintiff of the character and capacity of defendants sued as executors, etc., unless a notice to prove the same accompanied defendant's plea, was held valid, and not to take away any of defendant's rights. *Roberts v. White*, 32 R. I. 185, 78 Atl. 497.

69. *Ill.*—*Koch v. Dickinson*, 152 Ill. App. 413. *Pa.*—*Helffrich v. Greenberg*, 206 Pa. 516, 56 Atl. 45; *Chain v. Hart*, 140 Pa. 374, 21 Atl. 442; *Hogg v. Charlton*, 25 Pa. 200; *Vanatta v. Anderson*, 3 Binn. 417; *Blair v. Ford China Co.*, 26 Pa. Super. 374. *Vt.*—*Jones v. Spear*, 21 Vt. 426. See also the title "**Affidavits of Merits and Defense,**" Vol. I, pp. 643, *et seq.*

70. *U. S.*—*Manhattan Life Ins. Co. v. Francisco*, 17 Wall. 672, 21 L. ed. 698. *Ill.*—*Chicago City R. Co. v. Sandusky*, 198 Ill. 400, 64 N. E. 990, *affirming* 99 Ill. App. 164; *Prindeville v. People*, 42 Ill. 217. *Md.*—*Sparrow v. Grove*, 31 Md. 214. *W. Va.*—*Sterling Organ Co. v. House*, 25 W. Va. 64.

But see *People v. Garbutt*, 17 Mich. 10; *Billings v. McCoy Bros.*, 5 Neb. 187.

A rule requiring a party to submit requested instructions before he rests his case and to cite authorities to support them, on penalty of having them refused, is unreasonable and void as impairing the right to present instructions and have them given if correct and applicable. *Odegard v. North Wisconsin Lumb. Co.*, 130 Wis. 659, 110 N. W. 809.

Proper instructions should not be refused in a criminal case because not presented within the time prescribed

and fast rule limiting the number of instructions has been held to be unreasonable and void.⁷¹

C. FORMAL REQUISITES.—Except that it may be proved to exist by long usage,⁷² a rule cannot rest in parol or in the breast of the court, but must be in writing and entered of record.⁷³ The declaration of a court as to what its decision *in futuro* as to a matter of practice will be does not have the force and effect of a regularly formulated and properly promulgated rule of practice.⁷⁴

D. FORCE AND EFFECT.—Rules have the force and effect of law,⁷⁵

by rule. *People v. Williams*, 32 Cal. 280.

See also the title "Instructions."

71. *Chicago City R. Co. v. Sandusky*, 198 Ill. 400, 64 N. E. 990, *affirming* 99 Ill. App. 164.

See also the title "Instructions."

72. By immemorial usage of the court. *Owens v. Ranstead*, 22 Ill. 161.

Long user and acquiescence, though written rules are to be preferred. *Fulleton v. Bank of United States*, 1 Pet. (U. S.) 604, 7 L. ed. 280.

"Trial courts have certain rules of procedure which are not specified in the statute, or the canons of the common law, and which may not even be spread upon the record of the court," and attorneys practicing in such courts have a right to act and rely on their existence and to believe that the court itself will observe them. *Maloney v. Hunt*, 29 Mo. App. 379.

"It is not essential that any court in establishing or changing its procedure should do so by the adoption of written rules. Its practice may be established by a uniform mode of proceeding, for a series of years, and this forms the law of the court." *Duncan v. United States*, 7 Pet. (U. S.) 435, 8 L. ed. 739. See also *Gardner v. Butler*, 193 Mass. 96, 78 N. E. 855.

73. Must be entered of record. *Roby v. Title Guarantee & Trust Co.*, 166 Ill. 336, 46 N. E. 1110; *Chicago Anderson Pressed Brick Co. v. Sobkowiak*, 148 Ill. 573, 36 N. E. 572; *Owens v. Ranstead*, 22 Ill. 161.

Properly there is no such thing as an oral rule, and such a rule is binding on no one. *McDonald v. State*, 172 Ind. 333, 88 N. E. 673. See also *Gist v. Drakely*, 2 Gill (Md.) 330.

The rules should be spread upon the record, or filed in the clerk's office, but if adopted and published they may perhaps be enforced before the actual

filing. *State v. Ensley*, 10 Iowa 149. See also *Smith v. Lee*, 10 Nev. 203.

74. *Ft. Worth & D. C. R. Co. v. Roberts*, 98 Tex. 42, 81 S. W. 25.

75. U. S.—*Rio Grande Irrigation & Colonization Co. v. Gildersleeve*, 174 U. S. 603, 19 Sup. Ct. 761, 43 L. ed. 1103; *United States v. Barber Lumber Co.*, 169 Fed. 184; *Bryant Bros Co. v. Robinson*, 149 Fed. 321, 79 C. C. A. 259; *American Graphophone Co. v. National Phonograph Co.*, 127 Fed. 349; *Northwestern Mut. Life Ins. Co. v. Keith*, 77 Fed. 374, 23 C. C. A. 196.

Ala.—*Lee v. Raiford*, 54 So. 543; *Butler v. Butler*, 11 Ala. 668. Cal.—*Reclamation Dist. v. Sherman*, 11 Cal. App. 399, 105 Pac. 277. Del.—*In re Du Pont*, 68 Atl. 399. D. C.—*Drew v. Hogan*, 26 App. Cas. 55; *Talty v. District of Columbia*, 20 App. Cas. 489; *District of Columbia v. Roth*, 18 App. Cas. 547.

Ill.—*Gage v. Eddy*, 167 Ill. 102, 47 N. E. 200; *Axtell v. Pulsifer*, 155 Ill. 141, 39 N. E. 612; *Lancaster v. Waukegan & S. W. R. Co.*, 132 Ill. 492, 24 N. E. 629; *Owens v. Ranstead*, 22 Ill. 161; *Royal Neighbors v. Sinon*, 135 Ill. App. 599; *Klinesmith v. Van Bramer*, 104 Ill. App. 384; *Hopper v. Mather*, 104 Ill. App. 309; *Spain v. Thomas*, 49 Ill. App. 249; *Beveridge v. Hewitt*, 8 Ill. App. 467. Ind.—*State v. Van Cleave*, 157 Ind. 603, 62 N. E. 446; *Smith v. State*, 140 Ind. 340, 36 N. E. 708; *Rout v. Ninde*, 111 Ind. 597, 13 N. E. 107; *Martin v. Martin*, 74 Ind. 207; *Advance Veneer & Lumber Co. v. Hornaday* (Ind. App.), 96 N. E. 784.

Ia.—*State v. O'Day*, 68 Iowa 213, 26 N. W. 81; *David v. Aetna Ins. Co.*, 9 Iowa 45. La.—*Walker v. Ducros*, 18 La. Ann. 703. Me.—*Witzler v. Collins*, 70 Me. 290; *Fox v. Conway Fire Ins. Co.*, 53 Me. 107; *Maberry v. Morse*, 43 Me. 176. Md.—*Const. art. 4, §18*.

Northern Central R. Co. v. Rutledge, 48 Md. 262; *Meloy v. Squires*, 42 Md.

and are binding upon litigants,⁷⁶ and upon counsel,⁷⁷ and upon the

378; *Quynn v. Carroll's Admr.*, 22 Md. 288. **Mass.**—*Pratt v. Pratt*, 157 Mass. 503, 32 N. E. 747; *Baker v. Blood*, 123 Mass. 543; *Thompson v. Hatch*, 3 Pick. 512. **Mich.**—*Van Benschoten v. Fales*, 126 Mich. 176, 85 N. W. 476. **Mo.**—*Maloney v. Hunt*, 29 Mo. App. 379. **Mont.** *State v. Foster*, 36 Mont. 278, 92 Pac. 761; *State v. Donlan*, 32 Mont. 256, 80 Pac. 244. **Nev.**—*Haley v. Eureka County Bank*, 20 Nev. 410, 22 Pac. 1098. **N. J.**—*Haulenbeck v. Cronkright*, 23 N. J. Eq. 407; *Ogden v. Robertson*, 15 N. J. L. 124. **N. M.**—*Hendry v. Cartwright*, 14 N. M. 72, 89 Pac. 309; *Rogers v. Richards*, 8 N. M. 658, 47 Pac. 719. **N. Y.**—*Matter of Moore*, 108 N. Y. 280, 15 N. E. 369; *Boyer v. Boyer*, 129 App. Div. 647, 114 N. Y. Supp. 15; *In re Bolte*, 97 App. Div. 551, 90 N. Y. Supp. 499; *Smith v. Warringer*, 41 Misc. 94, 83 N. Y. Supp. 655; *People v. Nichols*, 18 Hun 530. **N. C.**—*Calvert v. Carstarphen*, 133 N. C. 25, 45 S. E. 353; *State v. Edwards*, 110 N. C. 511, 14 S. E. 741. **Ore.**—*Francis v. Mutual Life Ins. Co.*, 114 Pac. 921. **Pa.**—*Green v. Metallic Paint Co.*, 25 Pa. Super. 415. **Tenn.**—*Haralson v. McGavock*, 10 Lea. 719; *Maultsby v. Carty*, 11 Humph. 361. **Tex.**—*Rowe v. Gohlman*, 44 Tex. Civ. App. 315, 98 S. W. 1077. **Vt.**—*Taft v. Taft*, 82 Vt. 64, 71 Atl. 831. **Wis.** *Baker v. State*, 84 Wis. 584, 54 N. W. 1003; *Attorney General v. Lunn*, 2 Wis. 507. **Wyo.**—*Bank of Chadron v. Anderson*, 6 Wyo. 518, 48 Pac. 197; *Spencer v. McMaster*, 3 Wyo. 105, 3 Pac. 798; *Halleck v. Bresnahan*, 3 Wyo. 73, 2 Pac. 537.

"A rule adopted by a court is something more than a rule of the presiding judge; it is a judicial act, and when taken by a court, and entered of record, becomes a law of procedure therein, in all matters to which it relates, until rescinded or modified by the court." *Magnuson v. Billings*, 152 Ind. 177, 52 N. E. 803.

Rules are to be considered as a part of the act pursuant to which they were adopted. *Davies v. Davies*, 10 Irish Eq. 614.

76. **U. S.**—*Bryant Bros. Co. v. Robinson*, 149 Fed. 321, 79 C. C. A. 259. **Conn.**—*Bronson v. Mechanics' Bank*, 83 Conn. 128, 75 Atl. 709. **Fla.**—*Morgan v. Eaton*, 59 Fla. 557, 51 So. 814. **Ill.**

People v. Blades, 104 Ill. 591. **Ind.** *Smith v. State*, 140 Ind. 340, 36 N. E. 708; *Advance Veneer & Lumber Co. v. Hornaday (Ind. App.)*, 96 N. E. 784; *Schrader v. Meyer (Ind. App.)*, 95 N. E. 335; *Reeves & Co. v. Gillette (Ind. App.)*, 94 N. E. 242. **Me.**—*Fox v. Conway Fire Ins. Co.*, 53 Me. 107. **Mont.** *State v. Donlan*, 32 Mont. 256, 80 Pac. 244. **Nev.**—*Lighter v. Ivancovich*, 10 Nev. 41. **Pa.**—*Roush's Estate*, 23 Pa. Super. Ct. 652. **Wis.**—*Attorney General v. Lum*, 2 Wis. 507.

The rules apply to all persons, all cases and all counsel alike, and must be obeyed. *Kolokas v. Missouri Pac. R. Co.*, 223 Mo. 455, 122 S. W. 1082; *Harding v. Bedoll*, 202 Mo. 625, 100 S. W. 638.

A motion not in compliance with the rules may be denied. *Nutter v. Houston*, 42 Mo. App. 363.

Govern right to appeal. *Owens v. Mathews*, 226 Mo. 77, 125 S. W. 1100.

Violation of the equity rules of pleading in the federal courts may be ground for dismissing the bill or for sustaining a demurrer thereto. See *American Graphophone Co. v. National Phonograph Co.*, 127 Fed. 349; *Goebel v. American Railway Supply Co.*, 55 Fed. 825; *City of Carlsbad v. Tibbetts*, 51 Fed. 852.

A substantial compliance with the rules of the supreme court is sufficient. *Smith v. Duff*, 39 Mont. 374, 102 Pac. 981.

Reasonable compliance with the rules is expected and will be insisted on, and dispensation from the consequences of a disregard of them will only be extended where the circumstances furnish adequate cause. *Green v. Elbert*, 137 U. S. 615, 11 Sup. Ct. 188, 34 L. ed. 792.

A mere colorable compliance with a rule is insufficient and will be treated as a failure to observe it. *Horton v. Green*, 104 N. C. 400, 10 S. E. 470; *Witt v. Long*, 93 N. C. 388.

77. **Cal.**—*Reclamation Dist. v. Sherman*, 11 Cal. App. 399, 105 Pac. 277. **Ind.**—*Smith v. State*, 140 Ind. 340, 36 N. E. 708. **Mo.**—*Kolokas v. Missouri Pac. R. Co.*, 223 Mo. 455, 122 S. W. 1082; *Harding v. Bedoll*, 202 Mo. 625, 100 S. W. 638. **Utah.**—*Riddle v. Quinn*, 32 Utah 341, 90 Pac. 893.

court⁷⁸ and its officers.⁷⁹ A rule made pursuant to statutory authority by an appellate court to govern the procedure in inferior courts is binding on the latter,⁸⁰ and rules adopted by a board or convention of judges are binding on the individual judges.⁸¹

A party is bound to know the rules of the court.⁸²

78. **Cal.**—*Hanson v. McCue*, 43 Cal. 178. **Del.**—*In re Du Pont*, 68 Atl. 399. **D. C.**—*Drew v. Hogan*, 26 App. Cas. 55; *Talty v. District of Columbia*, 20 App. Cas. 489; *District of Columbia v. Roth*, 18 App. Cas. 547. **Fla.**—*Morgan v. Eaton*, 59 Fla. 557, 51 So. 814; *Hoodless v. Jernigan*, 51 Fla. 211, 41 So. 194; *Hoodless v. Jernigan*, 46 Fla. 213, 35 So. 656; *Smith v. Guckenheimer & Sons*, 42 Fla. 1, 27 So. 900; *Merchants' Nat. Bank v. Grunthal*, 39 Fla. 388, 22 So. 685. **Ill.**—*Gage v. Eddy*, 167 Ill. 102, 47 N. E. 200; *Lancaster v. Waukegan & S. W. R. Co.*, 132 Ill. 492, 24 N. E. 629; *Royal Neighbors v. Sinon*, 135 Ill. App. 599; *Spain v. Thomas*, 49 Ill. App. 249; *Beveridge v. Hewitt*, 8 Ill. App. 467. **Ind.**—*Magnuson v. Billings*, 152 Ind. 177, 52 N. E. 803; *Martin v. Martin*, 74 Ind. 207; *Advance Veneer & Lumber Co. v. Hornaday* (Ind. App.), 96 N. E. 784; *Dillon v. State*, (Ind. App.), 96 N. E. 171. **La.**—*Walker v. Ducros*, 18 La. Ann. 703. **Me.**—*Fox v. Conway Fire Ins. Co.*, 53 Me. 107; *Maberry v. Morse*, 43 Me. 176. **Md.**—*Northern Central R. Co. v. Rutledge*, 48 Md. 262; *Quynn v. Carroll's Admr.*, 22 Md. 288; *Dunbar v. Conway*, 11 Gill & J. 92. **Mass.**—*Pratt v. Pratt*, 157 Mass. 503, 32 N. E. 747; *Baker v. Blood*, 128 Mass. 543; *Thompson v. Hatch*, 3 Pick. 512. **Mont.**—*State v. Donlan*, 32 Mont. 256, 80 Pac. 244. **N. J.**—*Ogden v. Robertson*, 15 N. J. L. 124. **N. Y.**—*Boyer v. Boyer*, 129 App. Div. 647, 114 N. Y. Supp. 15; *Carpenter v. Pirner*, 107 N. Y. Supp. 875. **Ore.**—*Francis v. Mutual Life Ins. Co.*, 114 Pac. 921; *State v. Birchard*, 35 Ore. 484, 59 Pac. 468; *Coyote, G. & S. M. Co. v. Ruble*, 9 Ore. 121. **Tenn.**—*Maultsby v. Carty*, 11 Humph. 361. **Wis.**—*Attorney General v. Lum*, 2 Wis. 507.

They constitute a law regulating its procedure. *Klinesmith v. Van Bramer*, 104 Ill. App. 384.

The court will hold itself bound by them unless there is something in the conduct of the party insisting on their

enforcement which deprives him of the right. *Davis v. Davis*, 10 Irish Eq. 614.

The court cannot entertain a motion made after the time fixed by its rule. *McRae v. Preston*, 54 Fla. 188, 44 So. 711.

79. **On the Clerk.**—**Fla.**—*Morgan v. Eaton*, 59 Fla. 557, 51 So. 814. **Ill.**—*Gage v. Eddy*, 167 Ill. 102, 47 N. E. 200. **Ind.**—*Manns Bros. Boot & Shoe Co. v. Templeton*, 149 Ind. 706, 44 N. E. 1108. **Wis.**—*Attorney General v. Lum*, 2 Wis. 507.

The clerk cannot file briefs after the time fixed though no penalty is prescribed for a failure so to file. *Morgan v. Eaton*, 59 Fla. 557, 51 So. 814.

The clerk of the district court is bound by the rules of the supreme court in regard to matters of appeal and appellate procedure and must comply therewith. *State v. Foster*, 36 Mont. 278, 92 Pac. 761.

80. **U. S.**—*Rio Grande Irrigation & Colonization Co. v. Gildersleeve*, 174 U. S. 603, 19 Sup. Ct. 761, 43 L. ed. 1103; *Gaines v. Relf*, 15 Pet. 9, 10 L. ed. 642; *Ex parte Whitney*, 13 Pet. 404, 10 L. ed. 221; *Story v. Livingston*, 13 Pet. 359, 10 L. ed. 200. **Ind.**—*Indiana Union Traction Co. v. Heller*, 44 Ind. App. 385, 89 N. E. 419. **N. C.**—*Barnes v. Easton*, 98 N. C. 116, 3 S. E. 744. **Pa.**—*Palethorp v. Palethorp*, 184 Pa. 585, 39 Atl. 489; *Chester Traction Co. v. Philadelphia, W. & B. R. Co.*, 180 Pa. 432, 36 Atl. 916. **Tex.**—*Fidelity & Casualty Co. v. Carter*, 23 Tex. Civ. App. 359, 57 S. W. 315.

A rule was held directory which provided for the preparation and settlement of issues in the lower court. *Wittkowski v. Watkins*, 84 N. C. 456.

81. *Wilson v. State*, 33 Ga. 207, 214; *In re Bolte*, 97 App. Div. 551, 90 N. Y. Supp. 499.

82. *Dusy v. Prudom*, 95 Cal. 646, 30 Pac. 798; *Manufacturers Paper Co. v. Lindblom*, 80 Ill. App. 267.

Absence is no excuse for non-compliance. *Advance Veneer & Lumber*

The United States in a suit brought by it against an individual is bound by the rules of the court to the same extent that an individual would be.⁸³

E. CONSTRUCTION.—Rules are to be construed as statutory provisions would be construed.⁸⁴ They should be fairly⁸⁵ and liberally⁸⁶ construed, with a view of attaining the object sought in their enactment⁸⁷ and of procuring a hearing and decision of the case on the merits,⁸⁸ but not so liberally as to annul them.⁸⁹ They should be given the same construction in all cases.⁹⁰ Mere forms should not be permitted to override substance.⁹¹ Whether the word “may” is to be construed as meaning must or as leaving the matter in discretion depends on the evident intention.⁹²

Co. v. Hornaday (Ind. App.), 96 N. E. 784.

83. It comes into court voluntarily, and not as a sovereign. United States v. Barber Lumb. Co., 169 Fed. 184.

84. Cal.—Hanson v. McCue, 43 Cal. 178. Fla.—Hoodless v. Jernigan, 51 Fla. 211, 41 So. 194; Florida Land Rock Phosphate Co. v. Anderson, 50 Fla. 516, 39 So. 392; Hoodless v. Jernigan, 46 Fla. 213, 35 So. 656; Merchants' Nat. Bank v. Grunthal, 39 Fla. 388, 22 So. 685. Ia.—David v. Aetna Ins. Co., 9 Iowa 45. Wyo.—Phillips v. Brill, 15 Wyo. 521, 90 Pac. 443.

85. Ferguson & Beardsell v. Kays, 21 N. J. L. 431.

“Should be given a reasonable and practical construction, and not one calculated to embarrass suitors . . . by unnecessary restrictions.” Clarendon Land Investment Agency Co. v. McClelland Bros., 86 Tex. 179, 23 S. W. 576, 1100, 22 L. R. A. 105; Wigglesworth v. Uvalde Live Stock Co. (Tex. Civ. App.), 126 S. W. 1180.

86. Ill.—Doppelt v. Blum, 118 Ill. App. 64. Kan.—Dooley v. Foster, 5 Kan. 269. Miss.—Jackson v. Lemler, 83 Miss. 37, 35 So. 306, chancery rules. 87. Dooley v. Foster, 5 Kan. 269; Ferguson & Beardsell v. Kays, 21 N. J. L. 431.

As in the case of statutes, whether they should be strictly or liberally construed depends upon their purpose as well as their terms. Phillips v. Brill, 15 Wyo. 521, 90 Pac. 443.

88. Estate of Nelson, 128 Cal. 242, 60 Pac. 772; Continental Bldg. & Loan Assn. v. Woolff, 11 Cal. App. 677, 106 Pac. 107; Doppelt v. Blum, 118 Ill. App. 64.

“A court should lean in favor of

giving to litigants every reasonable opportunity of presenting their cases on the merits, and rules of procedure should be made to serve their true purpose of expediting and facilitating the disposition of causes according to their merits, rather than to convert them into a means of obstruction.” Flagg v. Puterbaugh, 98 Cal. 134, 32 Pac. 863.

Should not be so construed as to prevent a fair submission of the case to the jury. Billings v. McCoy Bros., 5 Neb. 187.

Rules of the supreme court should not be so construed as to deprive a party of his appeal without any fault on his part, solely because of alleged literary shortcomings on the part of his representatives. Indiana Union Traction Co. v. Heller, 44 Ind. App. 385, 89 N. E. 419.

A rule providing for an extension of time for filing briefs before default was held not to be construed as depriving the court of power to grant such extension after default in the interests of justice and for good cause shown. Phillips v. Brill, 15 Wyo. 521, 90 Pac. 443.

89. Harding v. Bedoll, 202 Mo. 625, 100 S. W. 638.

90. Irrespective of the case, the parties, or their counsel. Kolokas v. Missouri Pac. R. Co., 223 Mo. 455, 122 S. W. 1082; Harding v. Bedoll, 202 Mo. 625, 100 S. W. 638.

91. Ex parte Clyde, 14 S. C. 385.

92. Construed as “must” unless it clearly appears from the context that the power conferred was intended to be discretionary. Northwestern Mut. Life Ins. Co. v. Keith, 77 Fed. 374, 23 C. C. A. 196.

The re-enactment of a rule is deemed an adoption of the construction previously placed upon it.⁹³

A court itself is the best interpreter of its own rules,⁹⁴ and its rulings as to the construction and application thereof will not be disturbed on appeal unless clearly erroneous.⁹⁵ The interpretation of its own rules by an appellate court is conclusive on the inferior courts.⁹⁶

F. OPERATION AND ENFORCEMENT.—1. In General.—The procedure in each of the courts is governed by its own rules, unless, as

In this regard a rule "is not like a statute prescribing a rule to answer the general demands of justice, or conferring an individual right, where the word 'may' must be read as 'shall' in order to effect its purpose." *Gassenheimer v. United States*, 26 App. Cas. (D. C.) 432.

The use of the word "may" instead of "shall" was held to show an intention to leave the matter of the operation of a rule to the discretion of the trial judge. *Gassenheimer v. United States*, 26 App. Cas. (D. C.) 432.

93. *Preston Nat. Bank v. Rohnert*, 137 Mich. 152, 100 N. W. 393.

94. *Mix v. Chandler*, 44 Ill. 174; *American Structural Steel Co. v. Annex Hotel Co.*, 226 Pa. 461, 75 Atl. 669; *Trescott v. Co-operative Building Bank*, 212 Pa. 47, 61 Atl. 478; *Webster v. Monongahela River Consol. Coal & Coke Co.*, 201 Pa. 278, 50 Atl. 964; *Higgins Carpet Co. v. Latimer*, 165 Pa. 617, 30 Atl. 1050; *Laukhuff's Estate*, 39 Pa. Super. 117; *Kunkle's Estate*, 21 Pa. Super. 200.

In construing a rule and determining its scope and purpose, great weight is to be given to the opinion of the court by which it has been promulgated and whose practice it has been intended to regulate. *Simmons v. Morrison*, 13 App. Cas. (D. C.) 161.

The interpretation of rules established by the superior court and a city court by mutual agreement was held to be for the superior court, and its decision in the matter was held to be binding on the city court. *Bibb Land-Lumb. Co. v. Lima Machine Works*, 98 Ga. 279, 25 S. E. 445.

95. *Ga.*—*Roberts v. Kuhrt*, 119 Ga. 704, 46 S. E. 856; *Frost v. Pennington*, 6 Ga. App. 298, 65 S. E. 41. *Ill.* *Stanton v. Kinsey*, 151 Ill. 301, 37 N. E. 871. *Ind.*—*Perdue v. Gill*, 35 Ind. App. 99, 73 N. E. 844. *Ia.*—*Bald-*

win v. St. Louis, K. & N. W. R. Co., 75 Iowa 297, 39 N. W. 507. *Minn.* *Rhodes v. Walsh*, 58 Minn. 196, 59 N. W. 1000. *Mo.*—*St. Louis Mut. Life Ins. Co. v. Board of Assessors*, 56 Mo. 503. *Neb.*—*Hunter v. Union Life Ins. Co.*, 58 Neb. 198, 78 N. W. 516. *N. Y.* *Evans v. Baeker*, 101 N. Y. 289, 4 N. E. 516. *Ore.*—*State v. Birchard*, 35 Ore. 484, 59 Pac. 468. *Pa.*—*Booth v. Wolff Process Leather Co.*, 224 Pa. 583, 73 Atl. 959; *American Structural Steel Co. v. Annex Hotel Co.*, 226 Pa. 461, 75 Atl. 669; *Trescott v. Co-operative Building Bank*, 212 Pa. 47, 61 Atl. 478; *Webster v. Monongahela River Consol. Coal & Coke Co.*, 201 Pa. 278, 50 Atl. 964; *Blair v. Hubartt*, 139 Pa. 96, 21 Atl. 210; *Laukhuff's Estate*, 39 Pa. Super. 117; *Kunkle's Estate*, 21 Pa. Super. 200. *Vt.*—*Jones v. Spear*, 21 Vt. 426.

It is for the appellate court to determine whether its rules have been complied with, and the supreme court will not review its judgment based on non-compliance. *Ohio Oil Co. v. Scott*, 241 Ill. 448, 89 N. E. 665.

The supreme court will not interfere with the enforcement by the trial court of its own rules. *Caples v. Central Pac. R. Co.*, 6 Nev. 265.

The opinions of the lower court as to the construction of the rules of that court, though entitled to great consideration, are nevertheless subject to revision by the supreme court. *Witzler v. Collins*, 70 Me. 290; *Wigglesworth v. Atkins*, 5 Cush. (Mass.) 212; *Rathbone v. Rathbone*, 4 Pick. (Mass.) 89.

"Any error of opinion in respect either to its legal effect (of a rule) or to its application to a particular case, will entitle the party injured to redress by appeal." *Dunbar v. Conway*, 11 Gill & J. (Md.) 92; *Gist v. Drakely*, 2 Gill. (Md.) 330.

96. *Smith v. Warringer*, 41 Misc. 94, 83 N. Y. Supp. 655.

has been herein pointed out, a superior court is given the power to provide rules for inferior courts.⁹⁷

2. Whether Prospective or Retroactive.—Rules should operate prospectively only,⁹⁸ and generally will not be given a retroactive effect,⁹⁹ though they may be where they relate to matters of procedure only.¹

3. Duty To Enforce.—It is not only the right, but the duty of the court to enforce its rules,² uniformly and in all cases,³ and it may do so of its own motion.⁴

It has been held that mandamus will not lie to compel a judge to proceed in conformity with the rules, but that the proper remedy is by appeal.⁵

4. Effect of Violation.—A violation of the rules in the trial

97. *Hunter v. Union Life Ins. Co.*, 58 Neb. 198, 78 N. W. 516.

The rules of the supreme court are binding on the district court in so far as that court has to do with matters of appeal and appellate procedure. *State v. Foster*, 36 Mont. 278, 92 Pac. 761; *Montana Ore Purchasing Co. v. Boston & Montana C. C. & S. M. Co.*, 33 Mont. 400, 84 Pac. 706.

Where a case is appealed to the appellate court when the appeal should have been taken to the supreme court, and is transferred to the latter court, the rules of the supreme court relating to briefs apply, and the appellate court will leave it to the supreme court to decide whether or not they have been complied with. *Hood v. Baker* (Ind. App.), 75 N. E. 603.

Where an appeal taken to the court of appeals should have been taken to the supreme court and was properly transferred to the latter court, it was held that the rules of the latter court governed as to the sufficiency of an abstract of record prepared after such transfer. *Jenkins v. Shannon County*, 226 Mo. 187, 125 S. W. 1100.

98. *Owens v. Ranstead*, 22 Ill. 161; *Reist v. Heilbrenner*, 11 Serg. & R. (Pa.) 131.

99. *The Lottawanna*, 21 Wall. (U. S.) 558, 22 L. ed. 654.

Rules were held not to apply to cases brought to the supreme court prior to the date when they took effect. *Poyntz v. Reynolds*, 37 Fla. 533, 19 So. 649.

A rule providing that a reversal for failure to grant a non-suit or direct a verdict because of a total failure of evidence, or because the evidence could

admit of but one conclusion, shall have the same effect as if a non-suit had been ordered or a verdict returned under direction, will not apply in actions commenced before its adoption. *Lee v. Unkefer*, 85 S. C. 199, 65 S. E. 989, 67 S. E. 246; *German-American Ins. Co. v. Southern R. Co.*, 82 S. C. 1, 62 S. E. 1115; *Wilson v. Virginia-Carolina Chemical Co.*, 78 S. C. 381, 58 S. E. 1019.

1. A rule relating only to procedure and in no way affecting the rights of the parties is applicable to future procedure in the pending litigation. *Laukhuff's Estate*, 39 Pa. Super. 117.

A rule authorizing the enforcement by libel in admiralty of a lien given by a state statute was held to have been properly applied in a case commenced before its adoption where a lien had been acquired under the state law. *Meyer v. Tupper*, 1 Black (U. S.) 522, 17 L. ed. 180.

2. *Egan v. Ohio & M. R. Co.*, 138 Ind. 274, 37 N. E. 1014.

3. *King v. State* (Ind. App.), 93 N. E. 1082; *Lee v. Baird*, 146 N. C. 361, 59 S. E. 876; *Horton v. Green*, 104 N. C. 400, 10 N. E. 470.

The right of the court to suspend or ignore a rule in a particular case is treated *infra*, V, H.

4. *State v. Van Cleave*, 157 Ind. 608, 62 N. E. 446; *Hays v. Foos*, 223 Mo. 421, 122 S. W. 1038.

5. Mandamus will not lie to compel a judge to proceed in conformity with the rules, the proper remedy being by appeal. *Ex parte Whitney*, 13 Pet. (U. S.) 404, 10 L. ed. 221.

court is ground for reversal where injustice results,⁶ but not where the complaining party suffers no prejudice thereby.⁷ It has been held that equity will grant relief to one against whom judgment is rendered because of the violation of a rule on which he relied and which was disregarded by the other party.⁸

A failure to comply with the rules of the appellate court may result in an affirmance *pro forma* or a dismissal of the appeal,⁹ or a denial of the relief sought,¹⁰ or a denial of statutory costs.¹¹

5. Enforcement of Invalid Rule. — Prohibition will lie to prevent the enforcement of a rule in conflict with a statute.¹² The enforcement of an invalid rule will not lead to a reversal where no harm results.¹³

Persons who suffer no special injury different from that of the public generally cannot maintain a proceeding to abrogate a rule.¹⁴

Waiver of Invalidity. — The objection that a rule is in conflict with a statute,¹⁵ or is not applicable to a particular case in which it is sought to be enforced,¹⁶ may be waived.

6. Brennan's Estate, 65 Pa. 16.

7. Magnuson v. Billings, 152 Ind. 177, 52 N. E. 803.

That a court acts contrary to its rules is not ground for reversal unless it is apparent that injustice has been done. Field v. Chicago, D. & V. R. Co., 68 Ill. 367; Mix v. Chandler, 44 Ill. 174; Hunt v. Pronger, 126 Ill. App. 403.

Not where no harm has resulted. Steele v. Wynn, 139 Ill. App. 428.

8. Riddle v. Quinn, 32 Utah 341, 90 Pac. 893.

9. Cal.—Hutton v. Reed, 25 Cal. 478. Ind.—Schrader v. Meyer (Ind. App.), 95 N. E. 335. Wyo.—Johns v. Adams Bros., 2 Wyo. 194.

The appeal will be dismissed for non-compliance with the rules, except in rare instances and where cogent excuse is shown. Lee v. Baird, 146 N. C. 361, 59 S. E. 876.

Filing a brief after a motion has been made to dismiss an appeal for failing to file it within the time prescribed will not prevent the granting of the motion. Murray v. Williamson, 79 Ind. 287. See also the title "Appeals."

10. A petition for a rehearing will be denied *pro forma* where it is framed in violation of the rules. Florida Land Rock Phosphate Co. v. Anderson, 50 Fla. 516, 39 So. 392. See also the title "Appeals."

11. Lehigh Coal & Iron Co. v. Scalten, 61 Minn. 63, 63 N. W. 245.

A subsequent compliance is not sufficient cause for reinstating an appeal dismissed for violation of a rule when no sufficient excuse is shown. Egan v. Ohio & M. R. Co., 138 Ind. 274, 37 N. E. 1014.

12. State v. Withrow, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43. See also the title "Prohibition."

13. Aiken v. State, 58 Ark. 544; Chicago City R. Co. v. Sandusky, 198 Ill. 400, 64 N. E. 990, affirming 99 Ill. App. 164.

14. The proprietors of a newspaper have no right to attack the validity of a rule designating another newspaper as the paper in which certain notices were to be printed by an application to procure its abrogation, they having no fixed and definite interest in the subject-matter, and having suffered no injury different from that of the public generally. Holcomb v. Reporter Journal Pub. Co. (Pa.), 3 Atl. 243.

15. Failure to object is a waiver. Hill's Admr. v. Penn Mut. Life Ins. Co., 120 Ky. 190, 85 S. W. 759.

No presumption of waiver can arise on appeal from failure to object in the court below where there has never been any appearance. Butler v. Butler, 11 Ala. 668.

16. Regardless of whether a rule requiring a party to submit a statement of facts on motion for judgment on a special verdict applied in an equity case, mandamus would not

G. WAIVER AND SUSPENSION.—1. By The Court.—In some jurisdictions it is held that unless, at the time of the adoption of a rule, power is reserved to exercise discretion in particular cases, it must be enforced in all cases alike.¹⁷ In others a contrary doctrine prevails, and the court has power to waive or suspend its own rules, or to except a particular case from their operation, whenever the purposes of justice require it,¹⁸ provided always that no prejudice re-

issue to compel the court to pass on the motion without one, where when the judge requested that such statement be furnished no objection was made. *Purcell v. McKune*, 14 Cal. 231.

17. **Del.**—*In re Du Pont*, 68 Atl. 399. **D. C.**—*Taylor v. Leesnitzer*, 31 App. Cas. 92; *Drew v. Hogan*, 26 App. Cas. 55; *Darlington v. Turner*, 24 App. Cas. 573; *United States v. Clabaugh*, 21 App. Cas. 440; *Talty v. District of Columbia*, 20 App. Cas. 489; *District of Columbia v. Roth*, 18 App. Cas. 547. **Ill.**—*Lancaster v. Waukegan & S. W. R. Co.*, 132 Ill. 492, 24 N. E. 629; *Owens v. Ranstead*, 22 Ill. 161; *Hopper v. Mather*, 104 Ill. App. 309; *Spain v. Thomas*, 49 Ill. App. 249; *Beveridge v. Hewitt*, 8 Ill. App. 467. **Ind.**—*Magnuson v. Billings*, 152 Ind. 177, 52 N. E. 803. **Me.**—*Fox v. Conway Fire Ins. Co.*, 53 Me. 107; *Maberry v. Morse*, 43 Me. 176. **Md.**—*Quynn v. Carroll's Admr.*, 22 Md. 288; *Lovejoy v. Irelan*, 17 Md. 525; *Hughes v. Jackson*, 12 Md. 450; *Gist v. Drakely*, 2 Gill 330; *Wall's Exrs. v. Wall*, 2 H. & G. 79. **Mass.** *Pratt v. Pratt*, 157 Mass. 503, 32 N. E. 747; *Baker v. Blood*, 128 Mass. 543; *Tripp v. Browell*, 2 Gray 402; *Thompson v. Hatch*, 3 Pick. 512. **Nev.**—*Haley v. Eureka County Bank*, 20 Nev. 410, 22 Pac. 1098. **Ore.**—*State v. Birchard*, 35 Ore. 484, 59 Pac. 468; *Coyote, G. & S. M. Co. v. Ruble*, 9 Ore. 121.

Vermont.—In *Taft v. Taft*, 82 Vt. 64, 71 Atl. 831, it is held that while a rule of the supreme court stands it is binding and cannot be altered to suit the circumstances of a particular case, but must be applied to all cases that come within it. On the other hand, in *First Nat. Bank v. Post*, 65 Vt. 222, 25 Atl. 1093; *McNeish v. Hullett Oat Co.*, 57 Vt. 316, and *National Union Bank v. Marsh*, 46 Vt. 443, it is held that trial courts have discretionary power to waive or relax their rules in particular cases.

Not relaxed or suspended to meet

temporary convenience. *Walker v. Ducros*, 18 La. Ann. 703.

"The rules of this court cannot be enforced in one case and ignored in another. They should be either uniformly enforced, or uniformly ignored, so that the profession may not be in uncertainty as to the position of the court." *Chicago, I. & L. R. Co. v. Newkirk* (Ind. App.), 93 N. E. 860.

It is "not so important what the rules are as that the rules, whatever they may be, shall be impartially applied to all, and that changes shall be prospective by amendment to the rules and not retroactive by granting exemption to some which has been denied to others." *Ullery v. Guthrie*, 148 N. C. 417, 62 S. E. 552.

Peculiar circumstances may take a case out of the operation of the rules, but no rule should be suspended without sufficient cause shown. *Smith v. State*, 140 Ind. 340, 36 N. E. 708.

A rule requiring bills of exceptions to be filed within a certain time was held not to require the striking out of a bill filed after that time where it expressly reserved to the court discretionary power to allow an extension. *Francis v. Mutual Life Ins. Co. (Ore.)*, 114 Pac. 921.

18. **U. S.**—*Green v. Elbert*, 137 U.S. 615, 11 Sup. Ct. 183, 34 L. ed. 792; *United States v. Breitling*, 20 How. 252, 15 L. ed. 900; *Manhattan Life Ins. Co. v. Francisco*, 17 Wall. 672, 21 L. ed. 698. **Cal.**—*Symons v. Bunnell*, 20 Pac. 859; *Sullivan v. Wallace*, 73 Cal. 307, 14 Pac. 789; *Chielovich v. Krauss*, 9 Pac. 945; *People v. Williams*, 32 Cal. 280. **Kan.**—*Dolan v. Stone*, 63 Kan. 450, 65 Pac. 641. **Minn.**—*Gillette-Herzog Mfg. Co. v. Ashton*, 55 Minn. 75, 56 N. W. 576; *Nye v. Swan*, 42 Minn. 243, 44 N. W. 9; *Gale v. Seifert*, 39 Minn. 171, 39 N. W. 69; *Sheldon v. Risedorph*, 23 Minn. 518. **Miss.**—*Vicksburg & M. R. Co. v. Ragsdale*, 51 Miss. 447. **Mont.**—*State v. Donlan*, 32 Mont.

sults.¹⁹ Some courts distinguish in this regard between rules which are

256, 80 Pac. 244. **N. H.**—*Sanborn v. Boston & M. R.*, 79 Atl. 642; *Petition of Rindge*, 54 N. H. 106; *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 143, 82 Am. Dec. 201; *Deming v. Foster*, 42 N. H. 165. **Pa.**—*Stamey v. Barkley*, 211 Pa. 313, 60 Atl. 991; *Lance v. Bonnell*, 105 Pa. 46. **Wash.**—*Sylvester v. Olson*, 63 Wash. 285, 115 Pac. 175; *Washington Bank v. Horn*, 24 Wash. 299, 64 Pac. 534. **W. Va.**—*Sterling Organ Co. v. House*, 25 W. Va. 64. **Wis.**—*Loose v. State*, 120 Wis. 115, 97 N. W. 526. **Eng.**—*Downing v. Hodder*, 12 Irish Eq. 371, in case of fraud, surprise, or accident.

It is discretionary with the court whether it will enforce the penalty prescribed for the violation of rules prescribed for its own benefit and convenience, and its action in that regard will not be disturbed on appeal or error in the absence of a gross abuse of discretion. *Missouri, K. & T. R. Co. v. Kidd*, 146 Fed. 499, 77 C. C. A. 13.

Courts should respect their established rules of procedure, and may not arbitrarily ignore them in a particular case without regard to the use of sound judicial discretion. *Martin v. De Loge*, 15 Mont. 343, 39 Pac. 312.

Rule as to time of filing transcript in the supreme court suspended, where, owing to the disqualification of the judges, there was no court competent to hear and decide the case until after it was in fact filed. *Pickett v. Wallace*, 54 Cal. 147.

The chancellor may, where justice requires it, extend the time fixed by a rule (*Meek v. Richardson*, 4 Rich. Eq. 88), but he may not reduce it. *Tindal v. Tindal*, 1 S. C. 111.

Their application may be enlarged in special cases. *Haight v. Gay*, 8 Cal. 297.

In the absence of anything in the record to show what reason controlled the court below in setting aside a rule, it will be presumed on appeal that a proper one existed and was acted upon. *Chielovich v. Krauss* (Cal.), 9 Pac. 945.

The court of appeals has discretionary power to pass on assignments of error though the rules in regard thereto may

not have been strictly and literally followed. *Cammack v. Rogers*, 96 Tex. 457, 73 S. W. 795; *Wigglesworth v. Uvalde Live Stock Co.* (Tex. Civ. App.), 126 S. W. 1180.

"The rules of a court are largely within the discretion of the judges, and while it is expected that they will neither adopt unreasonable rules nor harshly enforce them, yet it is not for an appellate court to say how the discretion of trial judges shall be exercised in making and enforcing rules." *Rubenstein v. Schmuck*, 129 App. Div. 326, 113 N. Y. Supp. 554.

"Being subject to the authority which gives them existence, they are administered in subordination to the rights and equities of suitors. In other words, they are not to be instrumentalities to defeat those rights; but their provisions are always adhered to, when in any neglect of them, rights have accrued which it would be inequitable or unjust to disturb. When, however, a failure to comply with their requirements in any given case, is the result of mistake, haste, or surprise, and positive injury is likely to ensue to a party, courts will not adhere to them simply on account of the rules, at the expense of justice and the just rights of parties." *Magill's Appeal*, 59 Pa. 430. And on this question it is immaterial whether the rule has been adopted under statutory authority or under the inherent powers of the court. *Phillips v. Brill*, 15 Wyo. 521, 90 Pac. 443.

19. The objecting party must make a most clear and satisfactory showing of substantial prejudice. *Loose v. State*, 120 Wis. 115, 97 N. W. 526.

It is an irregularity on the part of the court to permit a case to be set for trial in violation of its own rules, and a reversal will follow if defendant has been prejudiced. *Byrne v. Wood*, 8 Ohio Dec. (Rep.) 760.

If one having reason to rely upon such a rule acts accordingly, and is then manifestly injured by the court's arbitrary disregard of it, the wrong done will be corrected on appeal. *Stamey v. Barkley*, 211 Pa. 313, 60 Atl. 991; *Schrimpton v. Bertolet*, 155 Pa. 638, 26 Atl. 776.

mandatory and those which are merely directory,²⁰ or between those made for the guidance of the court alone and those involving the interests of the opposing parties.²¹

Inferior courts can never suspend the operation of rules adopted for the government of the procedure therein by an appellate court pursuant to statutory authority,²² nor can the court of last resort suspend in a particular case a rule of an inferior court adopted by it pursuant to law.²³

2. By the Parties.—A party may waive compliance with rules made for his benefit,²⁴ or the right to insist on the enforcement of a penalty for noncompliance with a rule.²⁵ Parties cannot, however, without the consent of the court, stipulate for the abrogation of rules prescribed for the convenience and benefit of the court, and which are designed to facilitate the proper discharge of its duties.²⁶

Rules cannot be waived or abrogated by court officers,²⁷ unless made solely for their benefit.²⁸

20. A rule "which is merely directory in its provisions, may be disregarded or obviated by allowing the act required to be performed, to be done *nunc pro tunc*," but the contrary is true where the rule is mandatory. *Matter of Moore*, 108 N. Y. 280, 15 N. E. 369; *Smith v. Warringer*, 41 Misc. 94, 83 N. Y. Supp. 655.

21. Where a rule is not for the guidance of the court alone, but regulates as well the proceedings and involves the interests of opposing parties, the court is bound by its provisions and cannot waive them or dispense with their enforcement in its discretion, there being no claim of accident or mistake. *Witzler v. Collins*, 70 Me. 290.

22. *Rio Grande Irrigation & Colonization Co. v. Gildersleeve*, 174 U. S. 603, 19 Sup. Ct. 761, 43 L. ed. 1103; *Jenkins v. Greenwald*, 13 Fed. Cas. No. 7270; *Green v. Metallic Paint Co.*, 25 Pa. Super. 415.

23. In respect to the preparation and settlement of a bill of exceptions. *Baker v. State*, 84 Wis. 584, 54 N. W. 1003.

A party may waive a rule forbidding the rendition of judgment within two days before the close of the term, and does so by failing to object at the time. *Rowe v. Gohlman*, 44 Tex. Civ. App. 315, 98 S. W. 1077.

24. *Notice*.—*Dwinell v. Larrabee*, 38 Me. 464.

Address of attorney indorsed on

papers. *Evans v. Backer*, 101 N. Y. 289, 4 N. E. 516.

25. May waive the right to move for a dismissal of an appeal for violation of a rule. *Anderson Bldg. L. F. & S. Assn. v. Thompson*, 88 Ind. 405.

When an equity case "is heard without objection by either party, all steps not taken by either, which the other had a right to insist upon for the orderly bringing the cause to a hearing must be considered as waived." *Allen v. Mayor, etc. of N. Y.*, 7 Fed. 483.

Persons acting in bad faith cannot avail themselves of rules. *Talbot v. Keay*, L. R. 8 Eq. Cas. 610.

26. *Cal.*—*Reynolds v. Lawrence*, 15 Cal. 359. *Minn.*—*Lehigh Coal & Iron Co. v. Scallen*, 61 Minn. 63, 63 N. W. 245. *Mo.*—*Hays v. Foos*, 223 Mo. 421, 122 S. W. 1038. *N. Y.*—*Boyer v. Boyer*, 129 App. Div. 647, 114 N. Y. Supp. 15. *Va.*—*Hughes v. Kelley*, 30 S. E. 387. *Wis.*—*Falkenburg v. Gorman*, 71 Wis. 8, 36 N. W. 599. *Wyo.*—*Spencer v. McMaster*, 3 Wyo. 105, 3 Pac. 793.

Time of Filing Briefs.—*Missouri, K. & T. R. Co. v. Kidd*, 146 Fed. 499, 77 C. C. A. 13; *Manns Bros. Boot & Shoe Co. v. Templeton*, 149 Ind. 706, 44 N. E. 1108.

27. *Manns Bros. Boot & Shoe Co. v. Templeton*, 149 Ind. 706, 44 N. E. 1108, as to clerk.

28. A rule requiring a copy of the notice of argument to be filed with the clerk was held to be for the bene-

H. AMENDMENT AND RESCISSION.—Rules may be amended²⁹ or rescinded³⁰ in the manner prescribed by law.

Ordinarily amendments will not be given a retroactive effect.³¹ A rescission of a rule relating strictly to matters of procedure may be made to operate retrospectively.³²

Rules are abrogated by the repeal of the statute conferring authority to adopt them,³³ or by the subsequent passage of an inconsistent law,³⁴ but not by a change in the personnel³⁵ or name³⁶ of the court, nor

fit of the clerk, and to be a matter with which the adverse party had nothing to do provided he had due notice of argument and the cause occupied its proper place on the paper. *Kennedy v. Kennedy*, 18 N. J. L. 51.

29. U. S.—*Rio Grande Irr. & Col. Co. v. Gildersleeve*, 174 U. S. 603, 19 Sup. Ct. 761, 43 L. ed. 1103; *Meyer v. Tupper*, 1 Black 522, 17 L. ed. 180. **Del.**—*In re Du Pont*, 68 Atl. 399. **Fla.** See *Kahn v. Weinlander*, 39 Fla. 210, 22 So. 653. **Mass.**—*Thompson v. Hatch*, 3 Pick. 512.

Recording and Publishing Amendments.—In *Norvell v. McHenry*, 1 Mich. 227, the omission by the clerk to record an amendment to a rule was held to furnish very slight evidence that it was not adopted, in view of the long acquiescence of the court and the bar.

New York Code Civ. Proc. §57, requiring amendments to rules of the court of appeals to be published in the next ensuing volume of the session laws and a copy to be filed in the office of the secretary of state, who must send a printed copy thereof to the clerk of each county, is directory merely, and a failure to comply therewith does not invalidate an amendment. *Maxwell v. Theatrical Mech. Assn.*, 104 N. Y. Supp. 815.

30. U. S.—*Rio Grande Irr. & Col. Co. v. Gildersleeve*, 174 U. S. 603, 19 Sup. Ct. 761, 43 L. ed. 1103. **Del.**—*In re Du Pont*, 68 Atl. 399. **Mass.** *Thompson v. Hatch*, 3 Pick. 512.

Manner of Rescinding.—When power to make rules is conferred on the court, and rules made pursuant thereto are entered of record, they cannot be rescinded or modified by a judge in vacation. *Trieshel v. McGill*, 28 Ill. App. 63.

A rule of court can be abolished by the court alone, and in the same manner in which it is made. An answer in conformity to a rule of court which has

not been abolished of record is sufficient, notwithstanding an oral announcement of a judge to the effect that such answer will be deemed insufficient. *Burlington & M. R. Co. v. Marchand*, 5 Iowa 468.

31. An amendment to the rule governing the printing of the record on appeal was held not to apply to a case tried before such amendment was adopted. *Rawlings v. Neal*, 122 N. C. 173, 29 S. E. 93.

32. *Coffin v. McClure*, 23 Ind. 356.

33. *Jordan v. White*, 20 Minn. 91.

34. *Bishop v. State*, 30 Ala. 34.

A statute requiring six days' notice of motion was held not to abrogate a rule previously adopted requiring eight. *Smith v. Hawley*, 11 S. D. 399, 78 N. W. 355.

Where the constitution provided that rules of practice regulating appeals in the supreme court should apply to appeals and proceedings in the court of appeal until otherwise provided, it was held that a rule fixing the time within which to apply for a rehearing adopted by the court of appeals pursuant to a statute was controlling in that court notwithstanding a subsequent statute fixing a longer time within which to make such applications in the supreme court. *Smith v. Cumberland Tel. & Tel. Co.*, 126 La. 168, 52 So. 255.

35. Rules established by a judge become the rules of the court and continue in force, though he is succeeded in office, until abrogated or rescinded by his successor. *Berthelot v. Hotard*, 117 La. 524, 42 So. 90.

A constitutional amendment increasing the number of judges does not abolish the court as it previously existed or render inoperative a rule previously adopted. *Sterling Organ Co. v. House*, 25 W. Va. 64.

36. Where the constitution created new courts and provided that they

by the conferring of power to make rules on a convention of judges, until such power is actually exercised.³⁷

I. PROOF OF RULES.—A court will take judicial notice of its own rules, but not of those of another court.³⁸ A rule can be proved only by the record,³⁹ except where it rests in custom or usage, in which case it may be established by affidavit of a member of the bar who knows the facts.⁴⁰ It has been held that its absence may be proved by the testimony of the clerk of court,⁴¹ but not by the affidavit of counsel.⁴²

VI. NUMBER OF JUDGES WHO MUST JOIN IN HEARING AND DECISION.—A. NUMBER WHO MUST SIT.—Ordinarily it is not essential that all the judges constituting a court participate in the hearing and decision of a case, but it is sufficient if a quorum does so,⁴³ a quorum being, in contemplation of law, the court.⁴⁴ A quorum must participate, however, in order to constitute a legal court.⁴⁵ Usually a majority of the court constitutes a quorum

should be considered the same as those bearing the same names under the old one, it was held that the rules adopted by the former courts continued in force until rescinded though not formally adopted or agreed to by the judges of the new courts. *Schwing v. Dunlap*, 123 La. 485, 49 So. 134.

37. Where the statute conferring such power contains no mandatory language requiring it to be exercised. *Shane v. McNeill*, 76 Iowa 459, 41 N. W. 166.

38. See the title "Judicial Notice," 7 ENCYCLOPÆDIA OF EVIDENCE, 998.

39. *Davis v. Northwestern E. R. Co.*, 170 Ill. 595, 48 N. W. 1058; *Roby v. Title Guarantee & Trust Co.*, 166 Ill. 336, 46 N. E. 1110; *Hughes v. Humphreys*, 102 Ill. App. 194; *Chicago City R. Co. v. Gregory*, 123 Ill. App. 259.

A recital in a motion as to the practice in another court is insufficient to establish the existence of a rule of said court to that effect. *Altman v. Schoenbeck*, 120 Ill. App. 351.

40. *Maloney v. Hunt*, 29 Mo. App. 379.

41. *Hughes v. Humphreys*, 102 Ill. App. 194.

42. *Hughes v. Humphreys*, 102 Ill. App. 194.

43. *Green County v. Wright*, 127 Ga. 150, 56 S. E. 288; *Deglow v. Kruse*, 57 Ohio St. 434.

44. *Harroun v. Brush Electric Light Co.*, 152 N. Y. 212, 46 N. E. 291; *State v. Bradley*, 67 Vt. 465, 32 Atl. 238.

45. *Green County v. Wright*, 127 Ga. 150, 56 S. E. 288.

Proceedings before less than the required number are a nullity. *People v. Barbour*, 9 Cal. 230; *People v. Ah Chung*, 5 Cal. 103; *Long v. State*, 59 Tex. Crim. 103, 127 S. W. 551.

Where the presiding judge and two justices of the peace are necessary to constitute a court, a judgment rendered by the presiding judge alone is a mere nullity. *Trice v. Crittenden County*, 7 Ark. 159; *Ferguson v. Crittenden County*, 6 Ark. 479.

Where less than a quorum of the judges who heard the argument were present when judgment was rendered, it was held that the judgment would be vacated on motion even at a subsequent term. *Jagger v. Coon*, 5 Mich. 31.

An appeal was heard by three of the four justices constituting the court. Thereafter one of them resigned. Later an appeal was taken from a subsequent order in the same case, and it was stipulated that a motion to dismiss the latter appeal might be considered with the first appeal. The said motion was heard by two of the justices who heard the first appeal and the one who was absent at that time, the successor of the one who resigned being disqualified. It was held that the stipulation was a submission by consent of the main appeal to the court as then constituted, and that a contention that there was no

thereof,⁴⁶ unless a different number is designated by the constitution or the statute.⁴⁷ A constitutional provision that a court shall be composed of a specified number of judges does not preclude the legislature from providing that a less number shall constitute a quorum.⁴⁸

Effect of Disqualification or Absence of Judges or of a Vacancy. — Judges who are disqualified from taking part in the decision of a particular case may sit for the sole purpose of making up a quorum.⁴⁹

quorum authorized to consider the appeal in the main case was untenable. *Mills v. Atlantic Coast Line R. Co.*, 87 S. C. 153, 69 S. E. 91.

A statute required two judges to constitute a quorum. Two judges heard a demurrer to a plea, and both concurred in the opinion that the plea was bad. An opinion was drawn by one and concurred in by the other, and the decision was announced by the former at a time when the latter was ill and unable to be present. It was held that the ruling was made by a quorum, especially where both judges sat at the trial on a subsequent plea of not guilty. *State v. Congdon*, 14 R. I. 458.

46. *Long v. State*, 59 Tex. Crim. 103, 127 S. W. 551.

Two of the three members of the supreme court constitute a quorum and may transact the business of the court though the constitution or statute does not so provide. *Walker v. Rogan*, 1 Wis. 597.

Five of the eight judges of the supreme court constitute a quorum. Pub. Act 1903, No. 250. *Scott v. Sullivan*, 164 Mich. 467, 129 N. W. 864.

Under a constitutional provision that the supreme court should consist of a chief justice and two associate justices, any two of whom shall constitute a quorum, it was held that the chief justice was not an essential element of the court in such a sense that no business could be transacted without him, but that a valid court could be held by the two associate justices, or one of them and a justice *pro hac vice* appointed to take the place of the other one who was disqualified, or the chief justice and one associate justice, and this is equally true though by reason of a vacancy there are only two justices in office. *Aultman & Co. v. Utsey*, 35 S. C. 596, 14 S. E. 351; *Williams v. Bent*, 35 S. C. 150, 14 S. E. 311; *Sullivan v. Speights*, 14 S. C. 358.

47. In the absence of the county judge, any number of the county commissioners less than the whole do not constitute a quorum of the commissioners' court, and cannot make a valid order. *West v. Burke*, 60 Tex. 51.

In *Pollard v. Dwight*, 4 Cranch (U. S.) 421, 2 L. ed. 666, it was held that, under the express provision of the statute, though the federal circuit courts consisted of two judges, one of them might hold such court.

The federal statute (36 Stat. 557) requiring the presence of three judges of a federal court for the hearing of an application for an injunction to enjoin the enforcement of a state statute does not apply to an application for an injunction against the enforcement of a city ordinance. *Sperry & Hutchinson Co. v. City of Tacoma*, 190 Fed. 682.

See the constitutions and statutes of the various states.

48. Though the constitution provided that the court should be composed of eight judges it was held that the legislature might provide that six judges should constitute a quorum. *Oakley v. Aspinwall*, 3 N. Y. 547.

49. Where three out of four justices constitute a quorum, a disqualified justice may sit for the purpose of making a quorum though he cannot act in a particular case. *Nephi Irrigation Co. v. Jenkins*, 8 Utah 452, 32 Pac. 699.

Where two of the three justices were disqualified, and counsel stipulated that the third justice alone should decide the case, it was held that such a decree was not invalidated by the fact that the two disqualified members sat for the purpose of making a quorum merely, they having taken no part in the decision. *Walker v. Rogan*, 1 Wis. 597.

Where a court was composed of three judges, a majority of whom could decide any question, and the statute

As a general rule a vacancy in the court,⁵⁰ or the death, disqualification, or absence of a judge,⁵¹ or his failure to sit,⁵² will not deprive the surviving or remaining judges of the power to hold court and to exercise all the functions of the particular court, provided the number is not thereby reduced below that legally required for the transaction of its business.

A judgment is not invalidated by the casual and temporary absence from the bench during the trial of one of the judges necessary to constitute a duly organized court,⁵³ or by reason of the fact that one of such judges leaves the bench to testify as a witness in the case in which such judgment is rendered.⁵⁴ But the contrary is true where one of such judges is absent from the bench for a material part of the trial,⁵⁵ or leaves the bench after the trial has commenced, and another is substituted for him.⁵⁶

A judgment is not invalidated by reason of the fact that one of the judges hearing and taking part in the decision of the case is not qualified to act,⁵⁷ or leaves the bench in the course of a trial and does

provided that no judge could take part in the decision of any case argued when he was not present and sitting, it was held that a successor of one of the three judges who heard the argument might sit as one of the three judges necessary to compose the court, and that a decision then rendered by the two who heard the argument in which the one who did not hear it took no part was valid. *Corning v. Slosson*, 16 N. Y. 294.

50. If two of three justices constitute a quorum, they are a quorum though there is a vacancy in the office of the third. *Aultman v. Utsey*, 35 S. C. 596, 14 S. E. 351; *Williams v. Bent*, 35 S. C. 150, 14 S. E. 311; *Sullivan v. Speights*, 14 S. C. 358.

51. *Holt v. Maverick*, 86 Tex. 457, 25 S. W. 607; *Givin, Allen & Co. v. O'Daniel*, 85 Tex. 563, 22 S. W. 876; *City of Austin v. Nalle*, 85 Tex. 520, 22 S. W. 668, 960; *Long v. State*, 59 Tex. Crim. 103, 127 S. W. 551.

Where a writ of error was argued before two justices, the third being disqualified, and one of the two died before judgment was rendered, it was held that the surviving justice who heard the argument and the successor of the deceased justice constituted a court competent to decide it. *Hardin v. Lovelace*, 79 Ga. 209, 5 S. E. 493.

Two members of the court of criminal or civil appeals may adjudicate a case where the third member is disqualified. *Holt v. Maverick*, 86 Tex.

457; *Givin, Allen & Co. v. O'Daniel*, 85 Tex. 563, 22 S. W. 876; *City of Austin v. Nalle*, 85 Tex. 520, 22 S. W. 668, 960; *Long v. State*, 59 Tex. Crim. 103, 127 S. W. 551; *San Antonio St. Ry. Co. v. Adams* (Tex. Cix. App.), 25 S. W. 639.

52. Though he is not disqualified. *State v. Bradley*, 67 Vt. 465, 32 Atl. 238.

53. *Tuttle v. People*, 36 N. Y. 431.

54. *People v. Dohring*, 59 N. Y. 374.

55. Three justices were necessary to constitute a valid court, and the trial commenced with four. One absented himself during a material part of the trial, thereby disqualifying himself, and thereafter returned. Subsequently another judge left the court and did not return, and it was held that a conviction obtained under such circumstances was invalid. *People v. Shaw*, 63 N. Y. 36.

56. *Blend v. People*, 41 N. Y. 604. See also *People v. Shaw*, 63 N. Y. 36.

57. A case was heard by four out of five judges, three of whom constituted a quorum, and a disinterested lawyer sat with them by consent of the parties. It was held that a decision concurred in by all four of the regular judges was valid though the opinion was delivered by the lawyer. *Radford Trust Co. v. East Tennessee Lumb. Co.*, 92 Tenn. 126, 21 S. W. 329.

not return,⁵⁸ or because one of the judges hearing the case fails to participate in the decision,⁵⁹ or dies, or is incapacitated or goes out of office before a decision is rendered,⁶⁰ where there is a quorum without him.

B. NUMBER WHO MUST CONCUR IN DECISION.—A concurrence of some specified number,⁶¹ usually a majority of the judges,⁶² or a

58. *People v. White*, 22 Wend. (N. Y.) 167.

Where a constitutional court was in session during the whole of the trial, the fact that two of the four judges who sat at its commencement withdrew before it was finished was held not to invalidate the judgment. *Furman v. Applegate*, 23 N. J. L. 28.

59. Where a case was heard before the full court of four judges, it was held that it might be decided by three of them sitting at a subsequent term, the fourth being absent. *Love v. Smith*, 4 Yerg. (Tenn.) 117.

60. Where a statute provided that six of the eight judges composing a court should constitute a quorum, it was held that four of the seven judges who heard a motion might decide it. *Oakley v. Aspinwall*, 3 N. Y. 547.

In *State v. Lane*, 26 N. C. 434, it was held that where one of the three judges of the supreme court died a judgment by the two survivors was valid.

In *Campbell v. Seaman*, 63 N. Y. 568, it was held that two judges could hold a general term of the supreme court and decide cases argued there and hence that where one of three judges who heard the appeal died before decision the case might be decided by the other two.

Under a statute providing that where two judges sit together, and there is a division of opinion, the opinion of the senior judge shall prevail, the senior judge may decide a case heard by himself and another judge where the latter dies or resigns before decision. *Darelius v. Davis*, 74 Minn. 345, 77 N. W. 214.

61. See the constitutions and statutes of the various states.

The concurrence of three justices of the court of appeal is essential to a decision. Const. art. 6, §4. Where three justices are unable to agree in a habeas corpus proceeding, the writ will be denied. *Ex parte La Due* (Cal. App.), 117 Pac. 586; *Ex parte Osborne*,

13 Cal. App. 735, 110 Pac. 585; *Ex parte Sauer*, 3 Cal. App. 237, 84 Pac. 395; *Ex parte Oates*, 2 Cal. App. xiii, 83 Pac. 261.

Where a concurrence of three members of the supreme court was necessary for a reversal, and only three of the justices who heard a case not yet decided remained on the bench, and they were divided in opinion, a reargument was ordered. *Vlasservitch v. Augusta & A. R. Co.* (S. C.), 64 S. E. 913.

Constitutional Question.—Three judges of the supreme court must concur where the constitutionality of a statute is involved. *Funkhouser v. Spahr*, 102 Va. 306, 46 S. E. 378.

Equal Division.—Where the constitution so provides with regard to the supreme court, and the judges are equally divided in opinion as to whether a judgment should be reversed or affirmed, it becomes the duty of those in favor of a reversal to vote with their associates in affirming the judgment so as to prevent an indefinite delay and a consequent denial of justice. *Santa Rosa City Railroad v. Central Street R. Co.*, 112 Cal. 436, 44 Pac. 733; *Frankel v. Deidesheimer*, 93 Cal. 73, 28 Pac. 794; *Luco v. De Toro*, 83 Cal. 26, 25 Pac. 983; *Nichols v. Lewis* (Fla.), 46 So. 2; *Randall v. L' Engle* (Fla.), 46 So. 2; *Western Union Telegraph Co. v. Merritt*, 58 Fla. 388, 50 So. 621; *State v. McClung*, 47 Fla. 224, 37 So. 51.

Where the constitution requires the concurrence of four justices to pronounce a judgment, an equal division cannot *ipso facto* work an affirmance. *Luco v. De Toro*, 88 Cal. 26, 25 Pac. 983.

Stare Decisis.—Under West Virginia Const. art. 8, §4, a decision is not binding authority in any other case where not concurred in by at least three judges. *Bruff v. Thompson*, 31 W. Va. 16, 6 S. E. 352. See also the title "**Stare Decisis.**"

62. See the constitutions and stat-

majority of a quorum,⁶³ is necessary to render a valid judgment. In

utes of the various states and the following cases: **Ga.**—Johnson v. State, 1 Ga. 271. **La.**—Const., arts. 89, 102; Thomas v. Goodwin, 120 La. 504, 45 So. 406; State v. Summit Lumb. Co., 117 La. 643, 42 So. 195. **N. Y.**—Corn- ing v. Slosson, 16 N. Y. 294. **N. C.** State v. Lane, 26 N. C. 434. **Okl.** Const., art. 7, §3. Grand Lodge A. O. U. W. v. Hobbie, 23 Okla. 479, 100 Pac. 540. **Pa.**—Huntingdon County Line, 8 Pa. Super. 380. **S. C.**—Johnson v. Lewis, 1 Rich. Eq. 390. **Tenn.** Austin v. Harbin, 95 Tenn. 598, 32 S. W. 628.

In the absence of any statutory provision of the subject, no judgment can be rendered except by a majority of the court. Northern R. R. v. Concord R., 50 N. H. 166.

In *Briscoe v. Commonwealth's Bank*, 8 Pet. (U. S.) 118, 8 L. ed. 887, it was held to be the practice of the federal supreme court not, except in cases of absolute necessity, to deliver any judgment in cases where constitutional questions were involved unless a majority of the whole court concurred.

Extraordinary Writ.—The refusal of an *ex parte* application for mandamus (*State v. Summit Lumb. Co.*, 117 La. 643, 42 So. 195), and a provisional order for a remedial writ (*State v. Behan*, 35 La. Ann. 1075), have been held not to be judgments so as to require a concurrence of a majority of the judges.

In a suit involving a principal and a reconventional demand, if three justices concur in rejecting the principal demand, and three concur in rejecting the reconventional demand, there is a concurrence of a majority of the court. *Losecco v. Gregory*, 108 La. 648, 32 So. 985.

Increase in Number of Judges.—If the constitution provides that "the supreme court shall consist of five judges, a majority of whom shall be necessary to form a quorum and pronounce a decision," and that the legislature may increase the number of judges and provide for departments of the court, a statute increasing the number of judges and providing for departments consisting of four justices each, and that "a concurrence of three judges shall be necessary to pronounce a decision in each department,"

is valid, and a concurrence of a majority of all the justices of the whole court is not necessary to a decision. *State v. Gormley* (Wash.), 104 Pac. 620.

Equal Division of Opinion.—Where one of the justices of the appellate court is disqualified, and the others are equally divided, the judgment stands affirmed by operation of law. *Pittsburgh, C., C. & St. L. R. Co. v. Chicago*, 144 Ill. App. 293; *Binder v. Langhorst*, 139 Ill. App. 493; *Chicago, B. & Q. R. Co. v. Camper*, 100 Ill. App. 21; *Allen v. Ashell*, 25 S. D. 405, 126 N. W. 1135.

Decision By Majority as a Precedent. A decision concurred in by a majority of the court is as conclusive upon the point decided as though the decision had been unanimous. *Feige v. Michigan Cent. R. Co.*, 62 Mich. 1, 23 N. W. 685; *McCutcheon v. Homer*, 43 Mich. 483, 5 N. W. 668; *Lewis v. Riggs*, 9 Tex. 164. See the title "**Stare Decisis.**"

Where seven out of eight justices sit in a case, a decision concurred in by four of them establishes the law both for the purposes of that case and for other like cases. *Dolph v. Norton*, 158 Mich. 417, 123 N. W. 13.

63. A majority of a quorum may decide a case provided a quorum is present when the decision is made, although the other members necessary to constitute a quorum do not vote. *McFarland v. Crary*, 6 Wend. (N. Y.) 297.

The concurrence of three of the five judges constituting a quorum of the eight judges composing the supreme court disposes of the case, and judgment may be entered on the opinion of the three. Three may settle the formal decree notwithstanding the removal of two of the concurring justices by death, resignation, or expiration of term. *Scott v. Sullivan*, 164 Mich. 467, 129 N. W. 864.

Where the decision was concurred in by two out of three chancellors who heard the case, it was held that a rehearing would not be granted on the theory that the court was equally divided because the fourth chancellor, who was absent and took no part in the decision, was of the same opinion

some jurisdictions the concurrence of a specified number of those present at the argument is required.⁶⁴

Provision is sometimes made for the appointment of a special judge where the required number do not concur,⁶⁵ or for the calling in of the judges of another court where the judges of an appellate court are unable to agree on a particular question.⁶⁶

In some jurisdictions the defeated party is entitled to a rehearing as of right before the entire bench where a dissenting opinion is filed in a case heard by a quorum of the judges only,⁶⁷ or where less than a specified number of judges concur in the decision.⁶⁸

It is not necessary that the required number concur on the same grounds, provided they all concur in the same judgment.⁶⁹

Change In Number Required.—It has been held that a change in the number required will apply to cases argued and submitted, but not decided, before it takes effect.⁷⁰

C. EFFECT OF AN EQUAL DIVISION OF OPINION.—In the absence of statute or a rule of court, where the court is equally divided on any motion, rule, or order, it can do nothing.⁷¹ No affirmative relief can

as the one who dissented. *Johnson v. Lewis*, 1 Rich Eq. (S. C.) 390.

Under a provision that a majority of all the magistrates of a county might levy a tax, it was held not necessary for a majority of all the magistrates to vote in favor of such tax, but that it was sufficient if a majority of a majority did so. *Steele v. Blanton*, 1 Lea (Tenn.) 514.

64. Under California Const., art. 6, §2; Code Civ. Proc. §45, in the supreme court four of those present at the argument must concur. *Philbrook v. Newman*, 148 Cal. 172, 82 Pac. 772. See the statutes and constitutions of the various states.

Where a case is submitted on briefs without oral argument, all the justices are deemed present at the argument. *Philbrook v. Newman*, 148 Cal. 172, 82 Pac. 772.

65. In Louisiana, in case of disagreement so there cannot be a concurrence of two judges of the court of appeals, the court may appoint a district judge or an attorney to sit in the case. *Colvin v. Johnston*, 104 La. 655, 29 So. 274.

66. In South Carolina where there is a question of constitutional law involved in an original proceeding in the supreme court upon the determination of which the entire court is not agreed the judges of the circuit court will be called to the assistance of the su-

preme court for the purpose of rehearing and determining the case. Const. art. 5, §12. *Carolina, C. & O. R. Co. v. McCown* (S. C.), 66 S. E. 1.

Where the justices of the supreme court "concur in affirming the judgment of the circuit court upon other grounds, it is not necessary to call the circuit judges, though the justices of the latter are not agreed on a constitutional question also involved." *Sturgess v. Atlantic Coast Line R. Co.*, 80 S. C. 167, 60 S. E. 939, 61 S. E. 261.

67. Mich. Pub. Acts, 1903, Act 250; *Scott v. Sullivan*, 164 Mich. 467, 129 N. W. 864. See also the title "Appeals," 2 Stand. Proc. 402, *et seq.*

68. Where a constitutional question is involved and three judges do not agree upon a decision thereof. Va. Const., art. 6, §88; *Funkhouser v. Spahr*, 102 Va. 306, 46 S. E. 378.

69. The grounds of the decision are not the judgment. *Philbrook v. Newman*, 148 Cal. 172, 82 Pac. 772.

Where a majority concur in the result only, the opinion is not controlling in other cases under the principle of *stare decisis*. *Peoples' Bank v. Goodwin*, 81 S. C. 419, 62 S. E. 1100. See the title "Stare Decisis."

70. *Denver & R. G. R. Co. v. Burchard* (Colo.), 86 Pac. 749.

71. *Goddard v. Coffin*, 10 Fed. Cas. No. 5,490; *Northern R. R. v. Concord R. R.*, 50 N. H. 166.

be granted under such circumstances,⁷² and no valid order or judgment can be made.⁷³ If affirmative action is necessary for further progress of the cause, the division operates as a stay of proceedings.⁷⁴ But if the action sought is only to arrest the progress of the cause, then the case proceeds as though the motion or application had never been made.⁷⁵ If the affirmative action sought is to set aside or modify an existing judgment or order, the division operates as a denial of the application, and the judgment or order stands in full force, to be carried into effect by the ordinary means.⁷⁶ The judges may agree that a certain judgment shall be rendered in all such cases for the purpose of putting an end to the litigation.⁷⁷ By statute in some jurisdictions where a case is heard before two judges of a *nisi prius* court, and there is a division of opinion, that of the senior in office prevails and becomes the opinion of the court.⁷⁸

Admission of Evidence. — Where the court is equally divided in opin-

Where the full court is equally divided as to whether an amendment should be allowed, it will express no opinion. *Kemper v. Trustees*, 17 Ohio 293.

Where, in a case submitted to the court without the intervention of a jury, the judges present were equally divided, it was held that the case should have been continued for a new trial. *Irons v. Hussey*, 3 Ind. 158.

Where the supreme court is equally divided on questions certified to it, no instructions can be given to the court below concerning them. *Silliman v. Hudson River Bridge Co.*, 1 Black. (U. S.) 582, 17 L. ed. 81.

72. *Durant v. Essex Co.*, 7 Wall. (U. S.) 107, 19 L. ed. 154; *Goddard v. Coffin*, 10 Fed. Cas. No. 5,490; *Madlem's Appeal*, 103 Pa. 584.

Petition dismissed. *Benson's Estate*, 28 Pa. Co. Ct. 596.

73. *Madlem's Appeal*, 103 Pa. 584; *Proctor's Case*, 12 Coke 118, 77 Eng. Reprint 1393; *Boulton v. Bull*, 2 H. Bl. (Eng.) 463, 500.

A valid final judgment cannot be given where there is an equal division of opinion as to the effect of evidence offered upon issues of fact, and hence a dismissal will be reversed. *Deglow v. Kruse*, 57 Ohio St. 434.

But where defendant's motion for a new trial falls because the judges are equally divided, plaintiff is entitled to judgment on the verdict as of course. *Cahill v. Benn*, 6 Binn. (Pa.) 99.

74. *Durant v. Essex Co.*, 7 Wall.

(U. S.) 107, 19 L. ed. 154; *Goddard v. Coffin*, 10 Fed. Cas. No. 5,490; *Ayers v. Bensley*, 32 Cal. 632.

Where two of the four justices who sat in an equity case were of the opinion that the bill should be dismissed and the other two held a contrary opinion, it was held that the cause remained pending, and that receivers appointed to hold the property pending suit remained in possession. *Northern R. R. v. Concord R.*, 50 N. H. 166.

75. *Ayers v. Bensley*, 32 Cal. 632.

As in the case of a motion for an amendment of the pleadings, or for a continuance. *Goddard v. Coffin*, 10 Fed. Cas. No. 5,490.

76. *Durant v. Essex Co.*, 7 Wall. (U. S.) 107, 19 L. ed. 154.

77. See *State v. Perkins*, 53 N. H. 435, where the court applied the rule that, in case of "an equal division of the court at the law term, in civil cases and misdemeanors, verdicts should generally be sustained on cases reserved, as they would be on bills of exceptions, when the ruling or instruction excepted to was not in fact *pro forma*."

Where the full court are equally divided on the questions presented on a bill of exceptions, the exceptions are overruled. *Shannon v. Shannon*, 10 Allen (Mass.) 249; *Durant v. Essex Co.*, 8 Allen (Mass.) 103.

78. *Dorelius v. Davis*, 74 Minn. 345, 77 N. W. 214; *In re State Bank*, 57 Minn. 361, 59 N. E. 315.

ion on the question of the admissibility of evidence the objection to its admissibility fails, and it is admitted.⁷⁹

Demurrer.—In the case of an equal division as to whether a demurrer should be sustained, it will ordinarily be overruled.⁸⁰

Motions.—Where the court is equally divided as to whether motions should be granted, they stand denied.⁸¹

In Equity.—In a case of a division as to the right to recover in an

79. *Henry v. Ricketts*, 1 Cranch C. C. 545, 11 Fed. Cas. No. 6,385; *State v. Brown*, 2 Marv. (Del.) 380, 36 Atl. 458; *State v. Brown*, 1 Houst. (Del.) 539.

80. *Putnam v. Rees*, 12 Ohio 21.

In such case the demurrer is in effect overruled, that is, it is not allowed; but judgment does not follow as of course, without a rule or order of court. *Goddard v. Coffin*, 10 Fed. Cas. No. 5,490.

The effect of a division, however, depends upon the rules of practice. *Durant v. Essex Co.*, 7 Wall. (U. S.) 107, 19 L. ed. 154.

81. **Mass.**—*Reed v. Davis*, 4 Pick. 216. **N. Y.**—*Lieut. Governor*, 2 Wend. 213. **Pa.**—*Madlem's Appeal*, 103 Pa. 584.

"If a rule be made for a cause to stay until the court be further moved, and the court is divided, there needs no new rule from the court, and the plaintiff without more may enter judgment upon the verdict. But if the case be moved to be put in the paper for argument, or the last rule be a *curia advisare vult*, and the court be divided, there can be no judgment." *Walmsley v. Russel*, 6 Mod. 200, 87 Eng. Reprint 955.

Motion for Judgment.—None can be entered and the case will be dismissed without costs and without prejudice. *Goddard v. Coffin*, 10 Fed. Cas. No. 5,490.

Motion In Arrest of Judgment. *United States v. Worrall*, 2 Dall. (U. S.) 384, 1 L. ed. 426; *State v. Brown*, 2 Marv. (Del.) 380, 36 Atl. 458.

On an equal division on a motion for arrest of judgment, a judgment previously entered under a general rule will stand. *Iveson v. Moore*, 1 Salk. 15, 1 Ld. Raym. 486, 91 Eng. Reprint 16, 91 Eng. Reprint 1224; *Jeveson v. Moor*, 12 Mod. 262, 88 Eng. Reprint 1309; *Chapman v. Lamphire*, 3 Mod. 155, 87 Eng. Reprint 100.

In case of an equal division on a motion to set aside a rule that judgment be arrested *nisi*, the rule stands and no judgment can be entered. *Iveson v. Moore*, 1 Salk. 15, 91 Eng. Reprint 1224, 1 Ld. Raym. 495, 91 Eng. Reprint 16; *Jeveson v. Moor*, 12 Mod. 262, 88 Eng. Reprint 1309.

Motion for New Trial.—**U. S.**—*United States v. Daniel*, 6 Wheat. 542, 5 L. ed. 326; *Goddard v. Coffin*, 10 Fed. Cas. No. 5,490. **N. Y.**—*Foot v. Tracy*, 1 Johns. 46. **Pa.**—*Cahill v. Benn*, 6 Binn. 99.

A rule to show cause why a new trial should not be granted is in effect a motion for a new trial, and is discharged where the judges are equally divided. *Lanning v. London*, 4 Wash. C. C. 332, 14 Fed. Cas. No. 8,075.

To obtain a new trial the burden is on the moving party to satisfy a majority of the court of the sufficiency of the grounds of the motion. *State v. Brown*, 2 Marv. (Del.) 380, 36 Atl. 458.

In the absence of any rule or order on the subject, judgment may not be entered as of course after verdict where the court is equally divided on the motion for a new trial, a motion for judgment being necessary. *Goddard v. Coffin*, 10 Fed. Cas. No. 5,490.

Motion To Set Aside Nonsuit.—In case of an equal division on motion, to set aside a nonsuit, the nonsuit stands. *Dean of Rochester v. Pierce*, 1 Camp. (Eng.) 466.

Motion for a Rehearing.—*Carmichael v. Eberle*, 177 U. S. 63, 20 Sup. Ct. 571, 44 L. ed. 672.

Petition for rehearing. *Ayres v. Bensley*, 32 Cal. 632.

Motion To Dismiss an Appeal.—*Hatton v. Weems*, 12 Gill & J. (Md.) 83.

A motion in the supreme court to file remittiturs of the supreme court of the United States. *Ableman v. Booth*, 11 Wis. 498.

equity case, the bill will ordinarily be dismissed without prejudice and without costs.⁸²

In habeas corpus proceedings, where the court is equally divided in opinion, the writ will be dismissed without prejudice.⁸³

On Appeal.—If the judges of an appellate court are equally divided as to whether an affirmance or reversal should be ordered, an affirmance results.⁸⁴

VII. DECISIONS AND OPINIONS.—A. DEFINITIONS AND DISTINCTIONS.—There is a distinction between a decision and an opinion,⁸⁵ though the two are sometimes used synonymously.⁸⁶

A decision is ordinarily defined as being the judgment of the court,⁸⁷ though strictly it is the basis of the judgment rather than

82. *Silliman v. Hudson River Bridge Co.*, 1 Black. (U. S.) 582, 17 L. ed. 81; *Veazie v. Williams*, 3 Story 611, 28 Fed. Cas. No. 16,907; *Waddle v. Bank of United States*, 2 Ohio 336.

83. *Stockman's Case*, 56 Mich. 218, 22 N. W. 321.

84. See the title "Appeals," 2 Stand. Proc. 476.

"The statement which always accompanies a judgment in such case, that it is rendered by a divided court, is only intended to show that there was a division among the judges upon the questions of law or fact involved, not that there was any disagreement as to the judgment to be entered upon such division. It serves to explain the absence of any opinion in the cause, and prevents the decision from becoming an authority for other cases of like character. But the judgment is as conclusive and binding in every respect upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case." The judgment of affirmance is the judgment of the court. The division of opinion is the reason for such judgment, but the reason forms no part of the judgment. *Durant v. Essex Co.*, 7 Wall. (U. S.) 107, 19 L. ed. 154.

If questions of law are reserved for the consideration of the full court, and the judges are equally divided on a point which involves plaintiff's right to recover, judgment is commonly rendered for the defendant. *Durant v. Essex Co.*, 8 Allen (Mass.) 103.

85. *Cal.*—*Wadleigh v. Phelps*, 149 Cal. 627, 87 Pac. 93; *Montecito Valley Co. v. Santa Barbara*, 144 Cal. 578, 77 Pac. 1113; *Houston v. Williams*, 13

Cal. 24, 73 Am. Dec. 565. *Ind.*—*Craig v. Bennett*, 158 Ind. 9, 62 N. E. 273. *Miss.*—*Adams v. Yazoo & M. V. R. Co.*, 77 Miss. 194, 24 So. 200, 317, 28 So. 956. *Nev.*—*Corbett v. Job*, 5 Nev. 201. *Wash.*—*Russell v. Schade Brew. Co.*, 49 Wash. 362, 95 Pac. 327.

86. *Pierce v. State*, 109 Ind. 535, 10 N. E. 302.

"While it is doubtless more technically accurate to except to the decision of the court, it is equally available to present the question, if the exception be to the opinion." *Pierce v. State*, 109 Ind. 535, 10 N. E. 302.

87. *Cal.*—*Wadleigh v. Phelps*, 149 Cal. 627, 87 Pac. 93; *Montecito Valley Co. v. Santa Barbara*, 144 Cal. 578, 77 Pac. 1113; *Houston v. Williams*, 13 Cal. 24, 73 Am. Dec. 565. *Ind.*—*Craig v. Bennett*, 158 Ind. 9, 62 N. E. 273. *Kan.*—*Board of Education v. State*, 7 Kan. App. 620, 52 Pac. 466, construing Code Civ. Proc. §4403. *Miss.*—*Adams v. Yazoo & M. V. R. Co.*, 77 Miss. 194, 24 So. 200, 317, 28 So. 956, 60 L. R. A. 33. *N. H.*—*Petition of Milford & M. R.*, 68 N. H. 570, 36 Atl. 545. *Ohio.* *Buckeye Pipe Line Co. v. Fee*, 62 Ohio St. 543, 57 N. E. 446. *Wash.* *Russell v. Schade Brew. Co.*, 49 Wash. 362, 95 Pac. 327.

Within New York Const. 1894, art. 6, §9, it embraces orders. *People v. Barker*, 152 N. Y. 417, 46 N. E. 875,

The decision is the announcement by the court of its judgment. *Elder v. Frevert*, 18 Nev. 278, 3 Pac. 237.

The word "judgment" is sufficiently comprehensive to include the decision. *Halbert v. Alford* (Tex.), 16 S. W. 814.

the judgment itself.⁸⁸ The word is generally used in reference to a decision made by a court upon a trial of issues without a jury.⁸⁹

An opinion is a statement of the reasons on which the decision or judgment is based.⁹⁰ A decision is ordinarily entered upon the record immediately on its rendition and can be changed only through a regular application to the court upon a petition for a rehearing or a modification,⁹¹ while an opinion is the property of the judges, and is subject to their revision, correction and modification in any particular until it is finally transcribed in the records.⁹²

88. Embraces findings. *In re Winslow's Estate*, 34 N. Y. Supp. 637. See also *Kleinschmidt v. McAndrews*, 117 U. S. 282, 6 Sup. Ct. 761, 29 L. ed. 905 (construing Mont. St. 1879, §408); *Buckeye Pipe Line Co. v. Fee*, 62 Ohio St. 543, 57 N. E. 446. But see *Elder v. Frevert*, 18 Nev. 278, 3 Pac. 237, construing a statute prescribing the practice on moving for a new trial.

89. *Clement v. Hartzell*, 60 Kan. 317, 56 Pac. 504 (construing the statute relating to new trials); *New York Code Civ. Proc.*, §3343, subd. 5.

Has no application where the trial is by jury. *Gates v. Baltimore & O. S. W. R. Co.*, 154 Ind. 338, 56 N. E. 722; *Wilson v. Vance*, 55 Ind. 394.

A nonsuit in a jury case and an order reversing the judgment entered thereon were held not to be decisions within the meaning of a statute relating to the abatement and survival of personal injury actions. *Corbett v. Twenty-third St. R. Co.*, 114 N. Y. 579, 21 N. E. 1033.

An order of affirmance upon the hearing and trial of the issues was held to be a decision within such statute. *Peetsch v. Quinn*, 6 Misc. 50, 26 N. Y. Supp. 728.

90. *Cal.*—*Wadleigh v. Phelps*, 149 Cal. 627, 87 Pac. 93; *Montecito Valley Co. v. Santa Barbara*, 144 Cal. 578, 77 Pac. 1113; *Houston v. Williams*, 13 Cal. 24, 73 Am. Dec. 565. *Ind.*—*Craig v. Bennett*, 158 Ind. 9, 62 N. E. 273. *Ia.* *Coffey v. Gamble*, 117 Iowa 545, 91 N. W. 813. *Miss.*—*Adams v. Yazoo & M. V. R. Co.*, 77 Miss. 194, 24 So. 200, 317, 28 So. 956. *Nev.*—*Corbett v. Job*, 5 Nev. 201. *Wash.*—*Russell v. Schade Brewing Co.*, 49 Wash. 362, 95 Pac. 327.

"The decree and not the opinion is the instrument through which the court acts." *Martin v. Evans*, 85 Md. 8, 36 Atl. 258, 60 Am. St. Rep. 292, 36

L. R. A. 218, citing *Durant v. Essex Co.*, 7 Wall. (U. S.) 107, 19 L. ed. 154; *Woods v. Fuller*, 61 Md. 457; *State v. Ramsburg*, 43 Md. 325, 333.

An opinion contains the views of the judge in relation to a given subject. *In re Winslow's Estate*, 34 N. Y. Supp. 637.

The formal and authoritative expression of the court's decision should generally be found in the judgment file rather than in the opinion. *Phoenix Ins. Co. v. Carey*, 80 Conn. 426, 68 Atl. 993; *Coughlin v. McElroy*, 72 Conn. 444, 44 Atl. 743.

A memorandum of decision is merely the opinion of the trial judge. *Phoenix Ins. Co. v. Carey*, 80 Conn. 426, 68 Atl. 993; *Styles v. Tyler*, 64 Conn. 432, 30 Atl. 165.

It is no part of the decision. *Kertson v. Great Northern Express Co.*, 72 Minn. 378, 75 N. W. 600.

A written statement of the judge of certain findings of fact and conclusions of law by him, which was not signed by him, or filed, or delivered to the party in whose favor it was made, and on which no order was entered, and concluding with a statement that certain matters did not appear from the evidence, and an order to produce witnesses on such matters, was held not to be a decision, but a mere memorandum which the judge was at liberty to revise or change as he saw fit. *Putnam v. Crombie*, 34 Barb. (N. Y.) 232.

91. *Cal.*—*Houston v. Williams*, 13 Cal. 24. *Ind.*—*Craig v. Bennett*, 158 Ind. 9, 62 N. E. 273. *Miss.*—*Adams v. Yazoo & M. V. R. Co.*, 77 Miss. 194, 24 So. 200, 317, 28 So. 956.

92. *Cal.*—*Wadleigh v. Phelps*, 149 Cal. 627, 87 Pac. 93; *Montecito Valley Co. v. Santa Barbara*, 144 Cal. 578, 77 Pac. 1113; *Houston v. Williams*, 13 Cal. 24. *Ind.*—*Craig v. Bennett*, 158 Ind. 9, 62 N. E. 273. *Miss.*—*Adams v. Ya-*

Decisions⁹³ and opinions⁹⁴ are to be distinguished from the findings, though the word decision is sometimes used in the latter sense.⁹⁵

In case of a conflict between the opinion and the decision, the latter controls.⁹⁶ When not required by law an opinion cannot be used to impeach the judgment entry.⁹⁷

Unanimous Decision.—A decision in which all the judges sitting concur,⁹⁸ or in which there is a concurrence by all the judges composing the court at the time it is rendered, though there is a vacancy,⁹⁹ is a unanimous decision; but the contrary is true where one of the judges sitting does not vote, though all those voting concur.¹

B. RIGHT TO FILE.—Every court has a right to give its reasons for its official action in an opinion filed for that purpose.² A decision filed by a judge who has vacated his office is a nullity and will not support a judgment.³

zoo & M. V. R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956.

It is binding neither upon the parties or the court, and may be changed at any time before the judgment is entered. *Stoll v. Stoll*, 5 Ky. L. Rep. (abstract) 421.

The trial judge may alter, amend, add to, or withdraw his memorandum of decision at least during the pendency of the proceedings. *Boyd, Petitioner*, 199 Mass. 262, 85 N. E. 464.

93. *Petition of Milford & M. R.*, 68 N. H. 570, 36 Atl. 545.

The decision may be rendered after or before the filing of findings, or no findings may be made. *Elder v. Frevert*, 18 Nev. 278, 3 Pac. 237.

94. **U. S.**—*British Queen Min. Co. v. Baker Silver Min. Co.*, 139 U. S. 222, 11 Sup. Ct. 523, 35 L. ed. 147; *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. 51, 19 L. ed. 65. *Pacific Sheet Metal Works v. California Canneries Co.*, 164 Fed. 980, 91 C. C. A. 108; *Kentucky Life & Acc. Ins. Co. v. Hamilton*, 63 Fed. 93, 11 C. C. A. 42. *Cal. Sunrise Land Co. v. Root*, 116 Pac. 72. **Mass.**—*Boyd, Petitioner*, 199 Mass. 262, 85 N. E. 464.

95. The word "decision" in a statute relating to motions for new trials was held to be used in the sense of finding upon the facts, where a case is tried by the court. *Allen v. Adams*, 150 Ind. 409, 50 N. E. 387; *Weaver v. Apple*, 147 Ind. 304, 46 N. E. 642.

The word "findings" as used in a motion for a new trial was held to be equivalent to the word "decision" used in the statute relating to the

grounds on which new trials might be granted. *Cobban v. Hecklen*, 27 Mont. 245, 70 Pac. 805.

96. Formal findings of fact and conclusions of law control. *Wadleigh v. Phelps*, 149 Cal. 627, 87 Pac. 93; *Montecito Valley Co. v. Santa Barbara*, 144 Cal. 578, 77 Pac. 1113.

97. A memorandum or opinion of the trial judge. *Missouri, K. & E. R. Co. v. Holschlag*, 144 Mo. 253, 45 S. W. 1101.

98. Though one does not sit. *Harroun v. Brush Electric Light Co.*, 152 N. Y. 212, 46 N. E. 291.

99. As where all the justices composing the court heard the argument, but one of them died before the case was decided. *McDonnell v. New York Cent. & H. R. R. Co.*, 159 N. Y. 524, 53 N. E. 1127.

1. *Warn v. New York Cent. & H. R. R. Co.*, 163 N. Y. 525, 57 N. E. 742.

2. *Ayers v. United States*, 44 Ct. Cl. 48.

Though the statute does not require it. *Title Guarantee & Trust Co. v. McCulloch*, 108 Md. 48, 69 Atl. 739.

3. Though he had arrived at a conclusion before that time, the statute requiring a written decision. *Cain v. Libby*, 32 Minn. 491, 21 N. W. 739.

A decision rendered by a judge on the day that his term expired and after his successor had qualified was held to be valid in the absence of a showing that said successor had in fact taken possession of the office. *Carli v. Rhener*, 27 Minn. 292, 7 N. W. 139.

C. TIME WITHIN WHICH DECISION MUST BE RENDERED.—Except as limited by constitutional or statutory provisions, the time within which a case shall be decided is discretionary with the court.⁴ It must, however, be decided within a reasonable time.⁵

Where a case is submitted to the court for decision he may take it under advisement to the next or a succeeding term,⁶ but a case may not be held for advisement after decision therein has been recorded,⁷ nor redecided from time to time, at the option of the court.⁸ Rendering a decision before the time fixed by the court may be ground for reversal, where prejudice results.⁹

In some jurisdictions the court is required by law to render its decision within a specified time after the submission of the case.¹⁰ A statutory provision to that effect is subject to the implied qualification that no other disposition is made of the case.¹¹ In some states

4. *Wyatt v. Arnott*, 7 Cal. App. 221, 94 Pac. 86.

5. If a judge prolongs his decision to an unreasonable length of time, so that it may be said his conduct involves an abuse of discretion, he may, through a proper proceeding, be compelled to decide but not in a particular way. If he is influenced by malice, or corruption, or other improper motive he is liable to impeachment, but cannot be held liable in damages at the suit of a private individual. *Wyatt v. Arnott*, 7 Cal. App. 221, 94 Pac. 86.

6. *Tarpenning v. Cannon*, 28 Kan. 665; *Barnes v. Benham*, 13 Okla. 582, 75 Pac. 1130.

7. *Whitford, Bartlett & Co. v. Townsend*, 32 R. I. 392, 79 Atl. 960; *Ashaway Nat. Bank v. Superior Court*, 28 R. I. 355, 67 Atl. 523.

8. *Whitford, Bartlett & Co. v. Townsend*, 32 R. I. 392, 79 Atl. 960; *Ashaway Nat. Bank v. Superior Court*, 28 R. I. 355, 67 Atl. 523.

9. Where the court announced that he would render his decision on a specified day, it was held to be reversible error to render a decision against plaintiff before that day, in his absence and without notice to him, since it deprived him of his right to take a nonsuit at any time before the entry of the finding. *Paepcke-Leicht Lumb Co. v. Barkowsky*, 73 Ill. App. 400.

10. **California.**—Upon trial of questions of fact by the court, its decision must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision. Code Civ. Proc. §632. *McLennan v. Bk. of California*, 87 Cal. 569, 25 Pac. 760.

Idaho.—Upon a trial of a question of fact by the court, he must file his decision within twenty days after the cause is submitted for decision. Rev. Codes, §4406. *McGary v. Steele* (Idaho), 119 Pac. 448.

Montana.—Upon a trial of an issue of fact by the court its decision or findings must be filed within twenty days after the case is submitted. Rev. Codes, §6763. *Toole v. Weirick*, 39 Mont. 357, 102 Pac. 590.

Maryland.—Under Const. art. 4, §15, the court of appeals is required to file a written opinion within three months after argument. *McCall's Ferry P. Co. v. Price*, 108 Md. 96, 69 Atl. 832.

Oklahoma.—The supreme court must render a written opinion in each case within six months after its submission for decision. Const. art. 7, §5. *Grand Lodge A. O. U. W. v. Hobbie*, 23 Okla. 479, 100 Pac. 540.

Utah.—Under Comp. Laws 1888, §3379, on trial of a question of fact by the court, a decision must be rendered within thirty days after submission. *Lynch v. Coviglio*, 17 Utah 106, 53 Pac. 983.

Washington.—Const. art. 4, §20, requires the judges of the superior court to decide cases within 90 days after their submission. *Demaris v. Barker*, 33 Wash. 200, 74 Pac. 362; *West Philadelphia Title & Trust Co. v. Olympia*, 19 Wash. 150, 52 Pac. 1015.

11. Such a statute was held not to preclude a judge, after he had taken an equity case under advisement, from opening the case for further proof, allowing an amendment, or directing a

such provisions have been held to be directory and not mandatory.¹²

Failure to render a decision within the time prescribed does not ordinarily deprive the court of jurisdiction to render one afterwards, or invalidate the decision so rendered,¹³ nor is it ground for a new trial,¹⁴ or for a reargument.¹⁵ It has, however, been held that, where the judges of an appellate court cannot agree within the time prescribed, an appeal will be dismissed.¹⁶ Where the decision is rendered within the time prescribed, the judgment is not invalidated because rendered after the expiration of such time.¹⁷

If a judge fails to file a decision within such time,¹⁸ without sufficient excuse,¹⁹ mandamus may then issue to compel him to file one. In some states a judge is not permitted to draw his salary until he has taken oath that no cause remains undecided in his court that has been submitted to him for decision for more than a specified time.²⁰

D. MANNER OF DECIDING CASES AND PREPARATION AND DELIVERY OF OPINION.—The decision must be the decision of the court as such,²¹

trial of an issue of fact by a jury or referee, etc. *Brinkley v. Brinkley*, 56 N. Y. 192.

12. *Cal.*—*McLennan v. Bank of California*, 87 Cal. 569, 25 Pac. 760; *McQuillan v. Donahue*, 49 Cal. 157. *Md.* *McCall's Ferry Co. v. Price*, 108 Md. 96, 69 Atl. 832. *Minn.*—*Vogle v. Grace*, 5 Minn. 294. *Mont.*—*Toole v. Weirick*, 39 Mont. 359, 102 Pac. 590. *N. Y.* *People v. Dodge*, 5 How. Pr. 47. *Utah.* *Lynch v. Coviglio*, 17 Utah 106, 53 Pac. 983.

Such a statute is directory in the sense that a failure to file a decision within the time prescribed does not invalidate one subsequently rendered (*Idaho Comstock M. & M. Co. v. Lundstrum*, 9 Idaho 257, 74 Pac. 975), but it is mandatory on the judge in the sense that mandamus will issue to compel him to decide a case not decided within the time prescribed (*McGary v. Steele* [Idaho], 119 Pac. 448).

13. *Idaho.*—*Idaho Comstock M. & M. Co. v. Lundstrum*, 9 Idaho 257, 74 Pac. 975. *Mont.*—*Toole v. Weirick*, 39 Mont. 359, 102 Pac. 590. *N. Y.*—*People v. Dodge*, 5 How. Pr. 47. *Utah.* *Lynch v. Coviglio*, 17 Utah 106, 53 Pac. 983. *Wash.*—*Olympic Oil Co. v. Kane*, 56 Wash. 199, 105 Pac. 477; *Demaris v. Barker*, 33 Wash. 200, 74 Pac. 362.

14. *McLennan v. Bk. of California*, 87 Cal. 569, 26 Pac. 760.

15. *McCall's Ferry Co. v. Price*, 108 Md. 96, 69 Atl. 832.

16. *Grand Lodge A. O. U. W. v. Hobbie*, 23 Okla. 479, 100 Pac. 540.

17. Where the decision was given orally and could have been entered at any time. *West Philadelphia Title & Trust Co. v. Olympia*, 19 Wash. 150, 52 Pac. 1015.

18. *McGary v. Steele* (Idaho), 119 Pac. 448; *People v. Dodge*, 5 How. Pr. (N. Y.) 47.

19. Failure of counsel to furnish the trial court with a brief is not a sufficient excuse. *McGary v. Steele* (Idaho), 119 Pac. 448.

20. *California.*—Const., art. 6, §24, provides that no judge of the superior or appellate courts shall be allowed to receive his monthly salary unless he makes affidavit that no cause remains undecided in his court that has been submitted for decision for the period of ninety days.

Failure to observe this provision does not forfeit the judge's right to his office or render him liable to any penalty other than that therein prescribed. *Wyatt v. Arnott*, 7 Cal. App. 221, 94 Pac. 86.

Idaho.—Under Const., art. 5, §17, no district or supreme court justice shall be paid his salary until he takes oath that there is no matter in his hands for decision and not decided, which had been finally submitted for his decision and determination 30 days prior to his taking such oath. *McGary v. Steele* (Idaho), 119 Pac. 448; *Idaho Comstock M. & M. Co. v. Lundstrum*, 9 Idaho 257, 74 Pac. 975.

21. A case was argued orally before a special judge, sitting in place of the

and it is the duty of the judges who hear the argument in a case to consult together in regard to it.²² Properly there cannot be more than one decision in the same action with respect to the same issues tried at the same time.²³

Except where the statute so provides,²⁴ the opinion need not be written by a judge who heard the oral argument.²⁵ Such a statutory requirement may be waived.²⁶

The caption at the beginning of an opinion, when not required by law, is no part of the opinion, and errors therein may be disregarded.²⁷

E. NECESSITY OF OPINIONS IN WRITING.—Unless the constitution or a statute so requires, a court is not bound to give a written opinion, or to state the reasons for its conclusions.²⁸ The constitutions and

chief justice, and two regular justices. "Before the opinion was delivered the special judge retired and the chief justice resumed his seat on the bench." The chief justice then read the opinion, which was concurred in by the two regular justices who heard the argument, and it was held that the decision was the decision of the court and was binding on the parties. *Bowles v. Wood*, 90 Miss. 742, 44 So. 169.

Where the chancellor delivered an opinion, and one of the other two judges also delivered an opinion based on different grounds, but in no way inconsistent with that of the chancellor, and the third judge expressed no opinion, the opinion of the chancellor was regarded as that of the court. *State v. Green*, 1 Penne. (Del.) 63, 39 Atl. 590.

All the decisions of the supreme court are made by the whole court unless the dissent or absence of some one of the judges is noted in the decision. *Vincennes Nat. Bank v. Cockrum*, 64 Ind. 229.

22. *Corning v. Slosson*, 16 N. Y. 294.

23. *Simon v. Burgess*, 130 N. Y. Supp. 642, *modifying*, 127 N. Y. Supp. 147.

Separate answers are filed by the different defendants. *Redwater Land & Canal Co. v. Reed* (S. D.), 128 N. W. 702.

24. See the statutes of the various states. See also *Alabama Western R. Co. v. Talley-Bates Const. Co.*, 162 Ala. 396, 50 So. 341.

25. *Wollman v. Fidelity & Casualty Co.*, 87 Mo. App. 677.

26. In *Alabama Western R. Co. v. Talley-Bates Const. Co.*, 162 Ala. 396, 50 So. 341, it was held that even if a

statute requiring the opinion to be delivered by a justice who heard the oral argument was valid, compliance therewith was waived where counsel acquiesced in the assignment of the case to a judge who had not heard the argument by addressing to him statements of reasons calling for an early decision, with a request for such decision.

27. Erroneous statement as to the court from which the appeal was taken. *Lovelace v. Taylor*, 6 Rob. (La.) 92.

28. *Parker v. Atlantic C. L. R. Co.*, 133 N. C. 335, 45 S. E. 658.

"The practice of giving the reasons in writing for judgments has grown into use in modern times. Formerly, the reasons, if any were given, were generally stated orally by the judges, and taken down by the reporters in shorthand. (1 Blackstone, 71.) In the judicial records of the king's courts, 'the reasons or causes of the judgment,' says Lord Coke, 'are not expressed, for wise and learned men do, before they judge, labor to reach to the depth of all the reasons of the case in question, but in their judgments express not any; and, in truth, if judges should set down the reasons and causes of their judgments within every record, that immense labor should withdraw them from the necessary services of the commonwealth, and their records should grow to be like *Elephantini Libri*, of infinite length, and, in mine opinion, lose somewhat of their present authority and reverence; and this is also worthy for learned and grave men to imitate' (Coke's Rep., Part 3, Pref. 5.)" *Houston v. Williams*, 13 Cal. 24.

The trial judge is not required to file a written opinion. *Phoenix Ins. Co. v. Carey*, 80 Conn. 426, 68 Atl. 993;

statutes of many states, however, require certain courts to file written opinions in all cases,²⁹ or under certain specified circumstances,³⁰

Styles v. Tyler, 64 Conn. 432, 30 Atl. 165.

Is optional with him whether he will file one, and if so, when. *Missouri, K. & E. R. Co. v. Holschlag*, 144 Mo. 253, 45 S. W. 1101.

An opinion need not be filed on reversal of a judgment of the county court by the circuit court, and is wholly unnecessary where there is an affirmation. *United States Exp. Co. v. Meintz*, 72 Ill. 293.

An appeal to the circuit court from the county court being regarded as an original cause in the circuit court, the statute requiring written opinions does not apply. *Randolph County v. Ralls*, 18 Ill. 29.

There is no law requiring a written opinion in an equity case. *Brady v. Edwards*, 35 Misc. 435, 71 N. Y. Supp. 972.

Not necessary on dismissal of the complaint upon a point of law. *Toner v. Mayor, etc.*, 1 Abb. N. C. (N. Y.) 302.

In **Pennsylvania** it is held that on sustaining exceptions to an auditor's or master's report the court of common pleas should file an opinion stating its reasons for so doing. *Rankin v. Rankin*, 224 Pa. 514, 73 Atl. 920; *Furth v. Stahl*, 205 Pa. 439, 55 Atl. 29; *Williams v. Concord Cong. Church*, 193 Pa. 120, 44 Atl. 272.

In discharging a rule for judgment for want of a sufficient affidavit of defense the court of common pleas should file an opinion setting forth its reasons for its conclusion, especially where the construction of a statute and rule of court is involved. *Sulzner v. Cappeau, Lemley & Miller Co.*, 223 Pa. 87, 72 Atl. 270. He should file an opinion on entering a judgment *non obstante veredicto*. *Hunt v. Philadelphia & R. Co.*, 224 Pa. 604, 73 Atl. 968.

29. See the constitutions and statutes of the various states and the following cases: **Ill.**—*Hurd's St.*, 1908, c. 37, p. 34; *Ohio Oil Co. v. Scott*, 241 Ill. 448, 89 N. E. 665; *Chicago City R. Co. v. Mead*, 206 Ill. 174, 69 N. E. 19. **Md.**—*Court of Appeals, Const.*, art. 4, §15; *McCall's Ferry Co. v. Price*, 108 Md. 96, 69 Atl. 832. **Minn.**—*Brackett v. Rich*, 23 Minn. 485. **Mo.**—*Rev. St.*,

1899, §2309; *Merriam v. St. Louis, C. G. & Ft. S. R. Co.*, 126 Mo. 445, 29 S. W. 152.

30. **On Demurrer.**—Is required to file a memorandum of decision in rendering a decision on demurrer. *Phoenix Ins. Co. v. Carey*, 80 Conn. 426, 68 Atl. 993.

Where a Case Is Tried Before the Court Without a Jury.—**Cal.**—*Code Civ. Proc.*, §632. **Mich.**—*Delashman v. Berry*, 20 Mich. 292. **N. Y.**—*Code Civ. Proc.*, §1010; *Bascombe v. Marshall*, 129 App. Div. 518, 113 N. Y. Supp. 993; *Wise v. Cohen*, 99 N. Y. Supp. 663. **N. D.**—*Garr, Scott & Co. v. Spaulding*, 2 N. D. 414, 51 N. W. 867. **R. I.** *Ct. & Pr. Act*, §303; *Ashaway Nat. Bank v. Superior Court*, 28 R. I. 355, 67 Atl. 523. **Wash.**—*Bal. Code*, §5029; *Russell v. Schade Brew. Co.*, 49 Wash. 363, 95 Pac. 327.

Courts of Equity.—*Code Pub. Gen. Laws 1904*, art. 16, §168. The statute does not apply to Baltimore City. *Title Guarantee & Trust Co. v. McCulloh*, 108 Md. 48, 69 Atl. 434.

Cases Remanded for New Trial.—A statute requiring a written opinion in all cases reversed and remanded for a new trial was held not to require one in a case reversed and remanded with instructions to the court below to enter a specified judgment. *Arhelger v. Mutual Life Ins. Co.*, 6 Ariz. 245, 56 Pac. 720.

Indiana.—*Const. art. 7, §5*, requiring written opinions by the supreme court does not apply to the court of appeals. The latter court is only required to give a written opinion on reversing the judgment of the lower court, and not when it is affirmed, the matter in the latter case being left to its discretion. *Burns 1901*, §1337q; *Craig v. Bennett*, 158 Ind. 9, 62 N. E. 273; *Indianapolis & N. W. T. Co. v. Newby*, 45 Ind. App. 540, 91 N. E. 36, 90 N. E. 29; *Cleveland, C. C. & St. L. R. Co. v. Van Natta*, 44 Ind. App. 608, 88 N. E. 716, 87 N. E. 999.

Nor is it required to give a written opinion on dismissal of an appeal. *Faulkner v. Baltimore & O. S. W. R. Co.*, 44 Ind. App. 441, 89 N. E. 511.

Texas.—In cases in which the jurisdiction of the court of civil appeals

stating the grounds of the decision,³¹ or to decide every point in every case and to give reasons therefor in writing.³² Such a provision is prospective, and does not apply to cases arising before its adoption.³³

In some jurisdictions it has been held that the legislature has no authority to pass such statutes, and that they are invalid as an encroachment on the power of the judicial department of the government.³⁴ In others such provisions are held to be directory merely,³⁵ and compliance therewith is not regarded as jurisdictional.³⁶

Such provisions are to be reasonably construed,³⁷ and are generally held to refer only to such questions as are necessary to a decision and are properly presented,³⁸ and which have not been previously

is final, it is not required to write and file its conclusions of fact and law (*Markus v. Thompson*, 51 Tex. Civ. App. 239, 111 S. W. 1074); or to file a written opinion (*Wright v. Hooker*, 55 Tex. Civ. App. 47, 118 S. W. 765), and it will not ordinarily file an opinion in such case where it affirms the judgment below. *Roberts v. Arlington Realty Co.* (Tex. Civ. App.), 128 S. W. 159; *Needham v. Hickey* (Tex. Civ. App.), 61 S. W. 433; *Delauney v. Beaumont Irr. Co.*, 38 Tex. Civ. App. 225, 85 S. W. 438.

Sufficiency of Opinion.—A mere opinion ending with the declaration that "the plaintiffs are entitled to judgment for" a specified sum (*Hall v. Beston*, 13 App. Div. 116, 43 N. Y. Supp. 304), or with the words "Judgment for the defendants, with costs" (*Reynolds v. Aetna Life Ins. Co.*, 6 App. Div. 254, 39 N. Y. Supp. 885), or "Judgment is granted accordingly, with costs." (*Kent v. Common Council*, 90 App. Div. 553, 86 N. Y. Supp. 411), or "Judgment of foreclosure and sale, with deficiency judgment." (*Osborne v. Hayward*, 57 N. Y. Supp. 542), or "Final judgment may be granted as against the plaintiff, with costs." (*Burnham v. Demke*, 54 App. Div. 132, 66 N. Y. Supp. 396), is not such a decision as is required by N. Y. Code Civ. Proc., §1022, in cases tried by the court without a jury. An order for judgment is sufficient. *Eaton v. Wells*, 82 N. Y. 576.

31. **Utah.**—*State v. Donaldson*, 35 Utah 96, 99 Pac. 447. **Wash.**—*State ex rel. Arnold v. Mitchell*, 55 Wash. 513, 104 Pac. 791.

See also the constitutions and statutes of the various states.

The refusal of an *ex parte* application for a mandamus is not a judg-

ment within a provision requiring judgments to be accompanied by the reasons on which they are based. *State v. Summit Lumb. Co.*, 117 La. 643, 42 So. 195.

32. A written opinion upon every point arising in the record in every case. *Judah v. Trustees of Vincennes University*, 23 Ind. 272; *Willets v. Ridgway*, 9 Ind. 367.

Need not state its reasons for overruling exceptions not distinctly stated. *Garrett v. Weinberg*, 59 S. C. 162, 37 S. E. 51, construing Const. art. 5, §8.

33. *Hand v. Taylor*, 4 Ind. 409.

34. *Vaughn v. Harp*, 49 Ark. 160; *Houston v. Williams*, 13 Cal. 24.

35. **Cal.**—*McQuillan v. Donahue*, 49 Cal. 157. **Ind.**—*Willets v. Ridgway*, 9 Ind. 367. **W. Va.**—*Horner v. Annick*, 64 W. Va. 172, 61 S. E. 40.

Does not affect the doctrine of *res adjudicata*. *Hall & Smith v. Bank of Virginia*, 15 W. Va. 323; *Henry v. Davis*, 13 W. Va. 230.

36. Requiring a written opinion in all cases reversed and remanded. *Arhelger v. Mutual Life Ins. Co.*, 6 Ariz. 245, 56 Pac. 720.

37. *McCall's Ferry Co. v. Price*, 108 Md. 96, 69 Atl. 832; *Horner v. Annick*, 64 W. Va. 172, 61 S. E. 40.

38. Will be held to refer only to questions the decision of which is necessary to the determination of the cause, and presented by the record with a fullness and distinctness rendering it possible for the court to comprehend it in all its bearings. *Trayser v. Trustees*, 39 Ind. 556; *Willets v. Ridgway*, 9 Ind. 367; *Baker v. Kerr*, 13 Iowa 384.

Where it is determined that, for a particular reason, the court erred in denying a new trial, the other reasons for a new trial embraced in the motion

decided.³⁹ Statutes in some states specifically provide that no opinion need be filed where the court deems one unnecessary.⁴⁰

There can be no opinion by the court on an affirmance because of an equal division of opinion.⁴¹

Where the statute requires a written decision, there is no determination of the case until a written decision is filed, though the court or judge has arrived at a conclusion in the premises.⁴² Until then it is subject to revision,⁴³ and even an oral opinion or statement as to the intended disposition of the case is not conclusive on the court, and does not preclude it from thereafter making a different written one.⁴⁴

State statutes requiring written opinions are not binding on the federal courts.⁴⁵

Waiver.—Statutory provisions requiring written decisions may be waived.⁴⁶

will not be considered, the reasons relied on for a new trial not being questions in the record, but arguments upon the question, to be considered so far as may be necessary to decide it. *Judah v. Trustees*, 23 Ind. 272.

Where a case is necessarily reversed for one or more errors and remanded for a new trial, points made upon the first trial but which may not arise upon the record, or which were not so distinctly and satisfactorily presented by the record as they might be after another trial will be considered as not necessarily and properly arising upon the record, and will be passed. *Willetts v. Ridgway*, 9 Ind. 367.

The court is not required to make a statement of the questions presented by the different paragraphs of the complaint and render a decision thereon, where its sufficiency was not questioned below or on appeal. *Bowen v. Stewart*, 128 Ind. 507, 26 N. E. 168, 28 N. E. 73.

39. *Horner v. Annick*, 64 W. Va. 172, 61 S. E. 40.

The statute requiring written opinions by the supreme court was held not to require the court, when it has reached a conclusion with which it is satisfied, upon any question affecting a class of cases, to answer, at length, and expose what it deems a fallacy in every subsequent argument directed to the inaccuracy of such conclusion. *Speight v. People*, 87 Ill. 595.

40. *Iowa*.—Where the facts are not in dispute and there are no questions that render an opinion necessary, none

need be filed. Code, §198. *Clay, Robinson & Co. v. Maynard Sav. Bank*, 104 Iowa 748, 73 N. W. 884.

Kansas.—A full opinion and syllabus are only required when the decisions will add something to the jurisprudence of the state and are deemed to be of sufficient value for publication. Laws 1895, c. 96, §16. *Anderson v. Connecticut Mut. Life Ins. Co.*, 55 Kan. 81, 39 Pac. 1038; *Metzler v. Wenzel*, 6 Kan. App. 921 49 Pac. 750.

North Carolina.—Acts 1893, c. 379. As where the law applicable was fully discussed in the opinion on a former appeal. *Bradsher v. Cheek*, 112 N. C. 838, 17 S. E. 533.

41. Will affirm without opinion. *Hertz v. Woodman*, 218 U. S. 205, 30 Sup. Ct. 621, 54 L. ed. 1001.

Even though the constitution or statute requires one in all cases. *Louisville & N. R. Co. v. Sharp*, 91 Ky. 411, 16 S. W. 86; *Johns v. Johns*, 20 Md. 58; *Goverman v. Spencer*, 7 Md. 214.

42. *Cain v. Libby*, 32 Minn. 491, 21 N. W. 739; *Carli v. Rhener*, 27 Minn. 292, 7 N. W. 139.

43. *Cain v. Libby*, 32 Minn. 491, 21 N. W. 739.

44. *Bascombe v. Marshall*, 129 App. Div. 518, 113 N. Y. Supp. 993; *Russell v. Schade Brew. Co.*, 49 Wash. 362, 95 Pac. 327.

45. *Martindale v. Waas*, 11 Fed. 551.

46. By failure to object. *Sands v. Church*, 6 N. Y. 347.

Where no written decision appears in the record on appeal as part of the judgment roll, it will be presumed

F. QUESTIONS DISCUSSED.—As a rule an appellate court will not discuss questions previously decided,⁴⁷ or contentions that are clearly without merit,⁴⁸ or set out and discuss the evidence *in extenso* in ruling on its sufficiency.⁴⁹

G. HEADNOTES AND SYLLABI.—In some jurisdictions it is held that the legislature has no power to require the judges to prepare syllabi of the opinions of the court.⁵⁰

Where prepared by the court, the syllabus is limited to points of law determined,⁵¹ and none is necessary in a case involving only questions of fact.⁵²

A headnote is not the law except in so far as it is warranted by the judgment of the court upon the facts of the case.⁵³

H. OPINION AS PART OF THE RECORD, AND RIGHT TO CONSIDER IT

to have been waived. *Garr, Scott & Co. v. Spaulding*, 2 N. D. 414, 51 N. W. 867.

47. *Ill.*—*Speight v. People*, 87 Ill. 595. *Neb.*—*Stevens v. State*, 56 Neb. 556, 76 N. W. 1055. *W. Va.*—*Horner v. Annick*, 64 W. Va. 172, 61 S. E. 40.

A *per curiam* opinion will imply that the law is so well settled that argument and elucidation are not necessary. *Letzkus v. Butler*, 69 Pa. 277.

See also *supra*, VII, F.

48. *Holmes v. State*, 87 Neb. 710, 127 N. W. 1067; *State v. Donaldson*, 35 Utah 96, 99 Pac. 447.

Where it is quite evident that the facts pleaded do not constitute a defense, a judgment sustaining a demurrer will be affirmed without discussion. *Jones v. United States*, 18 Wall. (U. S.) 662, 21 L. ed. 867.

49. *U. S.*—*Hoyt's Admr. v. Hanbury*, 128 U. S. 584, 9 Sup. Ct. 176, 32 L. ed. 565; *Harrell v. Beall*, 17 Wall. 590, 21 L. ed. 692. *Md.*—*McCabe v. Brosenne*, 107 Md. 490, 69 Atl. 259; *Hiss v. Weils*, 78 Md. 439, 28 Atl. 400; *Stirling v. Stirling*, 64 Md. 138, 21 Atl. 273. *Neb.*—*Holmes v. State*, 87 Neb. 710, 127 N. W. 1067; *Draper v. Osterman*, 87 Neb. 436, 127 N. W. 376.

It is sufficient if the opinion fairly reflects all the material evidence in the record. *Burrowes v. Chicago, B. & Q. R. Co.*, 87 Neb. 142, 126 N. W. 1084.

Ordinarily where the only question raised on appeal is whether the findings of fact are against the clear preponderance of the evidence and that question must be answered in the nega-

tive, the filing of a decision in writing in strict compliance with Stat. 1898, §2410, is all that is required or advisable, and the evidence will not be discussed for the purpose of justifying the conclusion arrived at. *Kraniger v. Schmidt*, 121 Wis. 82, 98 N. W. 929.

A statement and discussion of the facts in a chancery case will be omitted where they would be of no benefit as a guide in future cases. *Schloss v. Solomon*, 97 Mich. 526, 56 N. W. 753.

Where the supreme court finds that the verdict is not supported by the evidence, it is important that the opinion shall demonstrate that the verdict is palpably wrong, but where it finds that the verdict is supported it will not recite and discuss the facts on which it is based. *Sweet v. West Chicago Park Comrs.*, 177 Ill. 492, 53 N. E. 74.

50. *In re Head-Notes, etc.*, 43 Mich. 641, 8 N. W. 552.

Such work is essentially and intrinsically ministerial, and a part of the reporter's work, particularly where the constitution prohibits the judges from reporting decisions. *Ex parte Griffiths*, 118 Ind. 83, 20 N. E. 513.

51. Adjudications of facts are not required to be made points in the syllabus. *Koonce v. Doolittle*, 48 W. Va. 592, 37 S. E. 644.

52. No syllabus of law will be made in such case. *Feamster v. Feamster*, 51 W. Va. 506, 41 S. E. 910.

53. Though written by the judge writing the opinion. *Denham v. Holman*, 26 Ga. 182.

ON APPEAL.—An opinion forms no part of the common law record, or record proper,⁵⁴ unless the statute so provides.⁵⁵

A party cannot appeal from the opinion of the court,⁵⁶ or from a decision as distinguished from the judgment.⁵⁷

Error cannot be assigned upon an opinion,⁵⁸ nor may it be looked

54. **U. S.**—*Rector v. Ashley*, 6 Wall. 142, 18 L. ed. 733; *Medberry v. State*, 24 How. 413, 16 L. ed. 739; *Davis v. Packard*, 6 Pet. 41, 8 L. ed. 312; *Williams v. Norris*, 12 Wheat. 117, 6 L. ed. 571. **Cal.**—*Sunrise Land Co. v. Root*, 116 Pac. 72; *In re Hites Estate*, 155 Cal. 448, 101 Pac. 448; *Spencer v. McCament*, 7 Cal. App. 84, 93 Pac. 682; *Higgins v. Los Angeles R. Co.*, 5 Cal. App. 748, 91 Pac. 344. **Conn.**—*Phoenix Ins. Co. v. Carey*, 80 Conn. 426, 68 Atl. 993; *Styles v. Tyler*, 64 Conn. 432, 30 Atl. 165. **Mass.**—*Abbott v. Walker*, 204 Mass. 71, 90 N. E. 405; *Boyd, Petitioner*, 199 Mass. 262, 85 N. E. 464. **Minn.**—*Kertson v. Great Northern Exp. Co.*, 72 Minn. 378, 75 N. W. 600. **Mo.**—*Taylor v. Scherpe & Koken Arch. Co.*, 47 Mo. App. 257. **Mont.**—*Winnicott v. Orman*, 39 Mont. 339, 102 Pac. 570; *Menard v. Montana Cent. R. Co.*, 22 Mont. 340, 56 Pac. 592. **N. Y.**—*Randall v. New York El. R. Co.*, 149 N. Y. 211, 43 N. E. 540; *Koehler v. Hughes*, 148 N. Y. 507, 42 N. E. 1051; *Harde v. Purdy*, 114 N. Y. Supp. 814; *Price v. Western Distillery Co.*, 114 N. Y. Supp. 714; *Berlin v. Weir*, 108 N. Y. Supp. 1063.

Though a rule requires a copy of it to be annexed to and transmitted with the record. *England v. Gebhardt*, 112 U. S. 502, 5 Sup. Ct. 287, 28 L. ed. 811.

Is no part of the judgment roll, though Comp. Laws, §3435, requires a certified copy thereof to be transmitted to the supreme court. *Werner v. Babcock (Nev.)*, 116 Pac. 357.

The recital of facts in the opinion filed by the court of quarter sessions in desertion proceedings does not bring them upon the record for purposes of review on certiorari. *Com. v. Smith*, 200 Pa. 363, 49 Atl. 981; *Com. v. Brownell*, 35 Pa. Super. 249.

A recital in the judgment entry that the court delivered a written opinion does not make such opinion a part of such entry, nor does it become a part of the record on appeal though included in the transcript under a rule

of court, there being no minute entry making it a part of the record. *Kentucky Life & Acc. Ins. Co. v. Hamilton*, 63 Fed. 93, 11 C. C. A. 42.

The mere act of filing it does not make it a part of the record. It must be spread upon the records to make it so. *Hewitt v. Steele*, 118 Mo. 463, 24 S. E. 440.

See also the title "Appeals," VII, B, 3, H, Vol. 2, Stand. Proc. 339, note 74.

55. As, for example, the opinions of the supreme court of Illinois, in view of the statute requiring them to be spread at large upon the records of the court. *Gross v. United States Mortgage Co.*, 108 U. S. 477, 2 Sup. Ct. 940, 27 L. ed. 795.

So also in Louisiana. *Grand Gulf R. Co. v. Marshall*, 12 How. (U. S.) 165, 13 L. ed. 938. And see *Murdock v. City of Memphis*, 20 Wall. (U. S.) 590, 22 L. ed. 429, where the rule was extended to certified opinions.

New York Code Civ. Proc., §1022, provides that the court's decision in a case tried without a jury shall be a part of the judgment roll. *Kent v. Common Council*, 90 App. Div. 553, 86 N. Y. Supp. 411.

The decision in cases tried by the court where a jury is waived is an essential part of the judgment roll. *Garr, Scott & Co. v. Spaulding*, 2 N. D. 414, 51 N. W. 867.

56. *Stoll v. Stoll*, 5 Ky. L. Rep. (abstract) 421.

The supreme court is concerned with the decision, not with the reasons. *Traeger v. Mutual Bldg. Assn.*, 189 Ill. 314, 59 N. E. 544; *Ohio & M. R. Co. v. Wangeling*, 152 Ill. 138, 38 N. E. 760; *Moore v. Williams*, 132 Ill. 591, 24 N. E. 617.

An expression of opinion in a memorandum is not an adjudication and is not the subject of appeal. *Gaskell v. Nolte*, 138 App. Div. 875, 123 N. Y. Supp. 442.

57. *Perey v. Sire*, 119 N. Y. Supp. 225.

58. **Mo.**—*Taylor v. Scherpe & Koken*

to for the purpose of reversing an apparently correct judgment,⁵⁹ or for the purpose of adding to⁶⁰ or limiting the scope of the order or judgment appealed from, or restricting the review of it by the appellate court,⁶¹ or to ascertain the evidence or the facts found below on which the judgment was based,⁶² or anything which under proper practice should be made to appear in a bill of exceptions, or by an agreed statement of facts, or by the pleadings,⁶³ or to help out the findings.⁶⁴ When properly brought before the appellate court, however,⁶⁵ it may be looked to for the purpose of ascertaining the ques-

Arch. Co., 47 Mo. App. 257. **N. J.** Schorb v. Haurand, 71 Atl. 242. **Pa.** Seltzer v. Boyer, 224 Pa. 369, 73 Atl. 438; Johnston's Estate, 222 Pa. 514, 71 Atl. 1053; Fullerton's Estate, 146 Pa. 61, 23 Atl. 321.

Not upon the opinion of the appellate court, but only upon its judgments. Ohio Oil Co. v. Scott, 241 Ill. 448, 89 N. E. 665; Pelonze v. Slaughter, 241 Ill. 215, 89 N. E. 259; Penn Plate Glass Co. v. Rice Co., 216 Ill. 567, 75 N. E. 246; Illinois Cent. R. Co. v. Smith, 208 Ill. 608, 70 N. E. 628; Traeger v. Mutual Bldg. Assn., 189 Ill. 314, 59 N. E. 544.

It is the judgment of the appellate court and not its opinion that is reviewed by the supreme court. Chicago City R. Co. v. Mead, 206 Ill. 174, 69 N. E. 19.

59. Berlin v. Weir, 108 N. Y. Supp. 1063.

60. Menard v. Montana Cent. R. Co., 22 Mont. 340, 56 Pac. 592.

61. Winnicott v. Orman, 39 Mont. 339, 102 Pac. 570.

62. It cannot be assumed on appeal that the trial judge acted solely on the ground stated in his memorandum. Abbott v. Walker, 204 Mass. 71, 90 N. E. 405.

Loeb v. Columbia Twp. Trustees, 179 U. S. 472, 21 Sup. Ct. 174, 45 L. ed. 280; Townsend v. Beatrice Cemetery Assn., 138 Fed. 381, 70 C. C. A. 521. Though referred to for that purpose in the bill of exceptions. Pacific Metal Works v. Californian Canneries Co., 164 Fed. 908, 91 C. C. A. 108.

"The opinion of the court, however elaborately it may purport to deal with the facts, cannot supplant or be made to serve the purpose of a bill of exceptions or a statement of the case or any other recognized form of certifying the testimony to a court of appeal, and consequently cannot disturb

in the slightest degree the presumption that must be indulged in favor of the findings where the appeal is upon the judgment roll alone." Northern Assur. Co. v. Stout (Cal. App.), 117 Pac. 617.

63. Loeb v. Columbia Twp. Trustees, 179 U. S. 472, 21 Sup. Ct. 174, 45 L. ed. 280.

64. Saltonstall v. Birtwell, 150 U. S. 417, 14 Sup. Ct. 169, 37 L. ed. 1128; Dickinson v. Planters' Bank, 16 Wall. (U. S.) 250, 21 L. ed. 278.

65. It forms no part of the record unless made so by the trial judge, but under the rules of the Connecticut supreme court it is required to be printed in the appeal book when filed. Phoenix Ins. Co. v. Carey, 80 Conn. 426, 68 Atl. 993; Styles v. Tyler, 64 Conn. 432, 30 Atl. 165.

A written opinion cannot be considered where not in the abstract. Broadie v. Carson, 81 Kan. 467, 106 Pac. 294.

It should be inserted in the record or in some way brought before the appellate court. Title Guarantee & Trust Co. v. McCulloh, 108 Md. 48, 69 Atl. 434.

Nevada Comp. Laws, §3435, requires a certified copy of the opinion to be transmitted to the supreme court. Its only function is to aid the court in the determination of the appeal. Werner v. Babcock (Nev.), 116 Pac. 357.

Statements therein as to what the court "did or did not pass upon cannot be considered unless the judgment appealed from so refers to the opinion as to make it a part of the record." Koehler v. Hughes, 148 N. Y. 507, 42 N. E. 1051, citing Dibble v. Dimick, 143 N. Y. 549, 38 N. E. 724; Williams v. Delaware, etc. R. Co., 127 N. Y. 643, 27 N. E. 404; Tolman v. Syracuse, etc. R. Co., 92 N. Y. 353.

An opinion cannot be considered for any purpose on appeal from an order

tions considered and how they were disposed of,⁶⁶ or whether a federal question was involved below.⁶⁷ In some jurisdictions and under certain circumstances resort may also be had to it in aid of an appeal.⁶⁸

granting a new trial even if included in the bill of exceptions. *Morgan v. J. W. Robinson Co.*, 157 Cal. 348, 107 Pac. 695.

See also the title "Appeals."

66. To ascertain the rulings of the court on questions of law, or for interpreting findings of fact. *Phoenix Ins. Co. v. Carey*, 80 Conn. 426, 68 Atl. 933; *Styles v. Tyler*, 64 Conn. 432, 30 Atl. 165.

"An opinion may be cited and referred to in argument, and thus be the means of assisting the court in reaching a correct solution of the questions submitted." *Higgins v. Los Angeles Ry. Co.*, 5 Cal. App. 748, 91 Pac. 344.

In view of the statute (Hurd's Rev. St. 1908, c. 37, §34), which requires the appellate court to file a written opinion the supreme court "may rightfully look into the opinion of the appellate court for the purpose of being advised as to the questions considered by that court and how they were disposed of." *Ohio Oil Co. v. Scott*, 241 Ill. 448, 89 N. E. 665; *Penn. Plate Glass Co. v. Rice Co.*, 216 Ill. 567, 75

N. E. 246; *Illinois Cent. R. Co. v. Smith*, 208 Ill. 608, 70 N. E. 628; *Chicago City R. Co. v. Mead*, 206 Ill. 174, 69 N. E. 19.

To ascertain what principle governed the trial court in arriving at its decision. *Harde v. Purdy*, 114 N. Y. Supp. 814; *Kenyon v. Kenyon*, 88 Hun 211, 34 N. Y. Supp. 720.

67. On the questions of the jurisdiction of the supreme court the opinion may be examined for the purpose of ascertaining "whether it was claimed that the state law [in question] contravened the constitution of the United States." *Loeb v. Columbia Twp. Trustees*, 179 U. S. 472, 21 Sup. Ct. 174, 45 L. ed. 280.

68. As where the memorandum announces conclusions of law controlling the decision which a finding subsequently made does not present. *Styles v. Tyler*, 64 Conn. 432, 30 Atl. 165.

There is no occasion for doing so, however, where no such variance appears. *Cummings v. Hartford*, 70 Conn. 115, 38 Atl. 916.

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I. INTRODUCTORY.—Courts martial were instituted for the trial of naval and military offenses, and existed as early as the reign of James II, and probably had their origin in the ancient court of chivalry. They are regarded as a necessity in every civilized government, in order to properly discipline the military forces by punishing offenses therein.¹

Courts martial are either general courts,² regimental courts,³ garrison courts,⁴ or summary courts.⁵

II. DEFINITION.—A court martial is a military or naval tribunal, which has jurisdiction of offenses against the law of the service, military or naval, in which the offender is engaged.⁶

III. NATURE AND CHARACTER.—A. NATURE OF COURTS MARTIAL.—Courts martial are courts of limited and special jurisdiction.⁷ They are called into existence for a special purpose and to perform a particular duty. When the object of their creation has been accomplished they are dissolved.⁸ They are not included in the

1. *People v. Van Allen*, 55 N. Y. 31; *People v. Daniell*, 50 N. Y. 274.

Courts martial are courts within the meaning of §6, art. 1 of the Constitution of the state of New York. *People v. Van Allen*, 55 N. Y. 31.

2. U. S. Rev. St., §1342; Articles of War, 79; 1 Fed. St. Anno. 499.

3. U. S. Rev. St., §1342; Articles of War, 81; 1 Fed. St. Anno. 499.

4. U. S. Rev. St., §1342; Articles of War, 81; 1 Fed. St. Anno. 499.

5. U. S. Rev. St., §1342; 31 St. at L., ch. 809, p. 950; Articles of War, 83; 1 Fed. St. Anno. 499.

6. *People v. Van Allen*, 55 N. Y. 31, 35, citing Bouv. Law Dict.

The law governing court martial is found in the statutory enactments of congress, particularly the articles of war; in the army regulations, and in the customary military law (*Carter v. McLaughry*, 183 U. S. 365, 22 Sup. Ct. 181, 46 L. ed. 236). The whole of the law martial is not written, and is composed, in part, of military usage, which usage must govern in all well-organized troops, when it is not unreasonable, or in opposition to special enactments. *Schuneman v. Diblee*, 14 Johns. (N. Y.) 235.

7. 3 Greenl. on Ev. 470, and the following cases: *U. S.—McLaughry v. Deming*, 186 U. S. 49, 63, 22 Sup. Ct. 786, 46 L. ed. 1049, 1055; *Runkle v. United States*, 122 U. S. 543, 555, 7 Sup. Ct. 1141, 1146, 30 L. ed. 1167, 1170; *Wise v. Withers*, 3 Cranch 331,

2 L. ed. 457 (holding judgments subject to collateral attack); *Hamilton v. McLaughry*, 136 Fed. 445; *In re Zimmerman*, 30 Fed. 176, 180. **Mass.** *Brooks v. Daniels*, 22 Pick. 498; *Brooks v. Davis*, 17 Pick. 148. **N. Y.**—*People v. Van Allen*, 55 N. Y. 31. **Pa.**—*Duffield v. Smith*, 3 Serg. & R. 590, 599.

8. **U. S.**—*McLaughry v. Deming*, 186 U. S. 49, 63, 22 Sup. Ct. 786, 46 L. ed. 1049, 1055; *Runkle v. United States*, 122 U. S. 543, 555, 7 Sup. Ct. 1141, 30 L. ed. 1167; *Ex parte Watkins*, 3 Pet. 193, 208, 7 L. ed. 650; *Hamilton v. McLaughry*, 136 Fed. 445. **Mass.**—*Brooks v. Adams*, 11 Pick. 441. **N. Y.**—*Mills v. Martin*, 19 Johns. 7; *In re Wright*, 34 How. Pr. 207; *Smith v. Doyle*, 28 Misc. 411, 59 N. Y. Supp. 599. **Pa.** *Duffield v. Smith*, 3 Serg. & R. 590. **Vt.** *Barrett v. Smith*, 16 Vt. 246.

“A court martial is wholly unlike the case of a permanent court created by constitution or by statute and presided over by one who had some color of authority, although not in truth an officer *de jure*, and whose acts as a judge of such court may be valid where the public is concerned. The court exists even though the judge may be disqualified or not lawfully appointed or elected.” But where a court martial is composed of members ineligible to sit on such court, such a court is neither a valid court nor are the members thus detailed *de facto* officers. *McLaughry v. Deming*, 186 U. S. 49, 64, 22 Sup. Ct. 786, 46 L. ed. 1049, 1056.

judicial department of the United States,⁹ but are an executive agency, belonging to the executive, not to the judicial branch of the government.¹⁰ But within their sphere they have as full complete and plenary power and jurisdiction as the civil courts have over controversies within their cognizance.¹¹

B CHARACTER OF COURTS MARTIAL.—1. Generally.—The character of the court depends upon the appointing power.

2. General Courts.—General courts are appointed by the president,¹² or by any general officer commanding an army, a territorial

9. U. S.—Kurtz *v.* Moffitt, 115 U. S. 487, 6 Sup. Ct. 118, 29 L. ed. 458; Dynes *v.* Hoover, 29 How. 65, 15 L. ed. 838. **D. C.**—Smith *v.* Whitney, 4 Mackey 535, *affirmed*, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. ed. 601. **N. D.** State *v.* Nichols, 18 N. D. 233, 119 N. W. 632, 20 L. R. A. 413.

But it has all the elements of a court. "It has judges to hear the evidence and determine the facts and apply the law. It has parties, prosecutor and defendant. It has pleadings and a formal trial, renders a judgment and issues process to enforce it. In short, it does everything within the sphere of its jurisdiction which any judicial tribunal can do to administer justice." People *v.* Van Allen, 55 N. Y. 31, 36.

10. U. S.—*Ex parte* Mason, 135 U. S. 696, 26 L. ed. 1213; Dynes *v.* Hoover, 20 How. 65, 15 L. ed. 838; Runkle *v.* United States, 19 Ct. Cl. 396. **Minn.** State *v.* Wagener, 74 Minn. 518, 77 N. W. 424, 42 L. R. A. 749, 73 Am. St. Rep. 369. **N. Y.**—People *v.* Daniell, 50 N. Y. 274; Trask *v.* Payne, 43 Barb. 569. **N. D.**—State *v.* Nichols, 18 N. D. 233, 119 N. W. 632, 20 L. R. A. (N. S.) 413.

See *infra*, VI, C.

11. U. S.—Rose *v.* Roberts, 99 Fed. 948, 40 C. C. A. 199; Kirkman *v.* McLaughry, 152 Fed. 255, 259, *affirmed*, 160 Fed. 436; Carter *v.* McLaughry, 105 Fed. 614; *In re* Davison, 21 Fed. 618. **Pa.**—Com. *v.* McClean, 2 Pars. Eq. Cas. 367. **Utah.**—*Ex parte* Bright, 1 Utah 145.

See *infra*, VIII.

12. U. S. Rev. St., §1342; Articles of War, 72; 23 St. at L., ch. 224, p. 121; 1 Fed. St. Anno. 497; Swaim *v.* United States, 165 U. S. 553, 17 Sup. Ct. 448, 41 L. ed. 823, *affirming* 28 Ct. Cl. 178; Runkle *v.* United States, 19 Ct. Cl. 396,

reversed on another point, 122 U. S. 543, 7 Sup. Ct. 1141, 30 L. ed. 1167, 15 Op. Atty-Gen. 297, note.

The power of the president to appoint a general court is general and not restricted to the case where the commander of an officer is himself the accuser or prosecutor. Swaim *v.* United States, 165 U. S. 553, 17 Sup. Ct. 448, 41 L. ed. 823, *affirming* 28 Ct. Cl. 396.

Convening Simply Giving Orders to Subordinates.—"As Commander in Chief, the President is authorized to give orders to his subordinates, and the convening of a court martial is simply the giving of an order to certain officers to assemble as a court, and, when so assembled to exercise certain powers conferred upon them by the articles of war. If this power could not be exercised, it would be impracticable, in the absence of an assignment of a general officer to command the army, to administer military justice in a considerable class of cases of officers and soldiers not under the command of any department commander; as, for example, a large proportion of the officers of the general staff, and the whole body of the retired officers." Swaim *v.* United States, 165 U. S. 553, 17 Sup. Ct. 448, 41 L. ed. 823, *citing* Runkle *v.* United States, 19 Ct. Cl. 396.

President as Prosecutor.—The president is not the accuser or prosecutor where, on information as to an offense being conveyed to him, he appointed a board of inquiry to examine the accusations made, and upon the report the secretary of war referred the report to an officer to prepare the charges and specifications, after which the president appointed the court martial. Swaim *v.* United States, 165 U. S. 553, 558, 17 Sup. Ct. 448, 41 L. ed. 823.

division or a department, or colonel commanding a separate department.¹³

In time of war a general court may be appointed by the commander of a division or of a separate brigade of troops.¹⁴

Courts appointed by the secretary of the navy or by the commander in chief of a fleet or squadron are also general courts.¹⁵

When a fleet is in the waters of the United States, the commander of a fleet or squadron cannot convene such a court without express authority from the president.¹⁶ This refers to the continental waters only of the United States, and he may convene a court martial without the previous authorization of the president when the fleet is beyond the continental waters of the United States, though such waters are territorial waters of the United States.¹⁷

3. Regimental Courts.—Regimental courts are appointed by a regimental or corps commander.¹⁸

13. U. S. Rev. St., §1342; Articles of War, 72; 23 St. at L., ch. 224, p. 121; 1 Fed. St. Anno. 497.

Department Commander Appointing Court Martial When Beyond Territorial Limits.—"In the absence of special orders or legislation to that effect, . . . the personal presence within the territorial limits of his department is not essential to the validity of commands given by a department commander appointing a court martial within such limits." 16 Op. Att.-Gen. 678.

When any of such commanders "is the accuser or prosecutor of any officer under his command the court shall be appointed by the President." Rev. St., §1342; Articles of War, 72; 23 St. at L. 224, p. 121; 1 Fed. St. Anno. 497; *In re Bird*, 2 Sawy. 33, 3 Fed. Cas. No. 1,428 (conviction by court martial called by department commander who was the accuser set aside).

14. U. S. Rev. St., §1342; 12 St. at L., ch. 3, p. 330; Articles of War, 73, 16 Op. Att.-Gen. 106; 1 Fed. St. Anno. 497.

"When any such commander is the accuser or prosecutor of any person under his command, the court shall be appointed by the next higher commander." U. S. Rev. St., §1342; 12 St. at L., ch. 3, p. 330; Articles of War, 73; 1 Fed. St. Anno. 497.

Commander Directing Colonel To Prefer Charges.—The commander of a division is not the accuser, so as to require the next higher commander to appoint the court martial, where the colonel informed the commander of the division of the misconduct, whereupon

the commander directed him to prefer the charges and put them in proper form and he did so. 16 Op. Att.-Gen. 106.

15. U. S. Rev. St., §1624; Art. for Govt. of Navy 38; 1 Fed. St. Anno. 472; *Smith v. Whitney*, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. ed. 601.

16. U. S. Rev. St., §1624; Art. for Govt. of Navy 38; 1 Fed. St. Anno. 472; *United States v. Smith*, 197 U. S. 386, 25 Sup. Ct. 489, 49 L. ed. 801; *In re Crain*, 84 Fed. 988.

Presumption from Designation of Convening Officer in Proceedings. Where the proceedings of the court martial designate the convening officer as "Commander in Chief, U. S. Naval Force, North Atlantic Station," under Art. 243 of the Regulations for the Government of the Navy, "he must be presumed to have been in command of a fleet or squadron." *In re Crain*, 84 Fed. 988.

Record Showing President's Authorization.—The record shows sufficiently that the court martial was convened by "express authority" of the president, by a recital to that effect in the precept forming a part of the record. It is unnecessary, where no objection to the convening officer's authority has been raised, to attach to the record a copy of his commission from the president. *In re Crain*, 84 Fed. 788.

17. *United States v. Smith*, 197 U. S. 386, 25 Sup. Ct. 489, 49 L. ed. 801, as to Philippine waters.

18. U. S. Rev. St., §1342; 12 St.

Redress of Wrong to Soldiers. — Regimental courts are also summoned by the commanding officer of a regiment upon the request of any soldier who thinks himself wronged by an officer.¹⁹

4. Garrison Courts. — Garrison courts are appointed by the officer commanding a garrison, fort or other place where the troops consist of different corps.²⁰

5. Summary Courts. — Summary courts are appointed by the commanding officer of a garrison, fort or other military post, regiment or corps, detached battalion or company or other military command.²¹

Summary courts may be ordered upon petty officers and persons of inferior ratings by the commander of any vessel, or by the commandant of any navy yard, naval station or marine barracks to which they belong.²²

6. Courts in the National Guard. — For the purpose of determining the nature and character of courts martial in the national guard, examination of the state statutes is necessary. These statutes usually contain a provision that they must generally conform to and possess the jurisdiction conferred on similar courts by the United States statutes.²³

Governor of State. — In the absence of a state statute, the governor of a state has no power to convene a court martial for the trial of militia men failing to respond to the orders of the governor to report for United States service.²⁴

IV. ORGANIZATION OF COURTS MARTIAL. — A. IN GENERAL. — A court martial is the creature of statute, and as a body or tribunal, must be convened and constituted in entire conformity with the provisions of the statute or else it is without jurisdiction,²⁵ for a trial by a court martial not legally constituted is not due process of law.²⁶

The minority of some of the members is not such an objection as will avoid the proceedings.²⁷

Trial of Militia. — The United States regulations provide that courts martial for the trial of militia or other forces must be composed of militia officers only;²⁸ and therefore, regular army officers cannot sit

at L., ch. 201, p. 598; Articles of War, 81; 1 Fed. St. Anno. 499.

19. U. S. Rev. St., §1342; Articles of War, 30; 1 Fed. St. Anno. 487.

20. U. S. Rev. St., §1342; Articles of War, 82; 12 St. at L., ch. 201, p. 598; 1 Fed. St. Anno. 499.

21. Act of June 18, 1893, 30 St. at L., ch. 469, p. 483; 7 Fed. St. Anno. 1071.

22. U. S. Rev. St., §1624; 10 St. at L., ch. 136, p. 627; Art. for Govt. of Navy 26; 1 Fed. St. Anno. 470.

23. Cal. Political Code, §2018; 3 N. Y. Consol. Laws, p. 3529.

24. Duffield v. Smith, 3 Serg. & R.

(Pa.), 590; Moore v. Houston, 3 Serg. & R. (Pa.), 169, 178.

25. McClaughry v. Deming, 186 U. S. 49, 63, 22 Sup. Ct. 786, 46 L. ed. 1049, 1055, every member ineligible to sit on the trial.

26. 22 Op. Att.-Gen. 137.

27. Phillips' Case, 16 Op. Att.-Gen. 550.

28. United States v. Brown, 206 U. S. 240, 27 Sup. Ct. 620, 51 L. ed. 1046; McClaughry v. Deming, 186 U. S. 49, 22 Sup. Ct. 786, 46 L. ed. 1049, affirming, 113 Fed. 639, 51 C. C. A. 349; Martin v. Mott, 12 Wheat. (U. S.)

on courts martial for the trial of offenders in the volunteer forces.²⁹

Where every member of the court martial is ineligible to sit on the trial of militia men,³⁰ or only one member is ineligible, where the court martial consists of the minimum number allowed by law, the whole proceeding is absolutely void.³¹

Even consent cannot confer jurisdiction on a court martial, every member of which is ineligible to sit on the trial of the particular offender.³²

B. NUMBER OF OFFICERS REQUIRED. — 1. In General. — The United States statutes provide the minimum and maximum number of officers or members necessary to constitute the court martial, and provides that as many officers must be convened on every court as can be without injury to the service.³³ This provision is directory only to the

19, 6 L. ed. 537; *Walsh v. United States*, 43 Ct. Cl. 225.

The terms "militia officers" and "volunteer officers" are synonymous within the meaning of the above. *McClaghry v. Deming*, 186 U. S. 49, 22 Sup. Ct. 786, 46 L. ed. 1049.

Necessity for Being in United States Service.—The militia officers need not have been in the United States service. *Vanderheyden v. Young*, 11 Johns. (N. Y.) 150.

29. *United States v. Brown*, 206 U. S. 240, 27 Sup. Ct. 620, 51 L. ed. 1046; *McClaghry v. Deming*, 186 U. S. 49, 22 Sup. Ct. 786, 46 L. ed. 1049, *affirming*, 113 Fed. 639, 51 C. C. A. 349; *Walsh v. United States*, 43 Ct. Cl. 225 (court martial consisted of thirteen members, six of which were regular army officers).

Enlisting Volunteers Directly Into United States Service.—Troops enlisting simply and in terms as volunteers, are not troops of the regular army, though directly enlisted into the service of the United States under the Act of 1899, but are "other forces" within the acts of congress providing that officers of the regular army are not eligible to sit on trials of offenders in "other forces." *McClaghry v. Deming*, 186 U. S. 49, 61, 22 Sup. Ct. 786, 46 L. ed. 1049, 1054.

Eligibility of Regular Army Officers Serving in Volunteer Forces.—A commissioned officer of the regular army on indefinite leave of absence in order to enable him to accept a commission in the volunteer service, is not eligible to sit on the trial of "officers or soldiers of other forces" where regular

army officers are not eligible. *United States v. Brown*, 206 U. S. 240, 27 Sup. Ct. 620, 51 L. ed. 1046.

30. De Facto Court Martial.—Where every officer of the court martial was incompetent to sit on the trial of the person being tried, as to such person, there is no court. It has no jurisdiction over the subject-matter or over the person. The officers composing the alleged court are not *de facto* officers thereof, for there is no court, and therefore it could have no *de facto* officers. *McClaghry v. Deming*, 186 U. S. 49, 64, 22 Sup. Ct. 786, 46 L. ed. 1049, 1056.

31. *United States v. Brown*, 206 U. S. 240, 27 Sup. Ct. 620, 51 L. ed. 1046, *affirming* 41 Ct. Cl. 275.

32. *McClaghry v. Deming*, 186 U. S. 49, 22 Sup. Ct. 786, 46 L. ed. 1049.

33. *Bishop v. United States*, 197 U. S. 334, 25 Sup. Ct. 440, 49 L. ed. 780; *Swaim v. United States*, 165 U. S. 553, 17 Sup. Ct. 448, 41 L. ed. 823; *Martin v. Mott*, 12 Wheat. (U. S.) 19, 6 L. ed. 537; *Brooks v. Adams*, 11 Pick. (Mass.) 441.

General Courts.—Not less than five nor more than thirteen commissioned officers are required for a general courts martial under the United States regulations, and not less than thirteen required where they can be convened without manifest injury to the service. U. S. Rev. St., §1624; Art. for Govt. of Navy 39; 1 Fed. St. Anno. 472; *Bishop v. United States*, *supra*.

Garrison and regimental courts consist of three officers. U. S. Rev. St., §1342; Art. of War 81, 82; 1 Fed. St. Anno. 499.

convening officer and leaves the number of officers to be convened, within the maximum and minimum number, within the sound discretion of the convening officer, whose decision is conclusive on collateral attack.³⁴ But if the court consists of less than the minimum number permissible under the law, it is without jurisdiction and its judgment is absolutely void.³⁵

Summary Courts.—Naval.—A summary court shall consist of three officers not below the rank of ensign, and of a recorder. Any officer may be ordered to act as recorder. U. S. Rev. St., §1624; 10 St. at L., ch. 136, p. 628; 1 Fed. St. Anno. 470.

Summary Courts.—Army.—A summary court consists of one officer, and may be the commanding officer if he is the only officer present with a command. 30 St. at L., ch. 469, p. 483; 7 Fed. St. Anno. 1070.

State laws sometimes provide for a less number of members than do the United States regulations, as, for example, three in New York. *People v. Van Allen*, 55 N. Y. 31.

The absence of one of thirteen members, six of whom were juniors in rank and six seniors in rank to accused, of the court martial for two days is a mere irregularity, waived by failing to object to same prior to the approval of the sentence, where the absent member took no part in the deliberations. 7 Op. Att.-Gen. 98.

Effect of Absent Member Resuming Seat.—If one of the members is absent for several days, and afterwards resumes his seat, though the proceedings taking place in his absence are read over to him, the proceeding is irregular. He should not take any part in sentencing the accused, and if he does the sentence is illegal and void. *Clark's Case*, 2 Op. Att.-Gen. 414.

Excluding Absent Member as Ousting Jurisdiction.—The refusal to allow a member of the court martial who was absent two days because of sickness to take his seat does not oust the jurisdiction of the court and render the proceedings void; so long as five members sit. Whether an absent member shall act or not upon his return, must depend upon his own views of propriety, and not upon those of the court, which is nowhere clothed with power to expel a fellow member. (7 Op. Att.-Gen. 98, 102.) The remaining members, where one is sick, should adjourn

from day to day until he is able to attend. 4 Op. Att.-Gen. 17.

Officers of the marine corps detached for service with the army by the president's order may be associated with officers of the regular army on courts martial. U. S. Rev. St., §1342; 4 St. at L., ch. 132, 7, 713; Art. of War, 78; 1 Fed. St. Anno. 498.

34. *Bishop v. United States*, 197 U. S. 334, 25 Sup. Ct. 440, 49 L. ed. 780; *Swain v. United States*, 165 U. S. 553, 17 Sup. Ct. 448, 41 L. ed. 823; *Mullan v. United States*, 140 U. S. 240, 11 Sup. Ct. 788, 35 L. ed. 489, *affirming*, 23 Ct. Cl. 34; *Martin v. Mott*, 12 Wheat. (U. S.) 19, 6 L. ed. 537 (six sufficient); *Wooley v. United States*, 20 Law. Rep. (U. S.) 631; *Howe's Case*, 6 Op. Att.-Gen. 506 (cannot be less than five), 2 Op. Att.-Gen. 534.

Less Number in Revising Court than Original Trial.—Though the court martial consisted of two less when passing on the proceedings and sentence sent back for review, the revised sentence is valid, if the court martial did not consist of a number less than the minimum allowed by law. 7 Op. Att.-Gen. 338.

35. *United States v. Brown*, 206 U. S. 240, 27 Sup. Ct. 620, 51 L. ed. 1046, *affirming*, 41 Ct. Cl. 275 (consisted of minimum number but one member ineligible); *In re Leary*, 27 Hun (N. Y.) 564 (consisted of one member where statute required three members); *Howe's Case*, 6 Op. Att.-Gen. 506; 2 Op. Att.-Gen. 414 (though it consists of five, if one is absent part of the time, and does not hear all the evidence, the conviction will be set aside).

Persons belonging to the army and the navy are not subject to illegal or irresponsible courts martial, when the law for convening them and directing their proceedings have been disregarded. In such cases, everything which may be done is void, not voidable. *Dynes v. Hoover*, 20 How. (U. S.) 65, 15 L. ed. 838.

Even consent cannot confer jurisdiction in such a case.³⁶ The expressed satisfaction, however, of defendant with the court is a waiver of any objection to its personnel on the ground that as many officers as could be convened without injury to the service were not summoned.³⁷

2. Trial of Militia.—In the absence of specific provisions governing, courts martial for the trial of delinquent militia men need not be composed of the same number and rank of officers as for the trial of persons in actual service, but are governed by the general usage of the military service, or the customary military law.³⁸

C. RANK OF OFFICERS.—The statutes require the members of courts martial to be commissioned officers.³⁹

Under the United States regulations, not more than one-half of the members of the court, exclusive of the president, can be juniors in rank to defendant, where it can be avoided without injury to the service.⁴⁰ This provision is merely directory to the appointing officer

Necessity for New Court on Second Trial.—On the second trial a new court should be organized. He should not be tried by the members of the first court. *Clark's Case*, 3 Op. Att.-Gen. 397.

The death of a member of a naval court martial after sentence imposed but before signing sentence as required, does not make the sentence void. 23 Op. Att.-Gen. 550.

36. *In re Leary*, 27 Hun (N. Y.) 564. See *infra*, VI, 1.

37. *Bishop v. United States*, 197 U. S. 334, 25 Sup. Ct. 440, 49 L. ed. 780.

38. *Martin v. Mott*, 12 Wheat. (U. S.) 19, 34, 6 L. ed. 537.

If the statute provides that state militia can be tried by a jury composed of militia officers only but makes no reference to the number, reference can be made to the rules and articles of war governing the number in general courts martial to ascertain the number required only as a guide to the discretion of the officer calling the court martial, as matter of usage and not as matter of positive institution. *Martin v. Mott*, 12 Wheat. (U. S.) 19, 34, 6 L. ed. 537, *citing* *Swaim v. United States*, 165 U. S. 553, 17 Sup. Ct. 448, 41 L. ed. 823.

39. *Bishop v. United States*, 197 U. S. 334, 25 Sup. Ct. 440, 49 L. ed. 780; *Swaim v. United States*, 165 U. S. 553, 17 Sup. Ct. 448, 41 L. ed. 823; *Martin v. Mott*, 12 Wheat. (U. S.) 19, 6 L. ed. 537; 7 Op. Att.-Gen. 323;

Brooks v. Adams, 11 Pick. (Mass.) 441.

The term "officers" as used in the Articles of War means "commissioned officers." *Babbitt's Case*, 16 Ct. Cl. 202.

Persons Eligible To Sit on Courts Martial.—Graduate cadets assigned to service as supernumerary officers (7 Op. Att.-Gen. 323); volunteer naval officers appointed for the temporary increase of the navy (10 Op. Att.-Gen. 522); professors at the military academy (17 Op. Att.-Gen. 359, *contra*, 1 Op. Att.-Gen. 469); and officers of the marine corps are competent to sit on courts martial (2 Op. Att.-Gen. 311).

Persons Incompetent To Serve.—Undergraduate cadets (1 Op. Att.-Gen. 469), though serving as supernumerary officers (7 Op. Att.-Gen. 323); and chaplains, pursers, surgeons, and other non-combatants are not competent to serve on courts martial (2 Op. Att.-Gen. 297).

Volunteer officers of the navy are officers of the navy and may sit on general courts martial. 10 Op. Att.-Gen. 522.

40. *Bishop v. United States*, 197 U. S. 334, 25 Sup. Ct. 440, 49 L. ed. 780; *Swaim v. United States*, 165 U. S. 553, 17 Sup. Ct. 448, 41 L. ed. 823; *Mullan v. United States*, 140 U. S. 240, 11 Sup. Ct. 783, 35 L. ed. 489.

The fact that one of the officers is a junior in rank and another inferior in grade does not of itself affect the validity of the proceedings. *Armstrong's Case*, 17 Op. Att.-Gen. 397.

and leaves the rank of the members of court martial somewhat to the sound discretion of the convening officer, and his decision is conclusive on collateral attack,⁴¹ as the courts will assume, nothing to the contrary appearing upon the face of the order convening the court, that a trial by a court, most of whom were his juniors in rank, could not be avoided without injury to the service.⁴²

D. DISSOLUTION AND RECONVENING.—A court martial can only be dissolved by the convening officer, and may, at any time before he has dissolved it, be lawfully reconvened by him to reconsider its proceedings.⁴³

E. THE JUDGE ADVOCATE.—A judge advocate, by the military law,⁴⁴ as well as by statute, is essential to the legal existence of a

Presumption. — Collateral Attack.

“The presumption is that the President, in detailing the officers named to compose the court martial, acted in pursuance of law. The sentence cannot be collaterally attacked by going into an inquiry whether the trial by officers inferior in rank to the accused was or was not avoidable.” *Swaim v. United States*, 165 U. S. 553, 17 Sup. Ct. 448, 41 L. ed. 823.

In New York it is provided that “the president of every military court shall be the member of the court highest in grade and rank. When composed of one person he is deemed the president.” Consol. Laws (N. Y.) ch. 41, §144, p. 3535.

41. *Bishop v. United States*, 197 U. S. 334, 25 Sup. Ct. 440, 49 L. ed. 780; *Swaim v. United States*, 165 U. S. 553, 17 Sup. Ct. 448, 41 L. ed. 823; *Martin v. Mott*, 12 Wheat. (U. S.) 19, 6 L. ed. 537.

Precedent.—Sending Superior Officers to Complete Court.—The fact that on another occasion officers were sent to Panama to make up a court martial superior in rank to the accused does not affect the validity of a court martial held in Hong Kong, most of whom were inferior in rank to accused. *Mullan v. United States*, 140 U. S. 240, 11 Sup. Ct. 788, 35 L. ed. 489.

42. *Swaim v. United States*, 165 U. S. 553, 17 Sup. Ct. 448, 41 L. ed. 823; *Mullan v. United States*, 140 U. S. 240, 11 Sup. Ct. 788, 35 L. ed. 489; *Martin v. Mott*, 12 Wheat. (U. S.) 19, 6 L. ed. 537.

Presumption as to Proper Exercise of Discretion.—When the commander-in-chief of a squadron, not in the

waters of the United States, convenes a court martial, more than one-half of whose members are juniors in rank to the accused, the courts will assume when his action is attacked collaterally, that he properly exercised his discretion, and the trial of the accused by such a court could not be avoided without inconvenience to the service. *Mullan v. United States*, 140 U. S. 240, 11 Sup. Ct. 788, 35 L. ed. 489.

43. *Smith v. Whitney*, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. ed. 601; *Ex parte Reed*, 100 U. S. 13, 25 L. ed. 538, 20 Fed. Cas. No. 11,636; 4 Op. Att.-Gen. 19.

Correcting Record After Dissolution. After the court has dissolved the secretary of the navy cannot correct or amend the record, or take any action not consistent therewith. “Corrections can only be made by the courts martial when at least five members of the court who acted at the trial are present, and can only be done then in the presence of the judge-advocate.” 23 Op. Att.-Gen. 23; *Clark’s Case*, 3 Op. Att.-Gen. 397.

44. *Brooks v. Adams*, 11 Pick. (Mass.) 441.

“Without such officer no such court can be legally organized, and without his presence and services no business can be legally transacted by such court. He alone is authorized to administer the requisite oaths to the president and members of the court. It is his peculiar duty to swear all witnesses, to take accurate minutes of their testimony, to advise the court in all matters of law, and to keep a record of their proceedings.” *Brooks v. Adams*, 11 Pick. (Mass.) 441.

court martial.⁴⁵ He is appointed by the officer appointing the court.⁴⁶ According to the laws regulating courts martial, he is the official prosecutor;⁴⁷ but his appointment and taking of the oath are matters of mere procedure not reviewable in a collateral action.⁴⁸

V. JURISDICTION.—A. OFFENSES COGNIZABLE.—1. **Generally.**—The articles of war set forth generally the offenses that are triable by general courts,⁴⁹ as well as offenses triable generally by courts martial.⁵⁰

All crimes not capital and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the articles of war, are to be taken cognizance of by a general, regimental or garrison court martial according to the nature and degree of the offense.⁵¹ But the grant of jurisdiction to try and punish any offense specifically provided for, is conferred by the particular article which mentions it and not by the general language of this general enactment.⁵² Its

45. *Brooks v. Adams*, 11 Pick. (Mass.) 441.

46. U. S. Rev. St., §1342; Art. of War, 74; 1 Fed. St. Anno. 497.

Improper Appointment of Judge Advocate Pro-tempore.—Where the statute authorized the major general to appoint a judge advocate *pro tempore* only in case of physical or legal disability of the regular judge advocate, a judge advocate *pro tempore* appointed to fill a vacancy is without authority and the court martial is illegal. *Brooks v. Adams*, 11 Pick. (Mass.) 441.

47. 3 Op. Att.-Gen. 514 (in cases arising in the navy he is either a naval officer or counsel specially employed).

The secretary of the navy cannot employ a special attorney to conduct the proceedings, but should call on the department of justice to supply one (14 Op. Att.-Gen. 13; 13 Op. Att.-Gen. 514), but the attorney general may then employ special counsel (18 Op. Att.-Gen. 135).

48. *Swaim v. United States*, 165 U. S. 553, 17 Sup. Ct. 448, 41 L. ed. 823, person acting as judge advocate not appointed by convening officer.

49. U. S. Rev. St., §1342; Art. of War, 4, 52, 58; 1 Fed. St. Anno. 483-494.

50. See generally Art. for Government of Navy, and Art. of War, U. S. Rev. St. §§1342, 1624; 1 Fed. St. Anno. 458, 480.

United States courts martial derive their jurisdiction and are regulated by

an act of congress which specifies the crimes punishable by it. *Dynes v. Hoover*, 20 How. (U. S.) 65, 15 L. ed. 838.

51. U. S. Rev. St., §1342; Art. of War, 62; 1 Fed. St. Anno. 495; *United States v. Grafton*, 205 U. S. 333, 27 Sup. Ct. 749, 51 L. ed. 1084 (62nd Article of War); *Ex parte Mason*, 105 U. S. 696, 26 L. ed. 1213; *In re Carter*, 97 Fed. 496.

The attempted shooting of a prisoner by a soldier on duty within a jail may be punished under a general statute punishing "all crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of to the prejudice of good order and military discipline." *Ex parte Mason*, 105 U. S. 696, 26 L. ed. 1213.

Offenses To Prejudice of Good Order and Military Discipline.—Under a statute punishing offenders for conduct to the prejudice of good order and military discipline, a court martial has jurisdiction, though the specifications showed homicide (*United States v. Mavey*, 61 Fed. 140), or larceny (*In re Esmond*, 5 Mackey [D. C.] 64).

Publishing Sensational Charges Against Officer Before Reporting Charges.—It has jurisdiction of the offense of causing the publication of sensational charges against another officer before making the charge before the proper authorities for investigation as it is prejudicial to good order and discipline. *People v. Townsend*, 10 Abb. N. C. (N. Y.) 169.

52. *In re Carter*, 97 Fed. 496.

jurisdiction, however, is not limited to the offenses defined or specified in the articles of government for the army and navy, but extends to crimes and offenses not specified, but recognizable by the usages and customs of the army and navy,⁵³ such as acts of military or naval officers which tend to bring disgrace and reproach upon the service of which they are members, whether such acts are done in the performance of military duties, or in a civil position, or in a social relation, or in private business.⁵⁴ It is peculiarly for the court martial to determine whether the crime charged was "to the prejudice of good order and military discipline."⁵⁵

Fraudulent Enlistment.—The crime of fraudulent enlistment is exclusively a military or naval offense triable and punishable only by court martial.⁵⁶

Desertion.—Desertion is and always has been exclusively a military crime, triable and punishable, in time of peace, as well as in time of war, by court martial only, and not by civil tribunals; the only qualification being that since 1830 the punishment of death cannot be awarded in time of peace.⁵⁷

53. The jurisdiction of courts martial, under the articles for government of the navy was not limited to the crimes specified or defined in those articles, but extended to any offense which, by a fair deduction from the definition, congress meant to subject to punishment, being "one of a minor degree, of kindred character, which has already been recognized to be such by the practice of courts martial in the army and navy services of nations, and by those functionaries in different nations to whom has been confided a revising power over the sentences of courts martial," or which, though not included, in terms or by construction, within the definition, came within a "comprehensive enactment, such as the 32nd article of the rules for the government of the navy; which means that courts martial have jurisdiction of such crimes as are not specified, but which have been recognized to be crimes and offenses by the usages in the navy of all nations, and that they shall be punished according to the laws and customs of the seas." *Smith v. Whitney*, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. ed. 601; *Dynes v. Hoover*, 20 How. 65, 82, 15 L. ed. 838.

Manslaughter on Man of War.—Naval courts martial may punish the offense of manslaughter committed by an officer on board a man of war, even though not specified in the article gov-

erning the navy. *United States v. Mackenzie*, 30 Fed. Cas. No. 18,313.

54. *Carter v. McClaughry*, 183 U. S. 365, 401, 22 Sup. Ct. 181, 46 L. ed. 236 (army officer in charge of expenditures for river and harbor improvement); *Smith v. Whitney*, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. ed. 601.

Making an unfounded claim for the price of a horse, or attempting to seduce a brother officer's wife during his illness may be prosecuted under an article of war punishing "scandalous and infamous conduct unbecoming an officer and a gentleman." *Smith v. Whitney*, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. ed. 601.

The refusal to pay a just debt is conduct unbecoming an officer and a gentleman. *Fletcher v. United States*, 26 Ct. Cl. 541.

55. *Carter v. McClaughry*, 183 U. S. 365, 22 Sup. Ct. 181, 46 L. ed. 236; *s. c.*, 105 Fed. 614, 618.

56. *Dillingham v. Booker*, 163 Fed. 696, 90 C. C. A. 280; *United States v. Reaves*, 126 Fed. 127, 60 C. C. A. 675.

57. **U. S.**—*Kurtz v. Moffitt*, 115 U. S. 487, 6 Sup. Ct. 148, 29 L. ed. 458, 461; *Ex parte Townsend*, 133 Fed. 74; *In re Cadwallader*, 127 Fed. 881; *In re Fair*, 100 Fed. 149; *In re White*, 17 Fed. 723. **Me.**—*State v. Symonds*, 57 Me. 148. **Pa.**—*Huber v. Reiley*, 53 Pa. 112.

2. Offenses Committed in Foreign Territory.—Under the laws of war, a court martial has exclusive jurisdiction over all offenses committed by persons in the military service when the armies are in the territory of another government,⁵⁸ or on board a United States ship of war.⁵⁹

3. Over Civil Offenses.—Unless conferred by statute, courts martial have no exclusive jurisdiction over offenses violating the laws regulating civil society committed by persons in the military service of the United States,⁶⁰ unless while in the enemy's territory.⁶¹ By the 62nd article of war courts martial have been given concurrent jurisdiction with the civil courts of all offenses, not capital, committed by soldiers in violation of the laws governing civil society.⁶²

B. OVER PERSONS.—1. General Power.—All persons in the military or naval service of the United States are subject to trial by courts martial under the authority of the United States,⁶³ in time of

58. *Coleman v. Tennessee*, 97 U. S. 509, 24 L. ed. 1118 (in confederate state under military occupation of United States with military governor appointed by president). See also *Hamilton v. McClaghry*, 136 Fed. 445, Boxer uprising in China.

59. *United States v. Mackenzie*, 30 Fed. Cas. No. 18,313.

60. *Grafton v. United States*, 206 U. S. 333, 348, 27 Sup. Ct. 749, 51 L. ed. 1084, 1089; *Coleman v. Tennessee*, 97 U. S. 509, 24 L. ed. 1118; *United States v. Lewis*, 129 Fed. 823, *affirmed*, 200 U. S. 1, 26 Sup. Ct. 229, 50 L. ed. 343.

61. See *infra*, VI, C.

In time of war all offenses committed by soldiers are cognizable by court martial and the civil courts exercise jurisdiction thereof only by comity. *Ex parte Bright*, 1 Utah 145, 148.

62. *Franklin v. United States*, 216 U. S. 559, 30 Sup. Ct. 434, 54 L. ed. 615; *United States v. Grafton*, 206 U. S. 333, 27 Sup. Ct. 749, 51 L. ed. 1084.

63. *Johnson v. Sayre*, 158 U. S. 109, 15 Sup. Ct. 773, 39 L. ed. 914; *Ex parte Mason*, 105 U. S. 696, 26 L. ed. 1213; *Ex parte Milligan*, 4 Wall. (U. S.) 2, 18 L. ed. 281; *In re Davison*, 21 Fed. 618; *United States v. Mackenzie*, 30 Fed. Cas. No. 18,313.

The fifth amendment to the Constitution of the United States specifically excepts "cases arising in the land or naval forces" from the necessity of indictment for capital or infamous of-

fenses. *Ex parte Mason*, 105 U. S. 696, 26 L. ed. 1213.

Particular Persons Subject to Court Martial.—The following have been held subject to court martial as being in the military services of the United States: Cadets (*Babbit's Case*, 16 Ct. Cl. 202; 7 Op. Att.-Gen. 323; 1 Op. Att.-Gen. 276); a military officer performing duties in the Freedman's Bureau (14 Op. Att.-Gen. 268); Chief of Bureau of Medicine and Surgery in Navy for acts as such chief (*Wale's Case*, 18 Op. Att.-Gen. 176); a retired army officer (*Closson v. United States*, 7 App. Cas. (D. C.) 460); *Runkle v. United States*, 19 Ct. Cl. 396, *reversed* on another point, 122 U. S. 543, 7 Sup. Ct. 1141, 30 L. ed. 1167; *Murphy v. United States*, 38 Ct. Cl. 511; *Hill v. Territory*, 2 Wash. Ter. 147, 7 Pac. 63); a paymaster (*Smith v. Whitney*, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. ed. 601); a paymaster's clerk in the army (*In re Thomas*, 23 Fed. Cas. No. 13,888); a paymaster's clerk in the navy (*Ex parte Reed*, 100 U. S. 13, 25 L. ed. 538, 20 Fed. Cas. No. 11,636; *Johnson v. Sayre*, 158 U. S. 109, 15 Sup. Ct. 773, 39 L. ed. 914; *United States v. Bogart*, 3 Ben. 257, 24 Fed. Cas. No. 14,616; *In re Thomas, supra*, though not where appointed from civil life and doing duty in time of peace on land for periods terminable at the will of the officers (*Ex parte Van Vranken*, 47 Fed. 888); a paymaster general in the navy (*Smith v. United States*, 26 Ct. Cl. 143); civil engineers in the navy (15 Op. Att.-Gen. 597); civilian employes of the War Department serv-

peace as well as in time of war,⁶⁴ to which jurisdiction a person submits himself when he enlists in the army or in the naval service of the United States,⁶⁵ and as to them, this constitutes due process of law.⁶⁶ It is well settled, however, that a court martial has no jurisdiction over a person not in the military service,⁶⁷ but civilian employes serving with the army in the field, though not enlisted, are subject to trial by court martial.⁶⁸

2. Over Officers.—Officers can be tried only by general courts martial.⁶⁹

3. Jurisdiction of Regimental Garrison and Summary Courts. The jurisdiction of regimental, garrison and summary courts martial extends over enlisted men, except that they have no power to try capital cases, or commissioned officers,⁷⁰ nor has it jurisdiction to try one while holding the privileges of a certificate of eligibility to promotion, nor non-commissioned officers if they object thereto.⁷¹

4. Person Over or Under Age at Time of Enlistment.—The fact that the offender was above the legal age for enlistment,⁷² or below

ing in the Indian country during offensive and defensive operation (14 Op. Att.-Gen. 22).

Army Contractor.—Though it has been held that army contractors are subject under an act of congress (Act of July 17, 1862, 12 St. at L., p. 596, §16), to trial by court martial, for defrauding the United States (*United States v. Adams*, 7 Wall. (U. S.) 463, 19 L. ed. 249; *Hill's Case*, 9 Cl. Cl. 178; *Holmes v. Sheridan*, 1 Dill. 351, 12 Fed. Cas. No. 6,644), such an act, in *Ex parte Henderson*, 11 Fed. Cas. No. 6,349, is said to be unconstitutional.

64. *Johnson v. Sayre*, 158 U. S. 109, 15 Sup. Ct. 773, 39 L. ed. 914; *United States v. Mackenzie*, 30 Fed. Cas. No. 18,313.

65. *Ex parte Parks*, 93 U. S. 18, 23 L. ed. 787; *Ex parte Milligan*, 4 Wall. (U. S.) 2, 18 L. ed. 281; *Dynes v. Hoover*, 20 How. (U. S.) 65, 77, 15 L. ed. 838; *Ex parte Van Vranken*, 47 Fed. 888; *In re Davidson*, 21 Fed. 618; *In re Corbett*, 9 Ben. 274, 6 Fed. Cas. No. 3,219; *In re Bogart*, 2 Sawy. 396, 3 Fed. Cas. No. 1,596.

66. *Reaves v. Ainsworth*, 219 U. S. 296, 31 Sup. Ct. 230, 55 L. ed. 225.

67. U. S.—*Wise v. Withers*, 3 Cranch 331, 2 L. ed. 457 (exempt militia man); *United States v. Praeger*, 149 Fed. 474; *Ex parte Lusk*, 145 Fed. 860. Ill. *Johnson v. Jones*, 44 Ill. 142, 92 Am. Dec. 159. N. Y.—*Smith v. Shaw*, 12

Johns, 257. Wis.—*In re Kemp*, 16 Wis. 359.

68. 14 Op. Att.-Gen. 22, under the 60th Article of War.

Persons Not Subject to Courts Martial.—A quartermaster's clerk—a civilian employed in that capacity is not amenable to trial by court martial, except when "the army is in the field." 16 Op. Att.-Gen. 13; 16 Op. Att.-Gen. 48.

69. U. S. Rev. St., §1342; Art. of War, 79; 1 Fed. St. Anno. 499.

Graduated cadets assigned to duty as supernumerary officers can only be tried by general courts martial, as they are subject to the duties of commissioned officers, but under graduate cadets assigned to such service, may be tried by regimental or garrison court martial. 7 Op. Att.-Gen. 323.

70. U. S. Rev. St., §1342; 31 St. at L., ch. 809, p. 950; Art. of War, 83; 1 Fed. St. Anno. 499.

Undergraduate cadets are triable by regimental or garrison courts. 7 Op. Att.-Gen. 323.

71. 30 St. at L., ch. 469, p. 483; 7 Fed. St. Anno. 1070.

72. Jurisdiction Over Soldier Beyond Age for Legal Enlistment.—A court martial has jurisdiction over an enlisted soldier though he was not eligible for enlistment. *United States v. Grimley*, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. ed. 636.

the legal age for enlistment,⁷³ and though the minor enlists without the consent of his parents as required, this does not affect the jurisdiction of the court martial over him, as the enlistment is not void but voidable only.⁷⁴

5. Persons Confined Under Sentence of Imprisonment and Dismissal From Service.—By express statute, a court martial has jurisdiction to try and punish a soldier sentenced to imprisonment and dismissal from the service, for an offense committed while under confinement in pursuance of his sentence.⁷⁵

6. Militia.—United States courts martial have jurisdiction over offenses committed by the militia only when in the service of the United States in times of war or public danger.⁷⁶ The states generally

73. U. S.—*Dillingham v. Booker*, 163 Fed. 696, 90 C. C. A. 280; *United States v. Reeves*, 126 Fed. 127, 60 C. C. A. 675, *affirmed* 219 U. S. 296, 31 Sup. Ct. 230, 55 L. ed. 225; *Ex parte Rock*, 171 Fed. 240; *In re Carver*, 142 Fed. 623; *In re Kaufman*, 41 Fed. 876; *In re Spencer*, 40 Fed. 149; *In re Zimmerman*, 30 Fed. 176; *In re Davison*, 21 Fed. 618. **Mass.**—*In re McConologue's Case*, 107 Mass. 154; *Tyler v. Pomeroy*, 8 Allen 480. **N. C.**—*In re Graham*, 53 N. C. 416. **Pa.**—*Com. v. Gamble*, 11 Serg. & R. 93. **Contra.**—**U. S.**—*In re Baker*, 23 Fed. 30; *In re Davison*, 21 Fed. 618. **N. Y.**—*People v. Warden of New York County Jail*, 3 Crim. Rep. 545, *reversing* 34 Hun 393. **Pa.**—*United States v. Wright*, 5 Phila. 296.

74. U. S.—*Dillingham v. Booker*, 163 Fed. 696, 90 C. C. A. 280; *United States v. Reeves*, 126 Fed. 127, 60 C. C. A. 675, *reversing* 121 Fed. 848, *affirmed*, 219 U. S. 296, 31 Sup. Ct. 230, 55 L. ed. 225; *In re Miller*, 114 Fed. 838, 52 C. C. A. 472; *Solomon v. Davenport*, 87 Fed. 318, 30 C. C. A. 664; *In re Carver*, 142 Fed. 623; *In re Dowd*, 90 Fed. 718 (especially where he remains in the service after attaining the age at which he could legally enlist); *In re Kaufman*, 41 Fed. 876; *In re Dohrendorf*, 40 Fed. 148; *In re Cosenow*, 37 Fed. 668; *In re Zimmerman*, 30 Fed. 176. **Ia.**—*Ex parte Anderson*, 16 Iowa 595. **N. Y.**—*In re Beswick*, 25 How. Pr. 149.

Compare People v. The Warden, etc., 100 N. Y. 20, 2 N. E. 870, in which it is said that a "fundamental requisite to the jurisdiction of such courts is that the persons over whom they attempt to exercise authority shall have been duly enlisted and be legally sub-

ject to the obligations of military discipline," and holding that the enlistment of one under twenty-one years without the consent of his parent or guardian is not a valid enlistment where the statute provides that there shall be no enlistment under that age without such consent.

75. In re Craig, 70 Fed. 969; *Ex parte Wildman*, 29 Fed. Cas. No. 17,653a (statute March 3, 1873, not unconstitutional as violating fifth amendment to United States Constitution).

76. Johnson v. Sayre, 158 U. S. 109, 15 Sup. Ct. 773, 39 L. ed. 914; *United States v. Mackenzie*, 1 N. Y. Leg. Obs. 371, 30 Fed. Cas. No. 18,313; *Houston v. Moore*, 5 Wheat. (U. S.) 1, 5 L. ed. 19; *Mills v. Martin*, 19 Johns. (N. Y.) 7.

Jurisdiction Over Exempt Militia Man.—A United States court martial has no jurisdiction over a justice of the peace exempt from militia duty, failing or refusing to report for service in response to an order to report for service. *Wise v. Withers*, 3 Cranch (U. S.) 331, 2 L. ed. 457.

Officer Executing Process Against Exempted Person Liable to Action. The officer who executes the process enforcing a fine against an exempt person is liable to an action therefor, as the judgment of the court martial is beyond its jurisdiction. *Wise v. Withers*, 3 Cranch (U. S.) 331, 2 L. ed. 457.

Delinquent Militia Men as Subject to United States Courts Martial.—In the absence of a statute, delinquent militia men are not amenable to trial by United States courts martial because not in the service of the United States until mustered into service

provide by statute for the punishment of violations of the rules and regulations of the military discipline in times of peace by state court martial.⁷⁷

7. After Expiration of Enlistment.—For an offense committed while in the service the court martial has jurisdiction to try the offender though he is no longer in the service, provided the jurisdiction of the court attached before leaving the service,⁷⁸ and may execute the sentence after the lapse of many years, and the severance of all connections with the army.⁷⁹ But it has been said that there can be no prosecution for an offense committed while in the service, when

(*Mills v. Martin*, 19 Johns. (N. Y.) 7; *Rathbun v. Martin*, 20 Johns. (N. Y.) 343); but the United States statute makes them subject thereto (*Martin v. Mott*, 12 Wheat. 19, 6 L. ed. 537; *Houston v. Moore*, 5 Wheat. (U. S.) 1, 5 L. ed. 19).

Unless the statute confines its operations to times of war only, its jurisdiction does not expire at the end of a war existing at the time the militia man is called into service, nor is its jurisdiction dependent upon the fact of peace or war. *Martin v. Mott*, 12 Wheat. (U. S.) 19, 6 L. ed. 537.

Militia Officers May Be From Any State.—A militia man may be tried anywhere and by militia officers of any of the states. *Mills v. Martin*, 19 Johns. (N. Y.) 7, 24.

Defamatory publications by one officer relative to another officer in the national guard made not in connection with the service, but in pursuance of his private vocation as an editor, are not cognizable by courts martial, but by the civil courts only. *People v. Townsend*, 10 Abb. N. C. (N. Y.) 169.

77. *State v. Waggener*, 74 Minn. 518, 77 N. W. 424, 73 Am. St. Rep. 359, 42 L. R. A. 749 (law constitutional); *McGorray v. Murphy*, 80 Ohio St. 413, 88 N. E. 881.

Violation of Military Code as "Criminal Offense."—The violation of a military code of a state for the securing of efficiency in the state militia are not criminal offenses within the meaning of the constitutional provision requiring presentment or indictment by a grand jury for all criminal offenses. *State v. Wagener*, 74 Minn. 518, 77 N. W. 424, 73 Am. St. Rep. 369, 42 L. R. A. 749.

State Law Punishing Delinquent Militia Men.—The state may subject

delinquent militia men to a court martial under the state law. *Houston v. Moore*, 5 Wheat. (U. S.) 1, 5 L. ed. 19, s. c., 3 Serg. & R. (Pa.) 169.

78. *Barrett v. Hopkins*, 2 McCrary 129, 7 Fed. 312 (cited in *Carter v. McClaughry*, 183 U. S. 365, 22 Sup. Ct. 181, 46 L. ed. 236); *In re Bogart*, 2 Sawy. (U. S.) 396, 3 Fed. Cas. No. 1,596; *In re Bird*, 2 Sawy. 33, 3 Fed. Cas. No. 1,428, citing *Walker v. Morris*, 3 Am. Jur. (Mass.) 281.

Offense Committed During Enlistment Punishable After Enlistment Expired. Fifth Amendment.—*In re Bogart*, 2 Sawy. (U. S.) 396, 3 Fed. Cas. No. 1,596.

Jurisdiction After Discharge.—In *In re Bird*, 2 Sawy. 33, 3 Fed. Cas. No. 1,428, Judge Deady refers to the case of Lord George Sackville reported by Tyler in his treatise on courts martial, and *Walker v. Morris*, 3 Am. Jur. 281, as tending to sustain the jurisdiction of courts martial "to arrest and try the offender, as well after the discharge from service as before." He proceeds, however, to say that it is not "absolutely necessary to decide that question in this case" and from his statement of *Walker v. Morris* that question was not involved as the prosecution was instituted before leaving the service.

79. *Coleman v. Tennessee*, 97 U. S. 509, 24 L. ed. 1118.

Executing Sentence Thirteen Years After Severance of Services.—The court in 1878 held that a soldier convicted of murder and sentenced to death by a general court martial in 1865, but whose sentence had not been executed, might "be delivered up to the military authorities of the United States, to be dealt with as required by law." *Coleman v. Tennessee*, *supra*.

jurisdiction of the offender had not been obtained before leaving the service.⁸⁰

C. CONSENT TO OR WAIVER OF JURISDICTION.—Consent cannot confer jurisdiction upon a court martial all the members of which are ineligible to sit on the trial of the particular offender,⁸¹ or where the court martial consists of less than the minimum number allowed by law.⁸² Nor does the accused waive jurisdiction by pleading guilty to the offense charged.⁸³

VI. METHOD OF PROCEDURE.—A. GENERAL STATEMENT.

The authority of courts martial is statutory, and the statute under which they proceed must be followed throughout.⁸⁴ In the absence of positive enactment, courts martial, when duly organized, regulate their mode of proceedings by the general usage and customs of the military service, or what may not inaptly be called the customary military law.⁸⁵

80. 24 Op. Att.-Gen. 570. See also 5 Op. Att.-Gen. 58.

81. *McClaghry v. Deming*, 186 U. S. 49, 22 Sup. Ct. 786, 46 L. ed. 1049.

Consent cannot confer jurisdiction upon the court martial where not legally constituted. 22 Op. Att.-Gen. 137.

82. *In re Leary*, 27 Hun (N. Y.) 564.

Waiver of Rights as to Evidence.

Though the proceedings of courts of inquiry are only evidence before a court martial in cases other than where the punishment is dismissal from the service or capital punishment, the court martial is not without jurisdiction of a cause in which the sentence was dismissal from the service, where he was required as a condition precedent to the calling of the court martial, to submit to the introduction of the record of the testimony introduced before the board of inquiry, with the right to recall additional witnesses, as he waived such right. *Mullan v. United States*, 212 U. S. 516, 29 Sup. Ct. 330, 53 L. ed. 632.

83. *Duffield v. Smith*, 3 Serg. & R. (Pa.) 590.

Contra.—It has been held, however, that by pleading guilty, defendant admits both jurisdiction of the person and offense. *Vanderheyden v. Young*, 11 Johns. (N. Y.) 150.

84. *Runkle v. United States*, 122 U. S. 543, 7 Sup. Ct. 1141, 30 L. ed. 1167.

85. *Smith v. Whitney*, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. ed. 601;

Martin v. Mott, 12 Wheat. (U. S.) 19, 35, 6 L. ed. 537; *Kirkman v. McClaghry*, 160 Fed. 436, *affirming*, 152 Fed. 255.

“The principle of the non-interference of the courts of law with the procedure of courts martial is clear and obvious. The groundwork of the jurisdiction, and the extent of the powers of courts martial, are to be found in the Mutiny Act and the Articles of War, and upon all questions arising upon these her Majesty’s judges are competent to decide; but the Mutiny Act and Articles of War do not alone constitute the military code, for they are, for the most part, silent upon all that relates to the procedure of the military tribunals to be erected under them. Now this procedure is founded upon the usages and customs of war, upon the regulations issued by the Sovereign, and upon old practice in the army, as to all which points common law judges have no opportunity, either from their law books or from the course of their experience, to inform themselves. It would therefore be most illogical, to say nothing of the impediments to military discipline which would thereby be interposed, to apply to the procedure of courts martial those rules which are applicable to another and different course of practice.” *Smith v. Whitney*, 116 U. S. 167, 178, 6 Sup. Ct. 570, 576, 29 L. ed. 601, quoting the language of Mr. Justice Perry of the Supreme Court of Bombay.

Military Law Clearly Defined Sys-

B. SUMMONS.—The order of the officer convening the court martial, designating the officers of the court is a summons within the meaning of the statute.⁸⁶

C. SERVICE OF CHARGE.—By the army regulations a copy of the charges and specifications must be served upon the accused within eight days after the arrest,⁸⁷ but the navy regulations provide for the service of the charges at the time of the arrest.⁸⁸ But the term "arrest" refers to the arrest resulting from the preferring of charges, by the proper authority, and not to the preliminary arrest, either by way of punishment to promote good discipline or to await the action of a court of inquiry to prefer charges and specifications.⁸⁹ The fail-

tem.—Military law, however, is as clearly defined a system of laws as are the statute and common laws, or the statute and civil laws, prevailing in any state of the union. Military law consists of the articles of war enacted by congress, the regulations and instructions sanctioned by the president; the orders of commanding officers; and certain usages or customs constituting the unwritten or common law of the army. *Ex parte Bright*, 1 Utah 145, 148.

86. The fact that the convening officer, in another letter substituted one member for another is immaterial. *In re Crain*, 84 Fed. 788, 790.

87. *Closson v. Armes*, 7 App. Cas. (D. C.) 460; U. S. Rev. St., §1342; 12 St. at L., ch. 200, p. 395; Art. of War, 71; 1 Fed. St. Anno. 496.

Army.—Informing Accused of Charges at Time of Arrest.—While it is proper that a retired army officer should, at the time of arrest be informed of the charges against him, either verbally or in the order of arrest, the failure to do so does not invalidate the arrest provided in due time thereafter, that is, within eight days after the arrest, formal charges are preferred, and a copy of the charges served upon him as required by statute. *Closson v. Armes*, 7 App. Cas. (D. C.) 460, 478.

Service Unnecessary Where Charges Formulated and Communicated Before Arrest.—The service of charges upon accused within eight days after arrest for trial is unnecessary where the charges had already been formulated and communicated to him before his arrest. *Closson v. Armes*, 7 App. Cas. (D. C.) 460.

New York.—The delinquency court

of New York has been held not to be a court martial and a copy of charges and specifications need not be served as required in courts martial. *People v. Crane*, 125 N. Y. 535, 26 N. E. 736, reversing 9 N. Y. Supp. 670.

88. *Bishop v. United States*, 197 U. S. 334, 25 Sup. Ct. 440, 49 L. ed. 780; *Johnson v. Sayre*, 158 U. S. 109, 15 Sup. Ct. 773, 39 L. ed. 914; *In re Crain*, 84 Fed. 788; *Smith v. United States*, 36 Ct. Cl. 304; 4 Op. Att.-Gen. 410, 413.

An entry on the ship's log of the charges is insufficient to give defendant notice of the charges. *Smith v. United States*, 36 Ct. Cl. 304.

Presumptions as to Service of Copy of Charges.—Where the record shows that the accused, in response to an inquiry by the judge advocate, states that he had received a copy of the charges and specifications against him, it will be presumed to have been served upon him at the time of his arrest. *In re Crain*, 84 Fed. 788.

89. *United States v. Smith*, 197 U. S. 386, 25 Sup. Ct. 489, 49 L. ed. 801; *Bishop v. United States*, 197 U. S. 334, 25 Sup. Ct. 440, 49 L. ed. 780; *Johnson v. Sayre*, 158 U. S. 109, 15 Sup. Ct. 773, 39 L. ed. 914.

Service on Day Before Trial.—Serving a copy of the charges and specifications on the day before the court martial was ordered to convene, the day he was arrested for trial by the court martial, is sufficient, though accused was put under arrest at the time of the commission of the offense as a temporary precaution for the preservation of good order and further inquiry, and was released and returned to duty the same day to give time to investigate the case. *Bishop v. United States*,

ure to comply with this regulation is a jurisdictional defect, inquirable into by the civil courts.⁹⁰

D. PLEADINGS.—1. In General.—According to military usage and practice, the charge is in effect divided into two parts, the first technically called the “charge,” and the second the “specification.”⁹¹ The charge proper designates the military offense of which accused is charged. The specification sets forth the acts or omissions of the accused which form the legal constituents of the offense.⁹²

2. Particularity.—The pleadings need not possess the technical nicety of an indictment at common law,⁹³ courts martial being governed by the nature of the service, which demands intelligible precision of language, but regards the substance of things rather than their forms; eschewing looseness and confusion, but having in view that military administration must be capable of working in peace and more especially “amid the privations and the dangers of war.”⁹⁴ If the description of the offense is sufficiently clear to inform the accused of the military offense for which he is being tried so as to enable him to prepare his defense, it is sufficient.⁹⁵

197 U. S. 334, 25 Sup. Ct. 440, 49 L. ed. 780.

Service After Report of Board of Inquiry.—This is complied with by furnishing accused immediately after the report of the board of inquiry and the ordering of a court martial for the trial and four days before the court martial met. *Johnson v. Sayre*, 158 U. S. 109, 15 Sup. Ct. 773, 39 L. ed. 914.

90. *Smith v. United States*, 36 Ct. Cl. 304 (arrest for long time without filing charges and then informed of charges for first time at trial).

Contra.—But *In re Leary*, 27 Hun (N. Y.) 564, this is held to be a matter of procedure only, waived by going to trial without objection.

91. *Carter v. McClaughry*, 183 U. S. 365, 22 Sup. Ct. 181, 46 L. ed. 236; 7 Op. Att.-Gen. 603.

The custom is to present a “charge in general terms, indicative of the offense imputed, as “desertion,” “disobedience of orders,” “mutiny,” or “conduct unbecoming an officer and a gentleman”—and to subjoin a “specification” or “specifications,” in which are set forth the particular facts constituting the offense designated in the “charge.” 7 Op. Att.-Gen. 601.

92. *Carter v. McClaughry*, 183 U. S. 365, 22 Sup. Ct. 181, 46 L. ed. 236; s. c., 105 Fed. 614.

93. *U. S.—Carter v. McClaughry*,

183 U. S. 365, 22 Sup. Ct. 181, 46 L. ed. 236; *Smith v. Whitney*, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. ed. 601; *Ex parte Henderson*, 11 Fed. Cas. No. 6,349; 7 Op. Att.-Gen. 601, 604. **N. Y.** *People v. Porter*, 50 Hun 161, 3 N. Y. Supp. 35, 19 N. Y. St. 328. **Eng.**—*In re Poe*, 5 B. & Ad. 681, 27 E. C. L. 153.

94. *Carter v. McClaughry*, 183 U. S. 365, 22 Sup. Ct. 181, 46 L. ed. 236; 7 Op. Att.-Gen. 603.

95. *Gassoway's Case*, 1 Op. Att.-Gen. 294.

Reasonable Clearness with Particularity of Time and Place Sufficient.—It is sufficient that the charges are intelligently expressed, with reasonable clearness, stating the time and place when the misconduct was alleged to have occurred. *People v. Porter*, 50 Hun 161, 3 N. Y. Supp. 35.

Sufficiency of Specifications.—A specification of the charge is good and will support the finding and sentence upon it, with or without descriptive designation of the act, provided it appears that the facts alleged and approved constitute, in any point of view, the offense charged. 7 Op. Att.-Gen. 601, 605.

Sufficiency of Charge of Assault.—*In re Stubbs*, 133 Fed. 1012, 1014.

Charging Fraud in Army Contracts. Under a statute making army contractors amenable to courts martial for fraud connected with “army or navy

3. **Amendments.**—Charges cannot be so amended after arraignment as to entirely obliterate the original specifications and insert new ones, describing or setting forth offenses wholly different from those originally described.⁹⁶

4. **Joinder of Offenses.**—In the absence of statutory direction upon the subject military usage and procedure not only permits of an indefinite number of offenses being charged and adjudicated together in one proceeding by court martial,⁹⁷ but the rule is recognized that, whenever an officer has been apparently guilty of several or many offenses, whether of a similar character or distinct in their nature, charges and specifications covering them all should, if practicable, be preferred together, and together brought to trial.⁹⁸

E. **ARRAIGNMENT.**—If upon arraignment the prisoner stands mute and refuses to plead, the court may proceed to trial and judgment as if the prisoner had pleaded not guilty.⁹⁹

F. **TIME FOR HOLDING TRIAL.**—While the articles of war provide for trial within ten days after the service of charges unless the necessities of the service prevent it, in which case the trial must be within thirty days,¹ the failure of the military authorities to proceed to try defendant within the time limited, where it was due to the accused suing out a writ of *habeas corpus*, does not oust the jurisdiction of the court martial.²

G. **RIGHT TO COUNSEL.**—In the absence of statute, it rests solely in the discretion of the court martial whether or not the accused shall be allowed counsel.³

contracts," a charge that defendant was engaged in furnishing supplies "for the military service" is insufficient, as the terms "army and navy" refer to the regular army and navy, as for all that appears, the supplies may have been for the "militia." *Ex parte Henderson*, 11 Fed. Cas. No. 6,349.

Charging an officer with inebriation," though the statute uses the word "drunkenness," is sufficient. 1 Op. Att.-Gen. 294.

96. *Ex parte Henderson*, 11 Fed. Cas. No. 6,349.

97. *Carter v. McClaughry*, 183 U. S. 365, 22 Sup. Ct. 181, 46 L. ed. 236; *Rose v. Roberts*, 99 Fed. 948, 40 C. C. A. 199.

Setting Out Same Acts in Specifications Under Different Charges.—The mere fact that certain acts of accused are set out in all of the specifications supporting the three charges does not destroy the distinctive character of the offenses charged, nor can it be said to be a splitting up into several charges of one offense, and therefore a trial

and punishment three times for the same act, where the offenses are distinct, dependent upon different facts, and requiring different proof. *Carter v. McClaughry*, 105 Fed. 614, *affirmed*, 183 U. S. 365, 22 Sup. Ct. 181, 46 L. ed. 236.

Different charges of an unconnected and incongruous character may be joined, and tried in the same trial, as by military procedure all the charges and specifications to which a party may be subjected should be preferred together. 22 Op. Att.-Gen. 589, 595.

98. *Carter v. McClaughry*, 183 U. S. 365, 22 Sup. Ct. 181, 46 L. ed. 236; 22 Op. Att.-Gen. 589, 595.

99. U. S. Rev. St., §1342; Art. of War, 89; 1 Fed. St. Anno. 501.

1. *Closson v. Armes*, 7 App. Cas. (D. C.) 460.

2. *Closson v. Armes*, 7 App. Cas. (D. C.) 460, 481.

3. *Rathburn v. Sawyer*, 15 Wend. (N. Y.) 451, exercise of discretion not reviewable.

But a court martial has been held

II. CHALLENGES. — Whatever challenge is made must be made during the trial,⁴ and the relevancy and validity thereof will be determined by the court.⁵

Members of the court who are ineligible to sit should be challenged,⁶ but the court shall not receive a challenge to more than one member at a time.⁷ But a challenge to the whole court is unnecessary where no member thereof is eligible to sit on the trial of the particular offender, as there is no court to hear and dispose of the challenge.⁸

The validity of the challenge is not reviewable in a collateral action.⁹

I. NATURE OF SESSIONS. — Unless required by statute, the sessions need not be public,¹⁰ as a provision requiring trials to be public does not extend to military courts.¹¹

When there is a closed session the judge advocate must withdraw, and when his advice or assistance is required it must be obtained in open court.¹²

J. RIGHT TO JURY. — The course of their proceedings has always been without a jury, save so far as the members of the court perform the functions of both court and jury;¹³ and congress,¹⁴ or a state legislature may therefore provide for the enforcement of discipline by courts martial without the intervention of a jury even in times of peace.¹⁵

to be a court within the meaning of a constitutional provision giving an accused the right to appear by counsel in any court. *People v. Van Allen*, 55 N. Y. 31, 37. See *supra*, II.

4. **Nine Members in Court.**—Devlin's Case, 6 Op. Att.-Gen. 369.

5. U. S. Rev. St., §1342; Art. of War, 88; 1 Fed. St. Anno. 501.

For form of challenge, see *Brooks v. Daniels*, 22 Pick. (Mass.) 498.

6. Proceedings are not void on this account if no challenge is made. 15 Op. Att.-Gen. 432. See also *Keyes v. United States*, 109 U. S. 336, 3 Sup. Ct. 202, 27 L. ed. 954.

7. U. S. Rev. St., §1342; Art. of War, 88; 1 Fed. St. Anno. 501.

8. *McClaghry v. Deming*, 186 U. S. 49, 65, 22 Sup. Ct. 786, 46 L. ed. 1049, 1056.

9. *Swaim v. United States*, 165 U. S. 553, 17 Sup. Ct. 448, 41 L. ed. 823; *Keyes v. United States*, 109 U. S. 336, 3 Sup. Ct. 202, 27 L. ed. 954.

That prosecutor was a member of court and a witness at the trial is not reviewable collaterally. *Keyes v. United States*, *supra*.

10. *Rathburn v. Sawyer*, 15 Wend. (N. Y.) 451.

11. *People v. Daniell*, 6 Lans. (N. Y.) 44, *affirmed*, 50 N. Y. 274.

12. 27 St. at L., ch. 272, p. 278; Art. of War, 90, §2; 1 Fed. St. Anno. 501.

13. *State v. Wagener*, 74 Minn. 518, 77 N. W. 424, 73 Am. St. Rep. 369, 42 L. R. A. 749.

The right of trial by jury is preserved by the constitution in those cases only where it existed theretofore. And it is no objection that under the military code, such courts have no jury and do not conform their proceedings to those in ordinary courts of justice. *State v. Wagener*, 74 Minn. 518, 77 N. W. 424, 73 Am. St. Rep. 369, 42 L. R. A. 749.

14. Under the fifth amendment to the United States Constitution, congress may provide for the punishment of cases arising in the army or naval forces without a jury. *In re Bogart*, 2 Sawy. (U. S.) 396, 3 Fed. Cas. No. 1,596.

15. *State v. Wagener*, 74 Minn. 518, 77 N. W. 424, 93 Am. St. Rep. 369, 42 L. R. A. 749.

This is done in most of the states. In Missouri, the power of courts martial in times of peace is expressly limited to discharging the accused from the service. *State v. Wagener*, *supra*.

K. PRESENCE OF ACCUSED. — With some qualifications due to the nature of the service, it is just as improper for a court martial to proceed with the trial of an accused person in his absence as it is in other courts.¹⁶

L. TESTIMONY OF ACCUSED. — The accused cannot be called as a witness unless upon his own request.¹⁷

M. DEPOSITIONS. — Depositions of witnesses residing beyond the limits of the state, territory or district in which a court is ordered to sit, if taken on reasonable notice to the opposite party and duly authenticated, may be read in evidence in cases not capital.¹⁸

N. CONTINUANCES. — A court martial for reasonable cause must grant a continuance to either party for such time and as often as may appear to be just, but if the prisoner be in close confinement, the trial cannot be delayed for a period longer than sixty days.¹⁹

O. OATHS. — The statute requires the oath to be administered to the judge advocate by the president of the court, and the judge advocate is then to administer the oath to each member of the court martial.²⁰ While it is essential that the oath be administered to the judge advocate,²¹ such objection cannot be raised on collateral attack as it is a mere irregularity in procedure.²² Nor will an irregularity in the order of administering the oaths as prescribed by the statute render the proceedings void.²³

On the trial of several persons by the same court martial, it need not be re-sworn after its organization where the warrant for the court is special, and there is a specification of the persons to be tried and the charges made, accompanying a general warrant.²⁴

VII. ARREST AND CONFINEMENT. — A. NECESSITY FOR ARREST. — The United States statutes provide for the arrest and detention of the accused to answer the charges against him as the proper and necessary steps preliminary to the trial,²⁵ though statutes in some

16. But the sentence will not be disturbed because of defendant's absence for one day, no objection being made and the offense being trivial, punishable by fine only. *Weirman v. United States*, 36 Ct. Cl. 236.

17. Act of March 16, 1878; 20 St. at L., ch. 37, p. 30.

18. U. S. Rev. St., §1342; 12 St. at L., ch. 75, p. 736; Art. of War, 91; 1 Fed. St. Anno. 501.

19. U. S. Rev. St., §1342; Art. of War, 93; 12 St. at L., ch. 75, p. 736; 1 Fed. St. Anno. 502.

20. Pollard's Case, 13 Op. Att.-Gen. 374; U. S. Rev. St., §1342; Art. of War, 84, 85; 1 Fed. St. Anno. 500.

21. Guthrie's Case, 3 Op. Att.-Gen. 544; Clark's Case, 3 Op. Att.-Gen. 397.

Where proceedings do not show the oath was given, it will be considered

that the judge advocate was not sworn and the proceedings are void. *Clark's Case*, 3 Op. Att.-Gen. 396.

22. *Swaim v. United States*, 165 U. S. 553, 17 Sup. Ct. 448, 41 L. ed. 823.

23. 13 Op. Att.-Gen. 374, judge advocate giving oath to members before taking oath himself.

24. 2 Op. Att.-Gen. 297; 2 Op. Att.-Gen. 460.

25. *In re Corbett*, 9 Ben. 274, 6 Fed. Cas. No. 3,219; *Closson v. Armes*, 7 App. Cas. (D. C.) 460 (Art. 65 of Rules of War).

An accused army officer may be placed under arrest and held for trial before formal charges in writing have been preferred in due form, provided service of charges is made within eight

states provide for a summons only when the punishment is merely a fine.²⁶ But the arrest is not an essential preliminary to the military trial where defendant voluntarily comes in and submits himself to authority without formal arrest in the regular way.²⁷

B. CONFINEMENT BEFORE AND DURING TRIAL.—1. In General. Though it is provided that no officer or soldier shall be confined more than eight days, or until a court martial can be assembled,²⁸ this does not fix a period of eight days as an absolute limit prior to conviction, as it has no application to confinement during trial and awaiting judgment, but refers to confinement preliminary to trial only.²⁹

When the court martial takes cognizance of the charge, "it becomes the duty of the commanding officer thereafter to have the accused at all times at hand to receive the judgment of the court when it should be promulgated, and to that end he is authorized by statute to keep the defendant in confinement,"³⁰ and may keep him confined after conviction until the approval or disapproval of the sentence by the reviewing authorities.³¹

2. Place of Confinement.—In the absence of specific provision as to the place of confinement pending trial, such reasonable means of custody may be used as are available.³²

VIII. ACTION ON CHARGES.—A. MANNER OF VOTING.—Members of a court martial in giving their votes must begin with the youngest in commission.³³

days as required by the army regulations. *Closson v. Armes, supra.*

Necessity for New Arrest When Court Assembles.—If defendant has been in custody awaiting trial, though illegally, there need be no arrest upon the assembling of the court martial. *In re Corbett, supra.*

Offense Committed in Officer's Presence.—"The exigencies of the military service imperatively demand that, when an offense against the articles of war has been committed in the presence of a commanding officer, he should have the right immediately to place the offender under arrest. Both the general commanding the army and the Secretary of War have this right." *Closson v. Armes, 7 App. Cas. (D. C.) 460, 476.*

26. If the statute requires a summons before imposing a fine, a personal summons is necessary. Leaving at defendant's dwelling house, when defendant is away, is not sufficient. *Capron v. Austin, 7 Johns. (N. Y.) 96.*

27. *Closson v. Armes, 7 App. Cas. (D. C.) 460, 473.*

Irregular Arrest.—Though the arrest

was irregular, the defendant will not be discharged before trial by the court martial. *Reg. v. Cuming, 19 Q. B. D. (Eng.) 13.*

28. *In re Corbett, 9 Ben. (U. S.) 274, 6 Fed. Cas. No. 3,219; Hutchins v. Van Bokkelen, 34 Me. 126.*

Confinement for ten days before the trial is not unjustifiable unless it appears that a court martial could be assembled within that period. *Hutchins v. Van Bokkelen, 34 Me. 126, 131.*

29. *In re Corbett, 9 Ben. (U. S.) 274, 6 Fed. Cas. No. 3,219.*

30. *In re Corbett, 9 Ben. (U. S.) 274, 6 Fed. Cas. No. 3,219.*

31. *Vanderheyden v. Young, 11 Johns. (N. Y.) 150.*

32. Place of Confinement as Invalidating Arrest.—Where the military authorities had the right to arrest a retired officer, the fact that he was taken from his home and confined in military barracks belonging to the United States does not affect the validity of the arrest so as to justify the civil authorities in releasing him on habeas corpus proceedings. *Closson v. Armes, 7 App. Cas. (D. C.) 460.*

33. *U. S. Rev. St., §1342; Art. of War, 95; 1 Fed. St. Anno. 502.*

B. CONVICTION OF LESSER OFFENSE.—On the trial of defendant for one offense, the court martial may find him guilty of a lesser offense.³⁴

Filing Proceedings.—The judge advocate or person acting as such, at any general court martial, must with expedition forward the original proceedings and sentence of the court to the judge advocate general of the army in whose office they must be preserved.³⁵

IX. SENTENCE AND PUNISHMENT.—**A. REQUISITES.**—To give effect to the sentence of a court martial it must appear affirmatively and unequivocally by the record of its proceedings that it was legally constituted, that it had jurisdiction; that all the statutory regulations governing its proceedings were complied with, and that its sentences are conformable to law,³⁶ as there are no presumptions in favor of their exercise of jurisdiction.³⁷

B. EXTENT.—**1. In General.**—The sentence prescribed under a statute giving the court martial discretion to fine or imprison or impose such other punishment as the court martial shall adjudge, must conform to the custom or what is usual in the service.³⁸

2. In Time of Peace.—Though the acts of congress provide that in times of peace the sentence of a court martial cannot be in excess of that prescribed by the president,³⁹ the limitation can only have

34. *Dynes v. Hoover*, 20 How. (U. S.) 65, 15 L. ed. 838 (criticised in Pullan v. Kinsinger, 20 Fed. Cas. No. 11,463, on trial for desertion, conviction of attempt to desert); *Bankhead v. United States*, 20 Ct. Cl. 405 (on trial for habitual drunkenness, conviction of specific acts of drunkenness); *United States v. Mackenzie*, 30 Fed. Cas. No. 18,313.

35. U. S. Rev. St., §1342; 19 St. at L., ch. 102, p. 310; Art. of War, 113; 1 Fed. St. Anno. 507.

36. **U. S.**—*McClaghry v. Deming*, 186 U. S. 49, 63, 22 Sup. Ct. 786, 46 L. ed. 1049, 1055; *Runkle v. United States*, 122 U. S. 543, 7 Sup. Ct. 1141, 30 L. ed. 1167; *Dynes v. Hoover*, 20 How. 65, 15 L. ed. 838, 844; *Hamilton v. McClaghry*, 136 Fed. 445; *In re Crain*, 84 Fed. 788. **Mass.**—*Brooks v. Adams*, 11 Pick. 441. **N. Y.**—*Mills v. Martin*, 19 Johns. 7. **Pa.**—*Duffield v. Smith*, 3 Serg. & R. 590.

37. *Hamilton v. McClaghry*, 136 Fed. 445; *Deming v. McClaghry*, 113 Fed. 639, 51 C. C. A. 349.

Presumptions as to Sentence.—“Every presumption must be indulged in favor of the judgment of the court martial. . . . If the court martial could legally have imposed a sentence in a certain manner, it must be presumed

that it imposed it in that manner.” *Carter v. McClaghry*, 105 Fed. 614.

38. *Sim's Case*, 12 Op. Att.-Gen. 528, sentence of permanent disability of dealing in naval supplies with the government.

“Any punishment which a summary court martial is authorized to inflict may be inflicted by a general court martial.” U. S. Rev. St., §1624; Art. for Govt. of Navy, 35; 1 Fed. St. Anno. 471.

A legislature may by enactment provide that upon a fine being imposed, goods and property of the delinquent may be levied upon under an execution, and if the officer fail to find sufficient goods, that the delinquent might be imprisoned. *People v. Daniell*, 50 N. Y. 274.

39. *Carter v. McClaghry*, 183 U. S. 365, 22 Sup. Ct. 181, 46 L. ed. 236; *In re Stubbs*, 133 Fed. 1012.

“Whenever by any of the Articles of War for the government of the Army, the punishment or conviction of any military offense is left to the discretion of the court martial, the punishment therefor shall not, in time of peace, be in excess of a limit which the President may prescribe.” 26 St. at L., ch. 998, p. 491; 1 Fed. St. Anno. 510.

operation upon such persons as he affirmatively prescribes.⁴⁰

3. Death Penalty.—No person can be sentenced to death except by the concurrence of two-thirds of the members of a general court martial, and in the cases expressly mentioned in the articles of war.⁴¹

4. Penitentiary Sentence.—No one in the army can be punished by imprisonment in the penitentiary by the sentence of a court martial unless the offense, either by the United States laws, or the laws of the state or territory where committed, would be so punishable.⁴² Therefore, an offense not punishable by civil society cannot be punished by imprisonment in the penitentiary,⁴³ and the same is true

Under the provision for limitation of punishment, the president on February 26, 1891, "made an executive order in limitation of punishment, which was promulgated to the Army in General Orders No. 21, February 27, 1891, and therein it was said: 'In accordance with an act of Congress of September 27, 1890, the following limits to the punishment of enlisted men, together with the accompanying regulations, are established for the government in time of peace for all courts martial and will take effect thirty days after this order.' This executive order was amended by the President March 20, 1895, and again amended March 30, 1898, and in 1901. In neither of these executive orders were its provisions extended to commissioned officers, and they solely related to the cases of enlisted men. It is true that clause 938 of the army regulations promulgated October 31, 1895, provides: 'Whenever by any of the articles of war punishment is left to the discretion of the court, it shall not, in time of peace, be in excess of a limit which the President may prescribe. The limits so prescribed are set forth in the Manual for Courts Martial, published by authority of the Secretary of War.' But we do not find in the Manual any attempt to extend the limitations to others than enlisted men; and it is evident that a limit on discretion in punishment to be imposed by the President can only have such operation as he may affirmatively prescribe." *Carter v. McClaughry*, 183 U. S. 365, 382, 22 Sup. Ct. 181, 46 L. ed. 236.

Sentence Extending Beyond Time of Enlistment.—"It does not exceed its jurisdiction by sentencing a party to suffer punishment by imprisonment for a term extending beyond the term of

military service for which defendant enlisted," provided it is within the maximum prescribed by the president. *In re Stubbs*, 133 Fed. 1012.

40. Sentencing Commissioned Officer.—Sentence Prescribed for "Enlisted Men" Only.—A sentence upon a commissioned officer in excess of the maximum punishment fixed by the president, under the act of congress providing the punishment in time of peace shall not be in excess of that fixed by the president, is not beyond the power of the court martial, where the president's order issued in pursuance thereof related to "enlisted men" only. *Carter v. McClaughry*, 183 U. S. 365, 22 Sup. Ct. 181, 46 L. ed. 236.

41. U. S. Rev. St., §1342; Art. of War, 96; 1 Fed. St. Anno. 502.

42. Grafton v. United States, 206 U. S. 333, 27 Sup. Ct. 749, 51 L. ed. 1084; *Ex parte Mason*, 105 U. S. 696, 26 L. ed. 1213; *In re Brodie*, 128 Fed. 665, 63 C. C. A. 419; *In re Langan*, 123 Fed. 132; *Ex parte Van Vranken*, 47 Fed. 888; *In re Esmond*, 5 Mackey (D. C.) 64 (larceny).

This does not require confinement in the penitentiary; it merely restricts that character of punishment to the cases specified. *Ex parte Mason*, 105 U. S. 696, 700, 26 L. ed. 1213; *In re Brodie*, 128 Fed. 665, 63 C. C. A. 419.

43. Ex parte Mason, 105 U. S. 696, 699, 26 L. ed. 1213.

"But when the act charged as 'conduct to the prejudice of good order and military discipline' is actually a crime against society which is punishable by imprisonment in the penitentiary, . . . a court martial is authorized to inflict such punishment." *Ex parte Mason*, 105 U. S. 696, 26 L. ed. 1213, cited in *Grafton v. United*

when the offense, though recognized by the laws regulating civil society, is not punishable by the civil courts by imprisonment in the penitentiary.⁴⁴ This provision, however, does not prevent the punishment of the offender in other respects greater than the civil courts could inflict.⁴⁵

In the naval service imprisonment in the penitentiary can be imposed by the court martial only where it could adjudge the punishment of death.⁴⁶

An officer convicted of crimes punishable by imprisonment in the penitentiary may be so punished, though he is dismissed, and can be dismissed though so punished.⁴⁷

5. Publication of Sentence.—The punishment provided by the one-hundredth article of war requiring that "when an officer is dismissed from the service for cowardice or fraud, the sentence further shall direct that the crime, punishment, name, and place of abode of the delinquent shall be published in the newspapers must inevitably follow the conviction." The court martial has no option as to its infliction.⁴⁸

6. Fine or Imprisonment With Dismissal From Service.—If the statute in addition to fine or imprisonment provides for such other punishment as a court martial may adjudge, the court martial may add dismissal from the service to fine and imprisonment,⁴⁹ and such sentence is not illegal because inflicted after accused had ceased to be in the service.⁵⁰

7. Upon Conviction on Several Charges.—a. *In General.*—The rule established by military usage is "that the sentence of a court

States, 206 U. S. 333, 27 Sup. Ct. 749, 51 L. ed. 1084.

44. *Ex parte Mason*, 105 U. S. 696, 26 L. ed. 1213, cited in *Grafton v. United States*, 206 U. S. 333, 27 Sup. Ct. 749, 51 L. ed. 1084.

45. *Ex parte Mason*, 105 U. S. 696, 26 L. ed. 1213.

Dishonorable Discharge Added to Imprisonment In Penitentiary.—In addition to imprisonment in the penitentiary, the court martial may also subject the offender to dishonorable discharge from the service. *Ex parte Mason*, 105 U. S. 696, 26 L. ed. 1213. See also, *Carter v. McClaughry*, 183 U. S. 365, 22 Sup. Ct. 181, 46 L. ed. 236, 251.

Imprisonment at "Hard Labor." The word "imprisonment" in the 60th article of war was not used in a technical sense, to signify imprisonment at a military post without hard labor, but has a broader signification empowering the court martial to inflict punishment "with hard labor" in a penitentiary. *In re Langan*, 123 Fed. 132.

See also *Ex parte Van Vranken*, 47 Fed. 888.

46. *Ex parte Van Vranken*, 47 Fed. 888.

47. *Carter v. McClaughry*, 183 U. S. 365, 22 Sup. Ct. 181, 46 L. ed. 236, 251.

48. *In re Carter*, 97 Fed. 496.

49. *Carter v. McClaughry*, 183 U. S. 365, 22 Sup. Ct. 181, 46 L. ed. 236. See *supra*, VII, A, 2.

50. *Carter v. McClaughry*, 183 U. S. 365, 22 Sup. Ct. 181, 46 L. ed. 236; s. c., 99 Fed. 948.

Sentences of Dismissal and Imprisonment Concurrent.—The different provisions of the sentence take effect concurrently, while the accused is under the control of the military authorities, the dates of the order of dismissal, of the infliction of the fine, and of the beginning of the imprisonment being of the same date, jurisdiction over accused to hear and determine gives power to execute and enforce the sentence. *Carter v. McClaughry*, 183

martial shall be in every case, an entirety;" that is to say, that there shall be a single sentence covering all the convictions on all the charges and specifications upon which the accused is found guilty, however separate and distinct may be the different offenses found, and however different may be the punishments called for by the offenses.⁵¹ And the sentence is warranted to the extent that the offenses upon which the offender was found guilty are punishable.⁵²

b. *Effect of Partial Disapproval.*—A duly approved finding of guilty on one of several charges, a conviction upon which requires or authorizes the sentence adjudged, will give validity and effect to such sentence, although the similar findings on all the other charges are disapproved as not warranted by the testimony.⁵³

c. *Cumulative Sentences.*—It is a well established and long continued practice to regard the sentences of courts martial as cumulative, and to execute them consecutively one upon the expiration of another in the order of their imposition,⁵⁴ irrespective of any direction in the sentence,⁵⁵ and the regulations governing courts martial in the army and navy do not change this rule.⁵⁶

U. S. 365, 22 Sup. Ct. 181, 46 L. ed. 236.

51. *Carter v. McClaughry*, 183 U. S. 365, 393, 22 Sup. Ct. 181, 46 L. ed. 236, 250; *Rose v. Roberts*, 99 Fed. 948, 40 C. C. A. 199.

Under a statute providing for fine "or" imprisonment, for any of the offenses specified, the court martial may impose a sentence of fine "and" imprisonment of two distinct and separate offenses, though they related to, and grew out of, the same transaction. *Carter v. McClaughry*, 183 U. S. 365, 22 Sup. Ct. 181, 46 L. ed. 236, where the first charge alleged "a conspiracy to defraud," and the second charge alleged "causing false and fraudulent claims to be made."

Specifying in Sentence Count Upon Which Imposed.—Under the procedure of courts martial it is not required to be stated that a fine is imposed upon one count, and imprisonment upon another count. *Carter v. McClaughry*, 105 Fed. 614, 620.

Three Punishments for Two Offenses. Where the third charge was "conduct unbecoming an officer and a gentleman," the first charge "a conspiracy to defraud" and the second, "causing false and fraudulent claims to be made," the third charge was not the same as the first and second, although to be guilty of the latter involved being guilty of the former. So a sentence of dismissal under the third

charge was not illegal because inflicting a third punishment where only two offenses had been committed. *Carter v. McClaughry*, 183 U. S. 365, 22 Sup. Ct. 181, 46 L. ed. 236.

52. *Rose ex rel. Carter v. McClaughry*, 183 U. S. 365, 22 Sup. Ct. 181, 46 L. ed. 236; *s. c.*, 105 Fed. 614, 620; *Carter v. Roberts*, 99 Fed. 948, 40 C. C. A. 199.

53. *Carter v. McClaughry*, 183 U. S. 365, 22 Sup. Ct. 181, 46 L. ed. 236.

54. *Kirkman v. McClaughry*, 160 Fed. 436, *affirming* 152 Fed. 255.

55. **Direction in Sentence Not Necessary To Make Cumulative.**—"Such is the general rule of the service' whether or not the court, in the second sentence, may have in terms specified that the second punishment should be additional to the first; such second punishment being made cumulative by operation of law, irrespective of any direction in the sentence." *Kirkman v. McClaughry*, 160 Fed. 436, *affirming* 152 Fed. 255.

56. "Paragraphs 977, and 978 of the Army Regulations which make the date of the order promulgating the sentence of a court martial, or the date of the action of the reviewing authority, as the case may be, the date when 'a term of confinement' shall begin, if the date be not expressly fixed by 'the sentence'" though not without some force, do not regulate the dates from which a confinement under

C. FAILURE TO STATE PLACE OF CONFINEMENT. — The sentence is not void though it leaves the question whether confinement shall be at a military post or in a penitentiary to the determination of the reviewing authority.⁵⁷

D. INCREASING RIGOR OF CONFINEMENT. — A military officer, as may a civil officer, may increase the rigor of the confinement of a prisoner at his discretion, according to the disposition manifested.⁵⁸

E. RECONSIDERATION OF SENTENCE. — Courts martial have the power to reconsider any judgment and sentence rendered by them during the term or sitting, and to change the judgment even to a sentence of death where the former imposed only imprisonment.⁵⁹

F. APPROVAL OF SENTENCE. — 1. **Necessity.** — The effect and conclusiveness of the action of the court martial stands as much upon the reviewing officer's approval and order as upon the original proceedings and sentence of the court; all constitute an entire proceeding and are to be construed together.⁶⁰ The approval of the sentence and not of the whole proceeding is now the prerequisite to carrying the sentence into execution.⁶¹ Until approved by the reviewing authority, the sentence is without effect and is interlocutory and inchoate only.⁶² But when so confirmed it becomes final and must be executed, unless the offender is pardoned.⁶³

2. **By Whom.** — a. *Army Courts.* — (I.) **Convening Officer.** — As a general proposition, the sentence of a court martial cannot be carried into execution until approved by the officer convening the court or by the officer commanding for the time being.⁶⁴

(II.) **Death Sentence.** — Sentence of a court martial inflicting the death penalty cannot be carried into execution until confirmation by the president, except in cases of persons convicted in time of war, as spies, mutineers, deserters or murderers, and in the cases of guerrilla

a second sentence should be computed. *Kirkman v. McLaughry*, 160 Fed. 436, affirming 152 Fed. 255.

Paragraph 981 of the army regulations providing second sentences of "soldiers," (a term usually applied to enlisted men, but not officers) shall be executed upon the expiration of the first, applies to both officers and enlisted men. *Kirkman v. McLaughry*, 160 Fed. 436, affirming 152 Fed. 255.

57. *In re Brodie*, 128 Fed. 665, 63 C. C. A. 419.

Commitment Unnecessary. — Where the sheriff is acting as the instrument of a military court, a commitment is not necessary. *McGorray v. Murphy*, 80 Ohio St. 413, 88 N. E. 881.

58. *Schuneman v. Diblee*, 14 Johns. (N. Y.) 235.

59. 1 Op. Att.-Gen. 296.

60. *In re Esmond*, 5 Mackey (D. C.) 64, 70; 5 Op. Att.-Gen. 508, 511.

Sentence as Recommendation to Reviewing Authority. — A court martial acts only in response to the call of a superior authority, and the result of its deliberations is somewhat in the nature of a recommendation to that authority. *In re Brodie*, 128 Fed. 665, 63 C. C. A. 419; *Mills v. Martin*, 19 Johns. (N. Y.) 7.

61. *Carter v. McLaughry*, 183 U. S. 365, 22 Sup. Ct. 181, 46 L. ed. 236.

62. *Runkle v. United States*, 122 U. S. 543, 555, 7 Sup. Ct. 1141, 30 L. ed. 1167, reversing 19 Ct. Cl. 396; *Mills v. Martin*, 19 Johns. (N. Y.) 7, 30.

63. *Dynes v. Hoover*, 20 How. (U. S.) 65, 81, 15 L. ed. 838.

64. *Ex parte Reed*, 100 U. S. 13, 25 L. ed. 538; *s. c.*, 20 Fed. Cas. No. 11,636; 11 Op. Att.-Gen. 251; Art. of War, 104; *In re Esmond*, 5 Mackey (D. C.) 64; *Vanderheyden v. Young*, 11 Johns. (N. Y.) 150.

marauders convicted in time of war of robbery, burglary, arson, rape, assault with intent to commit rape, or of violation of the laws and customs of war. In these excepted cases the sentence may be carried into execution upon confirmation by the commanding general in the field, or by the department commander as the case may be.⁶⁵

(III.) **Dismissal From Service in Time of Peace.** — In time of peace, a sentence of dismissal from the service of a commissioned or warrant officer does not become operative until approved by the president.⁶⁶ It need not also be approved by the officer who convened the court.⁶⁷

b. *Naval Courts.* — The sentence of a naval court martial held within the United States, when such sentence extends to the infliction of the death penalty or to dismissal of a commissioned or warrant officer, must be approved by the president of the United States.⁶⁸ In cases other than these the convening officer may approve the sentence.⁶⁹

3. Sufficiency of Approval. — The action required here is judicial in its character, not administrative, and the president cannot delegate the power to act to another where the duty devolves upon him to approve the sentence.⁷⁰

While the record must affirmatively show the approval of the president in such case,⁷¹ the president's action need not be attested by

65. U. S. Rev. St., §1342; 13 St. at L., ch. 215, p. 356; Art. of War, 105; 1 Fed. St. Anno. 505.

66. *Carter v. McClaughry*, 183 U. S. 365, 22 Sup. Ct. 181, 46 L. ed. 236; *United States v. Page*, 137 U. S. 673, 11 Sup. Ct. 219, 34 L. ed. 828; *Runkle v. United States*, 122 U. S. 543, 7 Sup. Ct. 1141, 30 L. ed. 1167 (officer not out of service until record shows such approval); *Fletcher v. United States*, 26 Ct. Cl. 541, *affirmed*, *United States v. Fletcher*, 148 U. S. 84, 13 Sup. Ct. 552, 37 L. ed. 378.

67. *Bishop v. United States*, 197 U. S. 334, 25 Sup. Ct. 400, 49 L. ed. 780.

68. *Bishop v. United States*, 197 U. S. 334, 25 Sup. Ct. 400, 49 L. ed. 780; *Dynes v. Hoover*, 20 How. (U. S.) 65, 81, 15 L. ed. 838.

The acting master's mate is not a warrant officer of the navy so as to require the president's approval of the sentence dismissing him from the service, but it may be approved by the officer convening the court martial (11 Op. Att.-Gen. 251). "Neither the president nor secretary of the navy has lawful authority to approve or disapprove the sentence in such case." 11 Op. Att.-Gen. 251.

69. 4 Op. Att.-Gen. (U. S.) 444, 445 (president's approval not required in this case); 5 Op. Att.-Gen. 508 (secretary of navy).

70. *Runkle v. United States*, 122 U. S. 543, 7 Sup. Ct. 1141, 30 L. ed. 1167.

Reason of Rule.—The act of the officer who reviews the proceedings of the court, whether he be the commander of the fleet or the president, and without whose approval the sentence cannot be executed, is as much a part of the judgment, according to law, as is the trial or the sentence. *Runkle v. United States*, 122 U. S. 543, 7 Sup. Ct. 1141, 30 L. ed. 1167, 1170; 15 Op. Att.-Gen. 290, *citing* from 11 Op. Att.-Gen. 21.

71. *Runkle v. United States*, 122 U. S. 543, 7 Sup. Ct. 1141, 30 L. ed. 1167.

Order Showing President's Approval by Inference Only.—The order of the president approving the sentence "will not be sufficient unless it is authenticated in a way to show otherwise than argumentatively that it is the result of the judgment of the president himself, and that it is not a mere departmental order which might or might not have attracted his personal atten-

his sign manual in order to be effectual.⁷² Since no formality has been prescribed by law for attesting the determination of the president, the attestation of such determination by a written statement, signed by the secretary of war, in accordance with long usage, is sufficient.⁷³

4. Reviewing Authorities' Power Over Sentence.—a. *Of President.*—The power of the president over the sentence is a power over the whole, and includes the right to approve, reject or mitigate the

tion. The fact that the order was his own should not be left to inference only." *Runkle v. United States*, 122 U. S. 543, 7 Sup. Ct. 1141, 30 L. ed. 1167, criticised in *United States v. Fletcher*, 148 U. S. 84, 13 Sup. Ct. 552, 37 L. ed. 378, as being unsafe to follow.

Recital in Letter and Brief as Showing Approval.—The approval of sentence by the president is not only shown by a letter from the secretary of the navy notifying accused of his dismissal stating that the sentence had been approved by the president, but is also shown where his approval distinctly appears upon the "brief" of the findings of the court submitted to him. *Bishop v. United States*, 197 U. S. 334, 25 Sup. Ct. 400, 49 L. ed. 780.

Insufficient Order of Approval.—An order of approval signed by the secretary of the navy alone, not mentioning the personal action of the president, except in remission of part of the sentence, is not sufficient. There must be something having the effect of an affirmative statement that "the whole proceedings" had been laid before the president for action and that he personally approved the sentence. *Runkle v. United States*, 122 U. S. 543, 7 Sup. Ct. 1141, 30 L. ed. 1167, criticized in *United States v. Fletcher*, 148 U. S. 84, 13 Sup. Ct. 552, 37 L. ed. 378, on the ground that the circumstances of the case were so exceptional as to render it an unsafe precedent.

Certificate of Secretary of War Showing President's Approval.—Though the endorsement on the record of the proceedings does not say that the proceedings were submitted to the president, it only stating that they "had been forwarded to the secretary of war for the action of the president" and "that the proceedings, findings and sentence are approved," and the direction of

the execution of the sentence, which approval and sentence could only emanate from the president, the conclusion follows that the action taken was the action of the president. *United States v. Fletcher*, 148 U. S. 84, 13 Sup. Ct. 552, 37 L. ed. 378; *Ide v. United States*, 150 U. S. 517, 14 Sup. Ct. 188, 37 L. ed. 1166.

72. *United States v. Fletcher*, 148 U. S. 84, 89, 13 Sup. Ct. 552, 37 L. ed. 378 (*distinguishing* *Runkle v. United States*, 122 U. S. 543, 7 Sup. Ct. 1141, 30 L. ed. 1167, a case of conflicting presumptions); *United States v. Page*, 137 U. S. 673, 11 Sup. Ct. 219, 34 L. ed. 828; 15 Op. Att.-Gen. 290, 296.

Authenticating Remission of Part of Sentence.—The act of the president remitting a part of a court martial sentence may be authenticated in the same way in which the act confirming the sentence can be done. 15 Op. Att.-Gen. 290, 297.

73. *United States v. Page*, 137 U. S. 673, 11 Sup. Ct. 219, 34 L. ed. 828.

Presumption as to President's Approval.—"Where the record discloses that the proceedings have been laid before the president for his orders in the case, the orders subsequently issued thereon are presumed to be his, and not those of the Secretary by whom they are authenticated." *United States v. Page*, 137 U. S. 673, 11 Sup. Ct. 219, 34 L. ed. 828.

In *Runkle v. United States*, 122 U. S. 543, 7 Sup. Ct. 114, 30 L. ed. 1167, the record failed to show the vital fact of submission of the proceedings to the president.

Presumption of Approval from Remission of Part of Sentence.—The order of approval by the president cannot be presumed upon the strength of an inference drawn from the remission of part of the sentence. *Runkle v. United States*, 122 U. S. 543, 7 Sup. Ct. 114, 30 L. ed. 1167.

sentence.⁷⁴ And he may pardon the offender,⁷⁵ or send the proceedings back to the court martial for revision.⁷⁶ He may also order a new trial for the improper exclusion of evidence.⁷⁷ But he cannot make the sentence more severe,⁷⁸ nor substitute another punishment for the punishment imposed by the court martial.⁷⁹

b. *Other Officers.*—No sentence of a court martial can be carried out until the same be approved by the officer ordering the court, or by the officer in command for the time being.⁸⁰

The officer authorized to convene the court martial has power on revision of the proceedings to remit or mitigate the sentence of any court which he may approve or confirm,⁸¹ but he cannot commute the sentence.⁸² He may send the proceedings and sentence back for review before the dissolution of the court,⁸³ but he cannot compel the court to change its sentence.⁸⁴ A more severe sentence imposed upon

74. *Whistler's Case*, 2 Op. Att.-Gen. 286; *Swaim v. United States*, 165 U. S. 553, 17 Sup. Ct. 448, 41 L. ed. 823.

Ratifying Executed Sentence.—Sentence carried into effect without approval of president may be given validity by a subsequent confirmation. 16 Op. Att.-Gen. 298.

75. **Pardon and Reappointment.**—11 Op. Att.-Gen. 19.

Where the sentence was dismissal from the service and disqualification from holding any office of profit or trust under the government of the United States, after approval and dismissal from the service the president cannot set aside the findings and sentence and nominate the offender to the senate for restoration to his former rank. 17 Op. Att.-Gen. 297.

76. *Swaim v. United States*, 165 U. S. 553, 17 Sup. Ct. 448, 41 L. ed. 823.

77. *Hall's Case*, 1 Op. Att.-Gen. 233.

78. *Swaim v. United States*, 165 U. S. 553, 17 Sup. Ct. 448, 41 L. ed. 823; s. c., 28 Ct. Cl. 173.

May Urge More Severe Sentence. *Swaim v. United States*, 165 U. S. 553, 17 Sup. Ct. 448, 41 L. ed. 823, sent back twice.

79. *Ramsey's Case*, 4 Op. Att.-Gen. (U. S.) 444, suspension of pay.

80. U. S. Rev. St., §1342; 27 St. at L., 277; Art. of War, 104; 1 Fed. St. Anno. 504.

81. *Mullan v. United States*, 212 U. S. 516, 29 Sup. Ct. 330, 53 L. ed. 632; *Whistler's Case*, 2 Op. Att.-Gen. 286.

Reducing the sentence dismissing an

officer from the service to reduction in rank and duty for a term of years with half pay is a mitigation thereof. *Mullan v. United States*, 212 U. S. 516, 29 Sup. Ct. 330, 53 L. ed. 632.

82. *Mullan v. United States*, 212 U. S. 516, 29 Sup. Ct. 330, 53 L. ed. 632; 6 Op. Att.-Gen. 123.

The president, however, may commute the sentence should he so desire. *Mullan v. United States*, 42 Ct. Cl. 157, affirmed in 212 U. S. 516, 29 Sup. Ct. 330, 53 L. ed. 632, where, however, the point was not decided.

83. *Smith v. Whitney*, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. ed. 601; *Ex parte Reed*, 100 U. S. 13, 25 L. ed. 538.

Need Not Send Back for Revision Where Some Specifications Disapproved.

But though the president disapproves the findings of guilty of some of the specifications under some charges, and approved findings of guilty of a specification under each charge, and of the findings of guilty on all the charges, and approved the sentence, the sentence is valid. It is not to be assumed "that if the court martial had acquitted on the disapproved findings, . . . the sentence would have been less severe, and therefore the President should have sent the case back or mitigated the punishment, and that, because he did not, the punishment must be conclusively regarded as increased." *Carter v. McClaughry*, 183 U. S. 365, 22 Sup. Ct. 181, 46 L. ed. 236.

84. **Cannot enlarge measure of punishment** directly or indirectly. *Ex parte Reed*, 100 U. S. 13, 25 L. ed. 538.

his recommendation is not void so as to be reviewable on collateral attack.⁸⁵

5. Effect of Approval or Disapproval.—A sentence approved by the proper authority is final and cannot be revised.⁸⁶ And this rule is not confined to cases in which by the articles of war, the sentence of the court is required to be approved by the president,⁸⁷ even though the proceedings were irregular,⁸⁸ except for suggestion of absolute nullity in the proceedings.⁸⁹

The disapproval by the reviewing authority of the proceedings, findings and sentence of a court martial dismissing an officer from the service and directing his release and restoration to duty is an acquittal by the court martial.⁹⁰

6. Right to Copy of Sentence.—One tried by a general court martial is entitled upon demand made by himself or by any person on his behalf to a copy of the proceedings and sentence of such court.⁹¹

X. LIMITATION OF PROSECUTION.—A. IN GENERAL.—The articles of war provide that there can be no prosecution for any offense committed more than two years before the issuance of the order for the trial, unless by reason of defendant absenting himself or for some other manifest impediment, the defendant was not amenable to justice within the period.⁹² This provision is applicable to all

85. *Ex parte Reed*, 100 U. S. 13, 25 L. ed. 538, naval officer returning proceedings urging severer sentence.

86. *Runkle v. United States*, 122 U. S. 543, 7 Sup. Ct. 1141, 30 L. ed. 1167, affirming 19 Ct. Cl. 396; *Dynes v. Hoover*, 20 How. (U. S.) 65, 5 L. ed. 838; *Wooley v. United States*, 20 L. R. 631; 19 Op. Att.-Gen. 106; *Porter's Case*, 18 Op. Att.-Gen. 21; *Ryan's Case*, 10 Op. Att.-Gen. 64; 4 Op. Att.-Gen. 170, 274; *Whitney's Case*, 4 Op. Att.-Gen. 274; *Howe's Case*, 6 Op. Att.-Gen. 206; 17 Op. Att.-Gen. 297.

Power to Revoke Approval.—If the sentence has been approved by the president dismissing a soldier from the service, it is not revocable after it has been consummated by dismissal for the president's approval is a judicial act, the president may pardon the offender, however, but this does not restore him to the service. 11 Op. Att.-Gen. 19.

The president cannot annul or revoke the approval of a sentence by his predecessor. *Howe's Case*, 6 Op. Att.-Gen. 562; *Ryan's Case*, 10 Op. Att.-Gen. 64; *Runkle v. United States*, 19 Ct. Cl. 396.

Pardon or Mitigation of Sentence After Approval.—The reviewing authority cannot pardon or mitigate the sen-

tence after approval by him of the sentence. 19 Op. Att.-Gen. 106.

Effect of Disapproval After Approval.—The president's order revoking his approval of a sentence of dismissal from the service does not restore the offender to the service, but may be a constructive pardon. *Vanderslice v. United States*, 19 Ct. Cl. 480.

87. 18 Op. Att.-Gen. 21; 15 Op. Att.-Gen. 290; *Ryan's Case*, 10 Op. Att.-Gen. 64; *Howe's Case*, 6 Op. Att.-Gen. 514.

88. *Whitney's Case*, 4 Op. Att.-Gen. 274.

89. *Devlin's Case*, 6 Op. Att.-Gen. 369.

90. 13 Op. Att.-Gen. 459. See also 26 Op. Att.-Gen. 239.

91. U. S. Rev. St., §1342; Art. of War, 114; 1 Fed. St. Anno. 507.

92. *Ex parte Townsend*, 133 Fed. 74; *In re Cadwallader*, 127 Fed. 881; *In re Zimmerman*, 30 Fed. 176; *In re Davison*, 4 Fed. 507; *Harris's Case*, 14 Op. Att.-Gen. 265; 9 Op. Att.-Gen. 181; 6 Op. Att.-Gen. 239; 1 Op. Att.-Gen. 383.

Absence from the United States. *In re Davison*, 4 Fed. 507.

“The ‘other manifest impediments’ referred . . . to are such impedi-

offenses cognizable by courts martial,⁹³ except desertion.⁹⁴

B. WAIVER. — Formerly it was held that the limitation prescribed was an absolute bar to the jurisdiction of the court martial, and defendant could not waive it or consent to trial by court martial where the offense was barred by the statute,⁹⁵ but it is well settled now that the statute of limitations is a matter of defense, which must be investigated and determined in the exercise of jurisdiction, and not matter upon which the jurisdiction to hear and determine the charge depends, and cannot be reviewed by the civil courts.⁹⁶

XI. FORMER JEOPARDY. — **A. WHEN FIRST TRIAL BY COURT MARTIAL.** — A regulation that no further proceedings are to be taken against one who has been punished for the offense⁹⁷ does not apply to suspension from duty intended not as a punishment, but as a reasonable precaution for the maintenance of good order and discipline aboard ship.⁹⁸ But where the trial was by a tribunal legally incompetent to try defendant he may be put on trial again.⁹⁹

The provision as to second trials is borrowed from the common law and does not bar second trials on defendant's own motion.¹

B. FIRST TRIAL BY CIVIL COURT. — A trial by the civil authorities is not a bar to a trial by court martial for the military offense.²

ments only as operate to prevent the military court from exercising its jurisdiction over him; as, for instance, his being continuously a prisoner in the hands of the enemy, or of his being a prisoner under sentence of a civil court for crime, and the like." *In re Davison*, 4 Fed. 507. See also, 1 Op. Att.-Gen. 383, 13 Op. Att.-Gen. 462.

Concealing the offense is not a manifest impediment. *Harris's Case*, 14 Op. Att.-Gen. 265, 14 Op. Att.-Gen. 52.

That civil proceedings delayed trial is not within statute. *Closson v. Armes*, 7 App. Cas. (D. C.) 460; *Howe's Case*, 6 Op. Att.-Gen. 506, 511.

93. 14 Op. Att.-Gen. 52; *In re Davison*, 4 Fed. 507, 510.

94. Desertion. — Formerly desertion was barred by this provision (*In re Cadwallader*, 127 Fed. 881; *In re Zimmerman*, 30 Fed. 176; *In re Davison*, 4 Fed. 507); but by U. S. Rev. St. 26 St. at L. 54, a prosecution for desertion in time of peace is barred within two years from expiration of term of enlistment (*Ex parte Townsend*, 133 Fed. 74; *Lunenburg v. Shirley*, 132 Mass. 498), where a soldier enlisted for three years and immediately deserted and was apprehended five years later, he could not be tried by reason of the statute. 13 Op. Att.-Gen. 462.

95. 16 Op. Att.-Gen. 173; 6 Op. Att.-Gen. 239; 1 Op. Att.-Gen. 386.

96. *Ex parte Townsend*, 133 Fed. 74; *In re Zimmerman*, 30 Fed. 176; *In re Davison*, 21 Fed. 618; *In re White*, 17 Fed. 723; *In re Bogart*, 2 Sawy. (U. S.) 396, 3 Fed. Cas. No. 1,596.

97. *Bishop v. United States*, 197 U. S. 334, 25 Sup. Ct. 440, 49 L. ed. 780.

Arrest Without Trial. — An arrest and discharge without a trial is not a bar. 1 Op. Att.-Gen. 294.

98. *Bishop v. United States*, 197 U. S. 334, 337, 25 Sup. Ct. 798, 49 L. ed. 780, suspension from morning until evening for drunkenness and neglect of duty, and reinstatement "to await an opportunity for time to investigate the case."

Private reprimand by the commander of an officer for neglect of duty in accordance with the recommendation of a court of inquiry, is not such punishment as precludes another trial for the offense. 25 Op. Att.-Gen. 623.

99. *In re Bird*, 2 Sawy. 33, 3 Fed. Cas. No. 1,428; 3 Op. Att.-Gen. 397.

1. 1 Op. Att.-Gen. 233.

2. *In re Stubbs*, 133 Fed. 1012 (acquittal of homicide); *In re Esmond*, 5 Mackey (D. C.) 64 (acquittal of larceny).

A person may be convicted and sen-

XII. REVIEW.—A. BY CIVIL COURTS.—Courts martial are lawful tribunals, with authority to finally determine any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject-matter, and, whether, though having such jurisdiction, it exceeded its powers in the sentence pronounced.³

tenced upon conviction of "conduct unbecoming an officer and a gentleman," though the same course of conduct may constitute an offense elsewhere provided for, and he has been sentenced for the latter offense. *In re Carter*, 97 Fed. 496.

Trial by Court Martial as Bar to Civil Prosecution.—But trial by court martial is a bar to a prosecution therefor by the civil courts. *United States v. Grafton*, 206 U. S. 333, 27 Sup. Ct. 749, 51 L. ed. 1084.

3. U. S.—*Grafton v. United States*, 206 U. S. 333, 27 Sup. Ct. 749, 51 L. ed. 1084; *Carter v. McClaughry*, 183 U. S. 365, 380, 22 Sup. Ct. 181, 46 L. ed. 236, 242; *Carter v. Roberts*, 177 U. S. 496, 20 Sup. Ct. 713, 44 L. ed. 861; *Johnson v. Sayre*, 158 U. S. 109, 15 Sup. Ct. 773, 39 L. ed. 914; *Smith v. Whitney*, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. ed. 601; *Kurtz v. Moffitt*, 115 U. S. 487, 6 Sup. Ct. 148, 29 L. ed. 458; *Wales v. Whitney*, 114 U. S. 564, 5 Sup. Ct. 1050, 29 L. ed. 277; *Keyes v. United States*, 109 U. S. 336, 3 Sup. Ct. 202, 27 L. ed. 277; *Ex parte Mason*, 105 U. S. 696, 26 L. ed. 1213; *Dynes v. Hoover*, 20 How. 65, 84, 15 L. ed. 838; *United States v. Praeger*, 149 Fed. 474; *In re Crain*, 84 Fed. 788. **D. C.** *In re Esmond*, 5 Mackey 64. **Mass.** *Washburn v. Phillips*, 2 Mete. 296. **N. D.**—*State ex rel. Poole v. Nuchols*, 18 N. D. 233, 119 N. W. 632, 20 L. R. A. (N. S.) 413, and annotation. **Ohio.**—*McGorray v. Murphy*, 80 Ohio St. 413, 88 N. E. 881. **Pa.**—*Com. v. McClean*, 2 Pars. Eq. Cas. 367. **Vt.** *Brown v. Wadsworth*, 15 Vt. 170, 40 Am. Dec. 674. **Eng.**—*In re Mansergh*, 1 Best & S. 400, 101 E. C. L. 400.

The validity of its judgments are conditional by these indispensable prerequisites: "(1) That it was convened by an officer empowered by the statutes to call it; (2) that the officers whom he commanded to sit upon it were of those whom he was authorized by the articles of war to detail for that pur-

pose; (3) that the court thus constituted was invested by the acts of congress with power to try the person and the offense charged; and (4) that its sentence was in accordance with the Revised Statutes. The absence of any of these indispensable conditions renders the judgment and sentence of a court martial *coram non jure*, and absolutely void, because such a judgment and sentence is rendered without authority of law and without jurisdiction." *Deming v. McClaughry*, 113 Fed. 639, 650, 51 C. C. A. 349.

Courts martial form no part of the judicial system of the United States, and their proceedings within the limits of their jurisdiction cannot be controlled or revised by civil courts. *Kurtz v. Moffitt*, 115 U. S. 487, 6 Sup. Ct. 148, 29 L. ed. 458.

Court Martial Without Jurisdiction Over Civilian.—The decision of the court martial that certain questions asked a civilian testifying before it, and which he refused to testify because tending to incriminate him, is not conclusive on the civil courts as to the civilian being in contempt of the court martial as the court martial has no jurisdiction over a civilian. *United States v. Praeger*, 149 Fed. 474.

"But neither the Supreme Court of the District nor this court has any appellate jurisdiction over the naval court-martial, nor over offenses which such a court has power to try. Neither of these courts is authorized to interfere with it in the performance of its duty, by way of a writ of prohibition or any order of that nature. The civil courts can relieve a person from imprisonment under order of such court only by writ of habeas corpus, and then only when it is made apparent that it proceeds without jurisdiction. If there is no restraint, there is no right in the civil court to interfere. Its power then extends no further than to release the prisoner. It cannot remit a fine, or restore to an office, or reverse the judg-

Courts martial are courts of limited and special jurisdiction whose judgments may be collaterally attacked,⁴ but its proceedings cannot be collaterally impeached for any mere error or irregularity in procedure committed within the sphere of its authority.⁵

Habeas Corpus.—A civil court may issue a writ of *habeas corpus* to a court martial,⁶ and upon the hearing thereof inquire as to whether

ment of the military court. Whatever effect the decision of the court may have on the proceedings, orders or judgments of the military court, is incidental to the order releasing the prisoner. Of course if there is no prisoner to release, if there is no custody to be discharged, if there is no such restraint as requires relief, then the civil court has no power to interfere with the military court or other tribunal over which it has by law no appellate jurisdiction." *Wales v. Whitney*, 114 U. S. 564, 5 Sup. Ct. 1050, 29 L. ed. 277.

Reason of Non-Interference of Courts of Law.—"Of questions, not depending upon the construction of the statutes, but upon unwritten law or usage, within the jurisdiction of courts martial, military or naval officers, from their training and experience in the service, are more competent judges than the courts of common law." *Smith v. Whitney*, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. ed. 601.

Lack of Evidence.—If there was any evidence in support of the charge, the civil courts will not disturb the decision of the court martial on certiorari, but it is otherwise where there is no legal evidence whatever to support the charge. *People v. Townsend*, 10 Abb. N. C. (N. Y.) 169.

Where the court martial has no jurisdiction of the prosecution and defendant has objected to its jurisdiction at the outset and has no other remedy, refusal to grant a writ of prohibition to the defendant, where all the proceedings appear of record may be reviewed on error. But the court said that even if it had authority to grant a writ of prohibition (a question not decided) it would not do so unless it clearly appeared the court martial was about to exceed its jurisdiction. *Smith v. Whitney*, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. ed. 601.

4. *Ex parte Watkins*, 3 Pet. (U. S.) 193, 207, 7 L. ed. 650; *Wise v. Withers*, 3 Cranch (U. S.) 331, 2 L. ed. 457.

5. *Mullan v. United States*, 212 U. S. 516, 29 Sup. Ct. 330, 53 L. ed. 632; *Swaim v. United States*, 165 U. S. 553, 17 Sup. Ct. 448, 41 L. ed. 823; *Ide v. United States*, 150 U. S. 517, 14 Sup. Ct. 188, 37 L. ed. 1166; *United States v. Fletcher*, 148 U. S. 84, 13 Sup. Ct. 552, 37 L. ed. 378; *Keyes v. United States*, 109 U. S. 336, 3 Sup. Ct. 202, 27 L. ed. 954; *Ex parte Reed*, 100 U. S. 13, 25 L. ed. 538; *Dynes v. Hoover*, 20 How. (U. S.) 65, 15 L. ed. 838; *Brown v. Wadsworth*, 15 Vt. 170, 40 Am. Dec. 674.

Illustrations of Matters of Procedure Not Reviewable Collaterally.—"The action of the court-martial in permitting a person to act as judge advocate who was not appointed by the convening officer of the court-martial, nor sworn to the faithful performance of his duty, and in receiving oral and secondary evidence of an account when books of original entry were available; in receiving evidence to implicate the accused in signing false certificates relating to money which formed no part of the subject-matter of the charges on trial; in refusing to permit evidence as to the bad character of a principal witness, for the prosecution in refusing to hear the testimony of a material witness for the defense," is not reviewable in a collateral action. *Swaim v. United States*, 165 U. S. 553, 17 Sup. Ct. 448, 41 L. ed. 823.

The pleas of former conviction (*In re Bogart*, 2 Sawy. (U. S.) 396), and of the statute of limitations are matters of defense not reviewable collaterally (*In re Zimmerman*, 30 Fed. 176; *In re Davison*, 21 Fed. 618; *In re White*, 17 Fed. 723; *In re Bogart, supra*).

6. *Carter v. McClaughry*, 186 U. S. 365, 22 Sup. Ct. 181, 46 L. ed. 236; *Carter v. Roberts*, 177 U. S. 496, 20 Sup. Ct. 713, 44 L. ed. 861; *Ex parte Mason*, 105 U. S. 696, 25 L. ed. 1213; *People v. The Warden, etc.*, 100 N. Y. 20, 2 N. E. 870; *In re Beswick*, 25 How. Pr. (N. Y.) 149.

the court martial had jurisdiction of the cause.⁷

Certiorari. — The writ of certiorari may issue to review the judgment of a court martial, but its conclusion will not be disturbed if there was any evidence in support of the charges and specifications.⁸

Prohibition. — A writ of prohibition will issue to the secretary of the navy,⁹ or to a court martial,¹⁰ when it clearly appears that he is about to exceed his power relative to a court martial, but such writ cannot be made to serve the purpose of a writ of error or certiorari to correct mistakes of that court in deciding questions of law or fact within its jurisdiction.¹¹

Right To Appeal Direct to United States Supreme Court. — When the sentence of a court martial involves the construction or application of the constitution, a direct appeal will lie to the United States Supreme Court,¹² but if a case be first carried to the circuit court of appeals and there acted upon, its judgment stands unless revised by certiorari or appeal from that court in accordance with the statute.¹³

B. BY GENERAL COURT MARTIAL. — Either party may appeal from a regimental court, called for the purpose of redressing a wrong to a soldier, to a general court martial, and if upon such second hearing

7. U. S.—*McClaghry v. Deming*, 186 U. S. 49, 22 Sup. Ct. 786, 46 L. ed. 1049; *In re Grimley*, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. ed. 636; *Ex parte Milligan*, 4 Wall. (U. S.) 2, 18 L. ed. 281; *Dynes v. Hoover*, 20 How. 65, 75, 15 L. ed. 838; *Carter v. McClaghry*, 105 Fed. 614, 617; *Rose ex rel. Carter v. Roberts*, 99 Fed. 948, 40 C. C. A. 199; *Barrett v. Hopkins*, 7 Fed. 312; *Henderson v. Cleveland Op. S. Co.*, 11 Fed. Cas. No. 6,351; *In re Bogart*, 2 Sawy. 396, 3 Fed. Cas. No. 1,596. **N. Y.** *People v. The Warden*, etc., 100 N. Y. 20, 2 N. E. 870. **Ohio.**—*McGorray v. Murphy*, 80 Ohio St. 413, 88 N. E. 881.

While the writ of habeas corpus "may be used to relieve officers in the military service from illegal detention at the hands of their commanding officers or of military tribunals, such use must be with great caution, in view of the special nature of military service and of the contract entered into by those who engage in that service, and who thereby deliberately and for a consideration surrender to a great extent their rights and immunities as citizens." *Closson v. Armes*, 7 App. Cas. (D. C.) 460, 478.

8. People v. The Warden, etc., 100 N. Y. 20, 2 N. E. 870; *People v. Porter*, 50 Hun 161, 3 N. Y. Supp. 35; *People v. Rand*, 41 Hun (N. Y.) 529; *Matter*

of Leary, 30 Hun (N. Y.) 394; *People v. Townsend*, 10 Abb. N. C. (N. Y.) 169. See also *Carter v. Roberts*, 177 U. S. 496, 20 Sup. Ct. 713, 44 L. ed. 861.

9. Smith v. Whitney, 116 U. S. 167, 176, 6 Sup. Ct. 570, 29 L. ed. 601.

10. Mass.—*Washburn v. Phillips*, 2 Mete. 296. **S. C.**—*State v. Wakely*, 2 Nott & McC. 410; *State v. Stevens*, 2 McCord. 32. **Eng.**—*Grant v. Gould*, 2 H. Bl. 69.

In *Smith v. Whitney*, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. ed. 601, the question whether the supreme court of the District of Columbia has authority to issue writs of prohibition to courts martial is referred to as being of great importance. The court, however, said: "We are not inclined in the present case, to either assert or deny the existence of the power, because upon settled principles, assuming the power to exist, no case is shown for the exercise of it."

11. Smith v. Whitney, *supra*.

12. Carter v. McClaghry, 186 U. S. 365, 22 Sup. Ct. 181, 46 L. ed. 236; *Carter v. Roberts*, 177 U. S. 496, 20 Sup. Ct. 713, 44 L. ed. 861 (former jeopardy as involving constitutional question).

13. Carter v. Roberts, 177 U. S. 496, 500, 20 Sup. Ct. 713, 44 L. ed. 861.

the appeal appears to be groundless or vexatious, the party appealing may be punished at the discretion of such general court martial.¹⁴

XIII. COSTS.—Where a judgment of a court martial is brought up on certiorari and reversed, and costs are awarded, the respondent is personally liable for such costs.¹⁵ Provision is sometimes made by statute, that failure to pay such costs may be punished as a contempt of court.¹⁶

XIV. PUNISHMENT FOR CONTEMPT.—All courts martial have the power to punish for contempt of court.¹⁷

14. U. S. Rev. St., §1342; Art. of War, 30; 1 Fed. St. Anno. 487.

15. Matter of Leary, 30 Hun (N. Y.) 394.

16. *In re Leary*, 30 Hun (N. Y.) 394.

17. "A court martial may punish, at discretion, any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder." U. S. Rev. St., §1342; Art. of War, 86; 1 Fed. St. Anno. 501. See the title "**Contempt.**"

"Whenever any person refuses to give his evidence or to give it in the manner provided by these articles, or prevaricates, or behaves with contempt to the court, it shall be lawful for the court to imprison him for any time not

exceeding two months." U. S. Rev. St., §1624; Art. for Govt. of Navy, 42; 1 Fed. St. Anno. 473.

Inherent Power.—A court martial has no inherent power to punish for contempt, but derives its power solely from the statute. 18 Op. Att.-Gen. 278.

Civilian Witness.—A court martial has no power to punish a civilian witness for refusing to testify. 18 Op. Att.-Gen. 278; *United States v. Praeger*, 149 Fed. 474, 485.

Under the Act of Congress, approved March 2, 1901, c. 809, 31 St. 950, 951 (U. S. Comp. St. 1901, p. 965) its authority in that regard is limited to a certification of the facts to the United States district attorney. *United States v. Praeger, supra.*

COVENANT, ACTION OF

By A. P. RITTENHOUSE,
Sometime Judge of the Eighth Judicial District of Colorado.

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I. INTRODUCTION.—The action of covenant is a common law remedy for the recovery of damages for the breach of a covenant or contract under seal.¹

On Writing Under Seal.—The action of covenant can be maintained only upon a writing under seal.² But it has been held that the action will lie on a sealed instrument although changed by consent of the parties after its execution.³

Covenant will not lie on an instrument sealed only by plaintiff.⁴

1. **Conn.**—*Hinsdale v. Humphrey*, 15 Conn. 431, 435. **Fla.**—*Mitchell v. St. Andrews Bay Land Co.*, 4 Fla. 200. **Ill.**—*Haynes v. Lucas*, 50 Ill. 436. **Me.**—*Manning v. Perkins*, 86 Me. 419, 29 Atl. 1114. **Md.**—*Fry v. Talbott*, 106 Md. 43, 66 Atl. 664, not assumpsit. **N. H.**—*Ewins v. Gordon*, 49 N. H. 444; *Stickney v. Stickney*, 21 N. H. 61, 68. **N. J.**—*Patten v. Heustis*, 26 N. J. L. 293. **Eng.**—*Burnett v. Lynch*, 5 Barn. & Cress. 589, 108 Eng. Reprint 220.

Covenant Must Be Express.—*Kunckle v. Wynick*, 1 Dall. (U. S.) 305, 1 L. ed. 149.

A Personal Action.—*Hayden v. Patterson*, 39 Colo. 15, 88 Pac. 437, as to the statute of limitations.

2. **Ala.**—*McVoy v. Wheeler*, 6 Port. 201. **Ky.**—*Tribble v. Oldham*, 5 J. J. Marsh. 137. **Me.**—*Manning v. Perkins*, 86 Me. 419, 29 Atl. 1114. **N. J.**—*Smith v. Emery*, 12 N. J. L. 53; *Bilderback v. Painder*, 7 N. J. L. 64; *Ludlum v. Wood*, 2 N. J. L. 52. **N. Y.**—*Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, 13 Am. Rep. 556; *McComb v. Thompson*, 14 Johns. 207; *Van Santwood v. Sandford*, 12 Johns. 197. **Vt.**—*McKay v. Darling*, 65 Vt. 639, 27 Atl. 324; *Johnson v. Muzzy*, 45 Vt. 419, 12 Am. Rep. 214. **Va.**—*Hollingsworths v. Dunbar*, 3 Munf. 168, 5 Am. Dec. 504. **Wis.**—*Davis v. Judd*, 6 Wis. 85.

In *Jerome v. Ortman*, 66 Mich. 668, 33 N. W. 759, it was pointed out that this form of stating the rule was adopted because, at common law, the existence of a seal alone was the test of the existence of a deed, and that therefore if, under statute, the character of an instrument as a deed depends not upon the presence of a seal but upon the intention of the parties, covenant may lie though there be no seal.

An action of covenant against a corporation will lie only on a written instrument sealed with its common seal.

Farmers & Mechanics Tpk. Co. v. McCullough, 25 Pa. 303.

An action of covenant lies on a specialty exclusively, and not on a specialty modified or enlarged by simple contract. *Vicary v. Moore*, 2 Watts (Pa.) 451, 456, 27 Am. Dec. 323.

The action of covenant can be maintained only "against a person who by himself, or some other person acting on his behalf has executed a deed under seal, or who under very peculiar circumstances has agreed by deed to do a certain thing." *Rockford, R. I. & St. L. R. Co. v. Beckemeier*, 72 Ill. 267.

If the breach of the covenant sued upon is simply an omission to do the act by the performance of which the bond might become void, an action of covenant will not lie; for in such cases there is no promise under seal to do it. *Stiness, J.*, in *Douglas v. Hennessy*, 15 R. I. 272, 3 Atl. 213, 7 Atl. 1, 10 Atl. 583, citing *Powell v. Clark*, 3 N. J. L. 110.

Any sealed instrument where the words import an agreement. *United States v. Brown*, 1 Paine 422, 24 Fed. Cas. No. 14,670; *Ewins v. Gordon*, 49 N. H. 444.

Covenant lies on a warranty contained in a deed of conveyance of real property. *Booker's Admr. v. Bell's Exrs.*, 3 Bibb. (Ky.) 173, 6 Am. Dec. 641; *Hayden v. Patterson*, 39 Colo. 15, 88 Pac. 437.

3. *Dist. of Columbia v. Camden Iron Works*, 181 U. S. 453, 463, 21 Sup. Ct. 680, 45 L. ed. 948; *Phillips & C. Constr. Co. v. Seymour*, 91 U. S. 646, 23 L. ed. 341; *McCombs v. McKennan*, 2 Watts & S. (Pa.) 216, 37 Am. Dec. 505.

4. *Trustees of Hocking County v. Spencer*, 7 Ohio (part II) 149 (an action for rent on a lease sealed and subscribed only by the lessor only although the lessee had actually entered

Where one has a remedy by covenant on a sealed contract he cannot waive it and bring *assumpsit*.⁵ Nor can the court allow an amendment that changes the form of action from *assumpsit* to covenant.⁶

When Similar to Action of Debt.—When the action of covenant is brought on a money demand, it is similar to the action of debt on a sealed instrument.

Covenant is the appropriate remedy when the damages are unliquidated, or are incapable of being reduced by averment to a certainty.⁷ If a sum certain is sought covenant and debt are generally concurrent remedies.⁸

into possession); *Johnson v. Muzzy*, 45 Vt. 419, 12 Am. Rep. 214.

5. *McKay v. Darling*, 65 Vt. 639, 27 Atl. 324.

Where the covenant creates the liability, no action but debt or covenant can be maintained; but where the law creates the liability, independent of the covenant, an action on the case will lie. *Luckey v. Rowzee*, 1 A. K. Marsh. (Ky.) 295.

In *assumpsit* for money paid the duty of defendant to pay may be shown by a contract under seal, the action not being based upon the contract. *Fry v. Talbott*, 106 Md. 43, 66 Atl. 664, citing *Curtis v. Flint & P. M. R. Co.*, 32 Mich. 291.

In Michigan, however, by Comp. Laws §6194, *assumpsit* will lie in any case where covenant could be maintained. *Guerin v. Smith*, 62 Mich. 369, 28 N. W. 900, where the declaration contained one count upon covenant and the common counts. So where plaintiff elects to sue in that form of action the statute of limitations applying to that form governs. *Christy v. Farlin*, 49 Mich. 319, 13 N. W. 607.

6. *McKay v. Darling*, *supra*.

7. *Ark.*—*McLaughlin v. Hutchins*, 3 Ark. 207. *Ill.*—*Haynes v. Lucas*, 50 Ill. 436. *Me.*—*Manning v. Perkins*, 86 Me. 419, 29 Atl. 1114; *Jenness v. Parker*, 24 Me. 289. *N. J.*—*Morgan v. Guttenberg*, 40 N. J. L. 394. *Can.* *Garland v. McDonald*, 41 U. C. Q. B. 573.

In *Fortenbury v. Tunstall*, 5 Ark. 263, the instrument called for the payment of a specified sum "in good cotton." So in *Scott v. Canover*, 6 N. J. L. 222, it was held that, bank notes not being money, an instrument calling for payment of a certain sum "in bank notes" should be sued upon in covenant in which the plaintiff could

recover damages according to the then value of the notes.

8. *Ark.*—*McLaughlin v. Hutchins*, 3 Ark. 207. *Me.*—*Baldwin v. Emery*, 89 Me. 496, 36 Atl. 994. *R. I.*—*Douglas v. Hennessey*, 15 R. I. 272, 3 Atl. 213, 7 Atl. 1, 10 Atl. 583. *Eng.*—*March v. Freeman*, 3 Lev. 383, 83 Eng. Reprint 742.

In *Outtoun v. Dulin*, 72 Md. 536, 542, 20 Atl. 134, the court said: "The differences between the action in such case are entirely formal and not substantial. As all writs are of the same form, and as in a declaration it is sufficient to state the facts which constitute the ground of action, and as no demurrer is now allowed for an informal statement of a cause of action, it may be said that in cases of the description just mentioned, the difference between *covenant* and *debt* is entirely unimportant."

In *Taylor v. Wilson*, 27 N. C. 214, 216, the court said: "In general debt is the preferable remedy, as in that form of action the judgment is final in the first instance if the defendant do not plead."

Covenant is a proper form of action for the recovery of money on an instrument under seal, in which there is a promise to pay a certain sum upon a certain contingency. *Clark v. Harmer*, 5 App. Cas. (D. C.) 114.

Upon an agreement under seal for the payment of money in instalments, covenant will lie for non-payment of any of the instalments as they fall due. *North v. Eslava*, 12 Ala. 240.

Attachment Bond.—*Hill v. Rushing & Wood*, 4 Ala. 212.

Sheriff's Bond.—"It is clear that by the common law, an action of covenant was a concurrent remedy with debt on a single bill obligatory, or a penal bond, subject to be defeated by

II. PARTIES TO THE ACTION. — A. WHO MAY SUE. — Privity of estate was not sufficient to sustain the action, and so the action could not be maintained at common law by the assignee of the covenantee.⁹ But under modern statutes "whether the covenant be collateral or inhere in the land, if it be assigned, the assignee not only may, but, as the party beneficially interested, must sue in his own name."¹⁰

Nature of Covenants. — A personal covenant can be taken advantage of only by the covenantee, or his personal representatives. A real covenant, which does not run with the land, is personal in its nature; but a real covenant which runs with the land is binding upon the covenantor, his heirs and assigns, and inures to the benefit of the covenantee and his heirs and assigns.¹¹

the performance of conditions. In such an action, the breach of covenant would be the non-payment of the debt in the one case; in the other the non-payment of the penalty, and on that breach, damages would have been assessed equal in amount to the penalty for which judgment would have been rendered, and the defendant, in order to obtain relief against the penalty, was driven to his bill in equity. This being found oppressive, the common law was altered by the statute of 8 and 9 William III. Our statute regulating actions on penal bonds is similar to the English law, and declares that when any action shall be prosecuted in any court of law, upon any bond for the breach of any condition, other than for the payment of money, or shall be prosecuted for any penal sum for the non-performance of any covenant or written agreement, the plaintiff in his declaration shall assign the specific breaches for which the action is brought." *State v. Woodward*, 8 Mo. 353.

9. **U. S.**—*Broadwell v. Banks*, 134 Fed. 470, pointing out that this was remedied in England by the statute 32 Hen. VIII. **Ill.**—*Webster v. Fleming*, 73 Ill. App. 234. **Pa.**—*Strohecker v. Grant*, 16 Serg. & R. 237.

Knowles v. Knowles, 26 R. I. 534, 59 Atl. 854, was an action by executrix and devisee against heirs at law of covenantor. The court said: "Such an action would undoubtedly lie between the present parties if the agreement had in terms bound the heirs and assigns of the covenantor and run to the heirs and assigns of the covenantee. As it is only a covenant between two persons, not in terms bind-

ing or running to their representatives, the question arises whether the common law transmits the duty on the one side and the right on the other. . . . This is not the case of a lease. As was said by Lord Brougham in *Kepell v. Bailey*, 2 M. & K. 517, 534: 'The parties did not stand in the relation of lessor and lessee towards each other, and there is therefore no reversionary interest now in the covenantees to which the right claimed against the assignees of the covenantors may be annexed.' As viewed by the common law, the deed divested the plaintiffs' ancestor of all title. Upon its delivery the defendants' ancestor became the absolute owner, and the plaintiffs held only a conditional agreement of reconveyance. The plaintiffs' ancestor, after his conveyance, owned no land for the covenant to run with, and the plaintiffs inherited no land from their husband and father which was affected by the covenant. His executrix took merely the covenant as a chose in action which bound the covenantor personally, but not his heirs or devisees. There is no privity with respect to this land between the plaintiffs and the defendants."

10. *Masury v. Southworth*, 9 Ohio St. 340; *Johnson v. McClung*, 26 W. Va. 659.

11. See *Bouvier's Law Dict.* title "Covenant."

In *Gilmore v. Mobile & Montgomery R. Co.*, 79 Ala. 569, 572, 58 Am. Rep. 623, the court said: "It is impossible to lay down any fixed rule by which to distinguish in all cases, real covenants, which run with the land, and are binding as such on heirs, devisees and assignees, from those which are

Covenants running with the land are to be construed and controlled solely by the law of the state where the land is situated.¹²

merely personal and are binding only on the covenantor and his personal representative. The subject is one full of intricate learning, and the decisions of the courts touching it are greatly conflicting and far from satisfactory. Among those, however, which have been decided to follow the realty into the hands of an assignee, are covenants of warranty, and for quiet enjoyment; covenants by tenants to pay rent, to repair and maintain fences, reside on the premises, or cultivate the demised land in a particular manner; not to carry on a particular trade on the premises leased or purchased; not to build on adjacent premises, and many others of an analagous character. Among those adjudged to be personal, and not, therefore to touch or concern the land, are covenants made by owners of land, between whom and the covenantee there is no privity of title or estate; a covenant not to hire persons of a certain description to work in a mill."

In *Post v. Campan*, 42 Mich. 90, 97, 3 N. W. 272, Cooley, J., said: "A covenant may be said to run with the land, when its purpose is to give future protection to the title which the deed containing the covenant undertook to convey, and it does not run with the land, when its whole force is spent in giving assurance against something which immediately affects the title and causes present damage."

A covenant which may run with the land must have relation to the interest or estate granted, and the act to be done must concern the interest created or conveyed. **Ga.**—*Atlanta Con. St. R. Co. v. Jackson*, 108 Ga. 634, 34 S. E. 184. **Ind.**—*Indiana National Gas Co. v. Hinton*, 159 Ind. 398, 402, 64 N. E. 224; *Indianapolis Water Co. v. Nulte*, 126 Ind. 373, 26 N. E. 72; *Wells v. Benton*, 108 Ind. 385, 8 N. E. 444, 9 N. E. 601; *Conduitt v. Ross*, 102 Ind. 166, 26 N. E. 198. **N. J.**—*National Bank at Dover v. Segur*, 39 N. J. L. 173.

And there must be some privity of estate between the covenantor and the party who asserts a right to recover damages for breach of the covenants. **Ga.**—*Waycross R. Co. v. So. Pine Co.*, 115 Ga. 7, 40 S. E. 271. **Mass.**—*Nor-*

cross v. James, 140 Mass. 188, 193, 2 N. E. 946; *Savage v. Mason*, 3 Cush. 500; *Hurd v. Curtis*, 19 Pick. 459. **N. Y.** *Mygatt v. Coe*, 152 N. Y. 457, 461, 46 N. E. 949, 57 Am. St. Rep. 521. **R. I.**—*Knowles v. Knowles*, 26 R. I. 534, 59 Atl. 854. **Wis.**—*Wallace v. Pereles*, 109 Wis. 316, 322, 85 N. W. 371, 83 Am. St. Rep. 898, 53 L. R. A. 644.

In other words, where there is such privity of estate, the burdens of the covenant will run with the land and the heir or assignee of the covenantor may be bound thereby. *Gilmore v. Mobile & Montgomery R. Co.*, 79 Ala. 569, 573, 58 Am. Rep. 623.

Intention The Test.—*Landell v. Hamilton*, 175 Pa. 327, 34 Atl. 663, 34 L. R. A. 227. As where a covenant is declared in the agreement to be such a one and to be binding upon "heirs and assignees." *Mott v. Oppenheimer*, 135 N. Y. 312, 31 N. E. 1097, 17 L. R. A. 409. This case construed an agreement as to a party wall, as did also *Southworth v. Perring*, 71 Kan. 755, 81 Pac. 481, 82 Pac. 785, 2 L. R. A. (N. S.) 87; and *Hawkes v. Hoffman*, 56 Wash. 120, 105 Pac. 156.

As to Water Power.—*Merrifield v. Canal Comrs.*, 212 Ill. 456, 72 N. E. 405-587, 67 L. R. A. 369, and note.

Maintenance of Fence.—*Sexauer v. Wilson*, 136 Iowa 357, 113 N. W. 941, 14 L. R. A. (N. S.) 185.

Covenant To Build Railroad Siding. *Whalen v. Baltimore & O. R. Co.*, 108 Md. 11, 69 Atl. 390, 17 L. R. A. (N. S.) 130.

Water Rights.—*Atlanta, V. & N. R. Co. v. McKinney*, 124 Ga. 929, 53 S. E. 701, 6 L. R. A. (N. S.) 436; *Muscogee Mfg. Co. v. Eagle & Phoenix Mills*, 126 Ga. 210, 54 S. E. 1028, 7 L. R. A. (N. S.) 1139.

Covenant To Pay Rent in Kind. The assignee of lessee is liable for breach. *Herbaugh v. Zentmyer*, 3 Rawle (Pa.) 159.

Covenant not to build on adjoining land. *Johnson v. Robertson* (Iowa), 135 N. W. 585.

Covenant To Stop Trains.—*Ford v. Oregon El. R. Co.* (Ore.), 117 Pac. 809, 36 L. R. A. (N. S.) 358.

12. *Harrison v. Weatherby*, 180 Ill. 418, 54 N. E. 237; *Dalton v. Taliaferro*,

Covenants In Praesenti.—For breach of a real covenant *in praesenti*, such as the covenant of seisin,¹³ or of the covenant of good right to

101 Ill. App. 592, 596; *In re Cassidy*, 40 La. Ann. 827, 5 So. 592.

13. **U. S.**—*Peters v. Bowman*, 98 U. S. 56, 25 L. ed. 91. **Ala.**—*Sayre v. Sheffield Land Co.*, 106 Ala. 440, 18 So. 101. **Ark.**—*Abbott v. Rowan*, 33 Ark. 593; *Hendricks v. Keese*, 32 Ark. 714. **Cal.**—*Salmon v. Vallejo*, 41 Cal. 481; *Lawrence v. Montgomery*, 37 Cal. 183. **Conn.**—*Hartford & Salisbury Ore Co. v. Miller*, 41 Conn. 112. **Ill.**—*Tone v. Wilson*, 81 Ill. 529; *Jones v. Warner*, 81 Ill. 343. **Kan.**—*Scoffins v. Grandstaff*, 12 Kan. 467; *Bolinger v. Brake*, 4 Kan. App. 180, 45 Pac. 950. **Ky.** *Pence's Heirs v. Duvall's Heirs*, 9 B. Mon. 48. **Mass.**—*Cornell v. Jackson*, 3 Cush. 506; *Clark v. Swift*, 3 Mete. 390; *Thayer v. Clemence*, 22 Pick. 490. **Mich.**—*Sherwood v. Landon*, 57 Mich. 219, 23 N. W. 778. **Minn.**—*Aiken v. Franklin*, 42 Minn. 91, 43 N. W. 839, 6 L. R. A. 360, and note; *Allen v. Allen*, 48 Minn. 462, 51 N. W. 473. **Neb.**—*Real v. Hollister*, 20 Neb. 112, 29 N. W. 189; *Davidson v. Cox*, 10 Neb. 150, 4 N. W. 1035. **N. H.**—*Dickey v. Western*, 61 N. H. 23; *Smith v. Jeffs*, 44 N. H. 482. **N. J.**—*Carter v. Denman*, 23 N. J. L. 260. **N. Y.** *Abbott v. Allen*, 14 Johns. 248; *Beddoe v. Wadsworth*, 21 Wend. 120. **N. C.**—*Grist v. Hedges*, 14 N. C. 198. **Pa.**—*Wilson v. Cochran*, 46 Pa. 229. **Tex.**—*Westrope v. Chambers*, 51 Tex. 178. **Vt.**—*Swasey v. Brooks*, 30 Vt. 692; *Williams v. Wetherbee*, 1 Aik. 233. **Va.**—*Dickinson v. Hoomes*, 8 Gratt. 353.

In *Reinhalter v. Hutchins*, 26 R. I. 586, 589, 60 Atl. 234, the court said: "The weight of American authority is in favor of the position that real covenants *in praesenti* do not run with the land, and that covenants *in futuro* do so run. Those which are broken, if at all, at the instant of their creation, do not run with the land, . . . and are available only to the grantee himself, or to his personal representatives. They are the covenants of seisin, of right to convey, and in most jurisdictions, the covenant against incumbrances. Those which may be broken afterwards do run with the land until breach and may be termed real covenants, and while unbroken

pass with the land to heirs, devisees and assigns."

Covenants of seisin and of good right to convey do not run with the land, and pass no right of action to subsequent grantees. *Mygatt v. Coe*, 124 N. Y. 212, 26 N. E. 611, 11 L. R. A. 646.

Where covenants contained in a deed do not run with the land an action for breaches thereof cannot be maintained by a remote grantee of the land. *Bull v. Beiseker*, 16 N. D. 290, 113 N. W. 870, 14 L. R. A. (N. S.) 514.

Where an action for breach of a covenant of warranty of land is brought by a covenantee who has assigned his interest in the lands, he must allege in his declaration that he is answerable to his assignee for the breach. *Niles v. Sawtell*, 7 Mass. 444.

The right of action for breach of a covenant of seisin, is in the grantee of the deed containing the covenant, and not in one claiming under him. *Kuntzman v. Smith*, 77 N. J. L. 30, 75 Atl. 1009.

The contrary doctrine is held in some jurisdictions. *Jackson v. Green*, 112 Ind. 341, 14 N. E. 89; *Delierety v. Wright*, 101 Ind. 382, 386; *Wright v. Nipple*, 92 Ind. 310, 313; *Wilson v. Peeble*, 78 Ind. 384; *Craig v. Donovan*, 63 Ind. 513; *Bethell v. Bethell*, 54 Ind. 428, 23 Am. Dec. 650; *Coleman v. Lyman*, 42 Ind. 289; *Graves v. Garard*, 44 Ind. App. 712, 90 N. E. 22; *Martin v. Baker*, 5 Blackf. (Ind.) 232; *Jones v. Whitsett*, 79 Mo. 188; *Magwire v. Riffin*, 44 Mo. 512; *Chambers v. Smith*, 23 Mo. 174; *Dickson v. Desires Admr.*, 23 Mo. 151, 66 Am. Dec. 661.

An action for breach of covenant must be prosecuted in the name of the real party in interest, and the real party in interest is the person entitled to the money recovered as damages. *Sinker v. Floyd*, 104 Ind. 291, 4 N. E. 10.

In *Edin v. Baker*, 5 Blackf. (Ind.) 232, the court said: "It appears to us to be a mistake to say that the covenant of seisin cannot pass to the heir or assignee of the grantee. The covenant is not inserted in the deed

convey,¹⁴ and against incumbrances,¹⁵ the action may be brought by the grantee in the deed containing the covenant or by his personal representative, but not by his heirs or assigns.

merely for the grantee's benefit, but for the benefit of all others who may derive their claim to the land through him. Whoever thus derives his right, and ultimately sustains damages in conveyance of the covenantor's want of title, may sue him for the breach."

When a covenant of seisin or warranty is broken, a right of action immediately accrues to the grantee, and either he, or those claiming under him, may prosecute the same. *Sturgis v. Slocum*, 140 Iowa 25, 116 N. W. 128.

In *Allen v. Kennedy*, 91 Mo. 324, 329, 2 S. W. 142, the court said: "As to the covenant of seisin of an indefeasible estate in fee simple, the claim is that this covenant, if broken at all, is always broken when made, and does not run with the land. Whatever may be the rule elsewhere with us, it is more than a covenant in the present tense. It is rather a covenant of indemnity, and it has often been held that it runs with the land to the extent that the covenantee takes any estate, however indefeasible, or if possession accompanies the deed, though no title pass, yet, in either event, this covenant runs with the land and inures to the benefit of the subsequent grantee upon whom the loss falls."

14. *Ross v. Turner*, 7 Ark. 132, 44 Am. Dec. 531.

In further support of this doctrine see the authorities cited in the last preceding note.

The right of action for breach of covenants of seisin, and of good right to convey land, is in the vendee of his personal representatives, but does not pass to his heirs or assigns. *Prestwood v. McGowin*, 128 Ala. 267, 29 So. 386, 86 Am. St. Rep. 136.

In *Newman v. Sevier*, 134 Ill. App. 544, 548, the court said concerning the covenant of seisin and good right to convey: "It is well settled in this state that such covenants are *in præsenti* that if the covenantor at the time has no title, it is broken when the conveyance is made, and a right of action at once accrues to the covenantee, and further that such right is

but a mere chose in action which is personal and not assignable so as to enable a subsequent grantee of the covenantee to sue in his own name."

15. **U. S.**—*Fuller v. Jillett*, 2 Fed. 30. **Cal.**—*McPile v. Heaton*, 131 Cal. 109, 63 Pac. 179, 82 Am. St. Rep. 385; *Woodward v. Brown*, 119 Cal. 283, 51 Pac. 2, 542, 62 Am. St. Rep. 108. **Mass.**—*Smith v. Richards*, 155 Mass. 79, 28 N. E. 1132. **Mich.**—*Guerin v. Smith*, 62 Mich. 369, 28 N. W. 906. **Mo.**—*Blondeau v. Sheridan*, 81 Mo. 545; *Buren v. Hubbell*, 54 Mo. App. 617. **Neb.**—*Troxell v. Stevens*, 57 Neb. 329, 337, 77 N. W. 781; *Walton v. Campbell*, 51 Neb. 788, 71 N. W. 737; *Chesney v. Straube*, 35 Neb. 521, 524, 53 N. W. 479; *Davidson v. Cox*, 10 Neb. 150, 4 N. W. 1035; *Waters Estate v. Bagley*, 3 Neb. (Unof.) 706, 92 N. W. 637. **N. H.**—*Moore v. Merrill*, 17 N. H. 75, 43 Am. Dec. 593. **Va.**—*Marbury v. Thornton*, 82 Va. 702, 1 S. E. 909.

A breach of covenant against incumbrances confers a right of action upon the vendee, but not upon his successors to the title. *Sears v. Broady*, 66 Neb. 207, 212, 92 N. W. 214.

A covenant against incumbrances is personal, and no right of action for breach passes to a subsequent grantee. *Pease v. Warner*, 153 Mich. 140, 116 N. W. 994.

Where a deed contains a covenant against incumbrances, and there is at the time of such conveyance a mortgage existing upon the property, a right of action for breach of the covenant, accrues at once to the grantee in the deed. *Hasselbusch v. Mohmking*, 76 N. J. L. 691, 73 Atl. 961.

The right of action on a covenant against incumbrances arises upon evidences of an incumbrance, irrespective of any knowledge on the part of the grantee, or of any eviction of him, or of any actual injury it has occasioned him. *Brown v. Taylor*, 115 Tenn. 1, 7, 88 S. W. 933, 112 Am. St. Rep. 811, 4 L. R. A. (N. S.) 309.

Contra.—In some jurisdictions, however, the covenant against incumbrances is said to run with the land, and to give a right of action for its

Warranty and Quiet Enjoyment.—For breach of a real covenant running with the land, such as a covenant of warranty of title or for quiet enjoyment, the action may be brought and maintained by the grantee in the deed containing the covenant, or by whomsoever is his successor in title and possession, when the breach occurs.¹⁶

breach to the person injured thereby. **Ga.**—*Tucker v. McArthur*, 103 Ga. 409, 30 S. E. 283. **Ill.**—*Richard v. Bent*, 59 Ill. 38, 14 Am. Rep. 1. **Ind.**—*Dehority v. Wright*, 101 Ind. 382. **Minn.**—*Security Bank v. Holmes*, 68 Minn. 538, 71 N. W. 699. **N. Y.**—*Geiszler v. De Graaf*, 166 N. Y. 339, 59 N. E. 993, 82 Am. St. Rep. 659. **Ohio.**—*Footte v. Burnet*, 10 Ohio 317, 36 Am. Dec. 90. **Tex.**—*Taylor v. Lane*, 18 Tex. Civ. App. 545, 45 S. W. 317. **Vt.**—*Cole v. Kimball*, 52 Vt. 639.

The usual and sufficient remedy upon the breach of a covenant against incumbrances, is an action at law for damages. *Hastings v. Hastings*, 27 Misc. 244, 58 N. Y. Supp. 416.

In *Post v. Campan*, 42 Mich. 90, 94, 3 N. W. 272, the court said: "It is commonly said that a covenant against incumbrances is broken when made, if ever, and this is true in the sense that the promise always relates to an existing condition of things, and it is falsified then, if it ever is. But if the damage do not then result, it is misleading and mischievous to treat this mere technical breach as constituting the plaintiff's cause of action . . . I am of the opinion that the better, and only just rule is that a right of action accrues when substantial damage is suffered."

16. **U. S.**—*Peters v. Bowman*, 98 U. S. 56, 25 L. ed. 91. **Ala.**—*Deason v. Findley*, 145 Ala. 407, 40 So. 220; *Prestwood v. McGouin*, 128 Ala. 267, 29 So. 386, 86 Am. St. Rep. 136; *Gunter v. Williams*, 40 Ala. 561. **Cal.**—*Blackwell v. Atkinson*, 14 Cal. 470. **Conn.**—*Butler v. Barnes*, 60 Conn. 170, 21 Atl. 419, 12 L. R. A. 273. **Ga.**—*Tucker v. McArthur*, 103 Ga. 409, 30 S. E. 283. **Ill.**—*Illinois Land & Loan Co. v. Bonner*, 91 Ill. 114; *Brockmeyer v. Sanitary Dist. of Chicago*, 118 Ill. App. 49, 56; *Scheidt v. Belz*, 4 Ill. App. 431, 437. **Ind.**—*Midland R. Co. v. Fisher*, 125 Ind. 19, 24 N. E. 756, 21 Am. St. Rep. 189, 8 L. R. A. 604; *Conduitt v. Ross*, 102 Ind. 166, 26 N. E. 198; *Fisher v. Parry*, 68 Ind. 465; *Mc-*

Clure v. McClure, 65 Ind. 482; *Lake Erie & W. R. Co. v. Powers*, 15 Ind. App. 179, 43 N. E. 959. **Kan.**—*Scoffins v. Grandstaff*, 12 Kan. 467. **Ky.**—*Thomas v. Bland*, 91 Ky. 1, 14 S. W. 955, 11 L. R. A. 240; *Asher Lumb. Co. v. Cornett*, 23 Ky. L. Rep. 602, 63 S. W. 974; *Nunnally v. White's Exrs.*, 3 Metc. 584; *Birney v. Haim*, 2 Litt. 262. **La.**—*In re Cassidy's Succession*, 40 La. Ann. 827, 5 So. 292. **Me.**—*Allen v. Little*, 36 Me. 170; *Crocker v. Jewell*, 29 Me. 527. **Md.**—*Crisfield v. Storr*, 36 Md. 129, 11 Am. Rep. 480. **Mass.**—*Baker v. Bradt*, 168 Mass. 58, 46 N. E. 409. **Mich.**—*Ely v. Hergesell*, 46 Mich. 325, 9 N. W. 435. **Miss.**—*White v. Presley*, 54 Miss. 313. **Mo.**—*Collier v. Gamble*, 10 Mo. 467; *Quick v. Walker*, 125 Mo. App. 257, 102 S. W. 33. **Neb.**—*Real v. Hollister*, 17 Neb. 661, 24 N. W. 333. **N. H.**—*Chandler v. Brown*, 59 N. H. 370. **N. J.**—*Carter v. Denman*, 23 N. J. L. 260. **N. Y.**—*Mygatt v. Coe*, 124 N. Y. 212, 26 N. E. 611, 11 L. R. A. 646; *Rindskoff v. Farmers' L. & T. Co.*, 58 Barb. 36; *Clarke v. Priest*, 18 Misc. 501, 42 N. Y. Supp. 766; *Miller v. Clary*, 127 N. Y. Supp. 897. **N. C.**—*Lewis v. Cook*, 35 N. C. 193. **Ohio.**—*King v. Kerr*, 5 Ohio 154, 22 Am. Dec. 777. **Pa.**—*Williams v. O'Donnell*, 225 Pa. 321, 74 Atl. 205; *Whitehill v. Gotroalt*, 3 Pen. & W. 313. **R. I.**—*Reinhalter v. Hutchins*, 26 R. I. 586, 60 Atl. 234. **S. C.**—*Jeter v. Glenn*, 9 Rich. 374. **Tenn.**—*Morrow v. Baird*, 114 Tenn. 552, 86 S. W. 1079; *Kenney v. Norton*, 10 Heisk. 384. **Tex.**—*Rutherford v. Montgomery*, 14 Tex. Civ. App. 319, 37 S. W. 625; *Flaniken v. Neal*, 67 Tex. 629, 4 S. W. 212. **Vt.**—*Tillotson v. Prichard*, 60 Vt. 94, 14 Atl. 302, 6 Am. St. Rep. 95; *Wilder v. Davenport Estate*, 58 Vt. 642, 5 Atl. 753; *Clark v. Winchell*, 53 Vt. 408. **Va.**—*Marbury v. Thornton*, 82 Va. 702, 1 S. E. 909; *Dickinson v. Hoomes*, 8 Gratt. 353. **W. Va.**—*McConaughy v. Bennett's Exrs.*, 50 W. Va. 172, 40 S. E. 540; *Lydick v. B. & O. R. Co.*, 17 W. Va. 427. **Wis.**—*Schwallback v. Chicago, M. & St. P. R. Co.*, 69 Wis.

Further Assurance.—The covenant for further assurance is similar to the covenant for quiet enjoyment. It runs with the land, and a breach thereof gives a right of action to the covenantee, or his successor in the title.¹⁷ An action for specific performance is proper for breach of a covenant for further assurance of title to land.¹⁸

292, 34 N. W. 128, 2 Am. St. Rep. 740. **Eng.**—*Campbell v. Lewis*, 3 Barn. & Ald. 392, 5 E. C. L. 322, 106 Eng. Reprint 706; *Noke v. Awder, Crow*. Eliz. 436, 78 Eng. Reprint 677.

Covenants of warranty and of quiet enjoyment "run with the land into hands of assignee and heirs, and may be sued upon by the heir or assignee who is in possession when the breach occurs." *Deason v. Findley*, 145 Ala. 407, 40 So. 220.

But "the covenant of warranty of title in a deed of conveyance is broken as soon as made if there is a superior outstanding title, or an incumbrance diminishing the value of the enjoyment." *Fidelity & Deposit Co. v. Walker* (Ala.), 48 So. 600, 605, citing *Sayre v. Sheffield Co.*, 103 Ala. 441, 18 So. 101; *Copland v. McAdory*, 100 Ala. 553, 13 So. 545.

In a covenant running with the land the covenantee has a right of action for its breach against the successor in title of the covenantor. *Atlanta Knoxville & Northern R. Co. v. McKinney*, 124 Ga. 929, 53 S. E. 701, 110 Am. St. Rep. 215, 6 L. R. A. (N. S.) 436.

In *Polk v. Givens*, 44 Ind. App. 667, 90 N. E. 19, 21, the court said concerning covenants running with the land: "Parties to such covenants are bound thereby, and the party to whom a right of action accrues on account of the violation of covenants that run with the land, is not limited in his right of action to the person whose immediate act violates the covenant. Each grantee becomes liable for a violation of the covenant, so long as he holds the legal title to the premises conveyed under the deed containing the covenants."

"It is not necessary that a covenant between grantor, and grantee should be one, technically running with the land, in order to be enforced against a subsequent grantee." It is sufficient that he has notice of it. *Maurer v. Friedman*, 110 N. Y. Supp. 320.

"In case of successive warranties of title to land, the last vendee with warranty may maintain an action for breach of covenant against the first, or any other warrantor." *Morrow v. Baird*, 114 Tenn. 552, 558, 86 S. W. 1079.

On a covenant of special warranty of title to land no action can be maintained by the immediate grantee if he disposes of the land before a breach occurs, because such covenants run with the land. *Griffin v. Fairbrother*, 10 Me. 91.

"Where a covenant is with one person, for the benefit of another, . . . the action for breach must be in the name of the covenantee, or if he be dead, by his legal representatives. The beneficiary, however, may use his name or the name of the representative for the purpose." *Brann v. Maine Benefit Assn.*, 92 Me. 341, 42 Atl. 500.

A covenant of warranty of title to land, runs with the land, so as to give a right of action to a remote grantee who is evicted from the land by a paramount title. *Thompson v. Savage*, 5 T. B. Mon. (Ky.) 357.

In order that "a covenant may run with the land, so as to give the assignee its benefit, the covenantee must be the owner of the land to which the covenant relates." *Shaber v. St. Paul Water Co.*, 30 Minn. 179, 183, 14 N. W. 874.

The right of action for breach of covenant of warranty of title to land, is in the person who holds under such title, when the breach occurs, and does not pass to subsequent grantees. *De-long v. Spring Lake B. Imp. Co.*, 74 N. J. L. 250, 66 Atl. 591.

17. Ill.—*Scheidt v. Belz*, 4 Ill. App. 431, 437. N. Y.—*Clarke v. Priest*, 21 App. Div. 174, 47 N. Y. Supp. 489. **Eng.**—*Middlemore v. Goodale*, Cro. Car. 503, 79 Eng. Reprint 1033.

And see all authorities cited to last preceding subdivision.

18. *Werner v. Wheeler*, 142 App. Div. 358, 127 N. Y. Supp. 158, 166;

Party Walls.—A covenant concerning the use of a party wall runs with the land, and a right of action for breach thereof is in the party injured thereby.¹⁹

Negative Restrictive Covenants.—*By The Grantor.*—Where covenants concerning building restrictions are made by the grantor of lots for the mutual benefit of the grantees, any grantee has a right of action for the breach thereof.²⁰

By the Grantee.—Where a grantor exacts covenants from his grantees for the benefit of contiguous or neighboring lands which he retains, the grantor or his assigns of the property benefited may enforce such covenants against any or all of the grantees, but they cannot enforce such covenants as against each other.²¹

B. WHO MAY BE SUED.—An action for breach of a covenant running with the land, may be brought against the immediate grantor who covenanted, or against the original covenantor.²²

Roake v. Sullivan, 125 N. Y. Supp. 835, 837.

19. **Ill.**—McChesney v. Davis, 86 Ill. App. 380; Tomblin v. Fish, 18 Ill. App. 439. **Mass.**—Richardson v. Tobey, 121 Mass. 457, 23 Am. Rep. 283; Maine v. Cumston, 98 Mass. 317. **Mich.** Adams v. Noble, 120 Mich. 545, 79 N. W. 810. **Minn.**—Kimm v. Griffin, 67 Minn. 25, 69 N. W. 634, 64 Am. St. Rep. 385. **Ohio.**—Platt v. Eggleston, 20 Ohio St. 414.

An agreement whereby a lot owner is to be paid for use of a party wall, by the adjoining lot owner, runs with the land, and a grantee of the original builder may sue thereon. Rigg v. Temley, 78 Ark. 65, 69, 93 S. W. 570, 115 Am. St. Rep. 17.

Valuable annotations on this subject are to be found in 66 L. R. A. 673; 1 L. R. A. 33; 2 L. R. A. 199. See also note, *supra*.

20. **Mass.**—Parker v. Nightingale, 6 Allen 341, 83 Am. Dec. 632. **N. J.** Morrow v. Hasselman, 69 N. J. Eq. 612, 61 Atl. 369; De Gray v. Monmouth Beach Club House Co., 50 N. J. Eq. 29, 24 Atl. 388. **N. Y.**—Barrow v. Richard, 8 Paige 351, 35 Am. Dec. 713; Beckwith v. Pirung, 119 N. Y. Supp. 444; McDougall v. Schneider, 118 N. Y. Supp. 861, 864; Doyle v. John E. Olson Realty Co., 116 N. Y. Supp. 834; Francis v. Ziering, 112 Supp. 647. **Eng.**—Nottingham P. B. & T. Co. v. Butler, L. R. 15 Q. B. Div. 261.

"Mutual covenants between owners of adjoining lands in which the re-

striction upon each produce a corresponding benefit to the other, and in such a case, of course, either party or his assigns may invoke equitable aid to restrain a violation of such covenants." Korn v. Campbell, 192 N. Y. 490, 496, 85 N. E. 687, 127 Am. St. Rep. 925.

A suit to restrain by injunction the violation of a negative covenant may be maintained against the covenantor, or any one conspiring with the covenantor to violate it. New York Phonograph Co. v. Davega, 111 N. Y. Supp. 363, 370.

21. **Mass.**—Whitney v. Union R. Co., 11 Gray 359, 71 Am. Dec. 715. **N. Y.**—Korn v. Campbell, 192 N. Y. 490, 495, 85 N. E. 687, 127 Am. St. Rep. 925; Equitable Life Assn. Soc. v. Brennan, 148 N. Y. 661, 43 N. E. 173; Seymour v. McDonald, 4 Sand. Ch. 502. **Eng.**—Fulk v. Moxhay, 2 Phillips Ch. 774, 71 Eng. Reprint 1143.

An action at law for damages for breach of a restrictive building covenant can be brought only against the person who has broken such covenant, and not against a subsequent grantee. Zelman v. Kaufherr, 76 N. J. Eq. 52, 73 Atl. 1048.

22. **Atlanta, K. & N. R. Co. v. McKinney**, 124 Ga. 929, 53 S. E. 701, 110 Am. St. Rep. 110, 6 L. R. A. 436; **Thomas v. Bland**, 91 Ky. 1, 14 S. W. 955, 11 L. R. A. 240; **Hunt v. Orwig**, 17 B. Mon. (Ky.) 74, 66 Am. Dec. 144; **Cummins v. Kennedy**, 3 Litt. (Ky.) 118, 14 Am. Dec. 45.

Where a covenant is inherent or runs

C. JOINDER OF PARTIES. — If their interest is joint all living covenantees must join in an action of covenant, though only one seals the agreement and though all are not named in the contract.²³ If the interest is joint and several each covenantee may sue.²⁴

Tenants in common, deriving title with covenants of warranty from the same grantor may maintain a joint action for breaches of such covenants,²⁵ or may sue separately.²⁶

Principal and Surety. — Principal and surety who covenant by separate writings, cannot be joined as defendants in an action of covenant.²⁷

with the land, the heir's executors, administrators and assigns may be bound thereby. *Rockford, R. I. & St. L. R. Co. v. Beckemeier*, 72 Ill. 267.

"A vendee who has been evicted, or who has suffered such a loss as would entitle him to maintain an action upon a covenant of general warranty may bring his action to recover damages for the breach, against a remote vendor who conveyed the land with covenant of warranty. He is not confined to an action against his immediate vendor." *Snadon v. Salmon*, 135 Ky. 47, 121 S. W. 970.

In *Birney v. Hann*, 3 A. K. Marsh. (Ky.) 322, 13 Am. Dec. 167, 168, the court said: "It was a general rule in England that he who had conveyed away the estate, with a covenant of warranty which ran with the land, could not sustain a *warrantia chartae*: but it might be brought by the last grantee, and each grantee must vouch his warrantor to the end of the chain. This remedy being extinct in this country, it has been decided that an action of covenant lies in its stead against a remote grantor: See *Bookers Admr. v. Bell*, 3 Bibb. (Ky.) 173."

An action of covenant will by force of the statute of New Jersey, lie against heirs and devisees for the breach of a covenant against encumbrances contained in a deed of their ancestor. *New Jersey Ins. Co. v. Meeker*, 37 N. J. L. 282.

23. *Seymour v. Western R. Co.*, 106 U. S. 320, 1 Sup. Ct. 123, 27 L. ed. 103, citing *Sanders v. Johnson*, Comb. 230, 90 Eng. Reprint 446; *Vernon v. Jeffries*, 7 Mod. 358, 87 Eng. Reprint 1289; *Petrie v. Bury*, 5 Dowl. & R. (Eng.) 152; *Gresty v. Gibson*, L. R. 1 Exch. 112; *Reeves v. Watts*, L. R. 1 Q. B. 412.

Defendant can object to nonjoinder

of plaintiffs by demurrer, or in arrest of judgment under the plea of the general issue. *Farni v. Tesson*, 1 Black (U. S.) 309, 17 L. ed. 67.

If there be any legal ground for omitting the name of one of the joint covenantees, as a plaintiff, as his death, or refusal to join, it is necessary to allege such excuse for his nonjoinder, in the declaration. *Hays v. Lasater*, 3 Ark. 565, 568.

Fowler v. Kent, 71 N. H. 388, 52 Atl. 554, was an action for breach of a covenant to maintain a dam for the benefit of all the part owners of a water privilege, and it was held that all the owners of the servient estate must be joined as defendants.

24. *Lilly v. Hodges*, 8 Mod. 166, 88 Eng. Reprint 122.

25. *Mo.*—*Blondeau v. Sheridan*, 81 Mo. 545. *Pa.*—*McClure v. Gamble*, 27 Pa. 288. *Eng.*—*Kitchen v. Buckley*, 1 Lev. 109, 83 Eng. Reprint 322.

26. Tenants in common holding as grantees under the same deed, are not required to join in an action against their grantor for breach of a covenant of warranty of title. *Lamb v. Danforth*, 59 Me. 322, 8 Am. Rep. 426.

Two or more grantees holding in common under one deed containing a covenant of warranty, may join in an action for its breach, or either one may upon eviction by a paramount title, sue alone. *Swett v. Patrick*, 11 Me. 179.

27. Where two persons covenant with another by distinct and separate writings,—the one for the performance of several duties, and the other to become his surety for the performance of said duties, they cannot be joined in the same action for a breach. *Childress v. McCullough & Richardson*, 5 Port. (Ala.) 54, 30 Am. Dec. 549.

Husband and Wife. — If a covenant is made with husband and wife concerning his property he may sue alone for a breach.²⁸ But if the property belongs to both, and the action would survive to her, she should be joined.²⁹

A woman who joins her husband in a deed solely for the purpose of releasing her dower interest in land, cannot be joined with her husband in an action for breach of the covenants in such deed.³⁰

III. WHERE AND IN WHAT COURTS THE ACTION IS TO BE BROUGHT. — Where the action of covenant is founded upon privity of contract between the parties, their executors and administrators, it is transitory; but where it is founded upon privity of estate, it is local, and must be brought in the country where the land is situated.³¹

In Nebraska, county courts have jurisdiction, within the statutory limit of amount, of actions for breach of covenants against incumbrances,³² but have no jurisdiction of actions for breach of covenants, where title to land is involved.³³

Jurisdiction of Equity. — Breaches of express negative covenants may be restrained by courts of equity.³⁴

28. *Beaver v. Lane*, 2 Mod. 217, 86 Eng. Reprint 1034.

29. *Dunstan v. Burwell*, 1 Wils. 224, 95 Eng. Reprint 586. So where a conveyance is made to a man and his wife and their heirs. *Middlemore v. Goodhall*, Sir Wm. Jones 406, 82 Eng. Reprint 213.

30. An action on a general warranty in a joint deed cannot be maintained against the personal representative of the deceased warrantors jointly. Death severs the joinder, and the right of action on the warranty remains against a survivor when one of the warrantors dies. *Pochin v. Conley*, 74 Neb. 429, 109 N. W. 878; *Chambers v. Reinhold*, 33 Pa. Super. 266, 274.

31. **Ky.**—*Birney v. Haim*, 2 Litt. 263. **Mass.**—*Lienow v. Ellis*, 6 Mass. 331. **Mo.**—*Coleman v. Lucksinger*, 224 Mo. 1, 123 S. W. 441, 26 L. R. A. (N. S.) 934. **N. H.**—*Worster v. Winnepiscogee Lake Co.*, 25 N. H. 525; *White v. Sanborn*, 6 N. H. 220. **Tex.** *McCreary v. Douglass*, 5 Tex. Civ. App. 492, 24 S. W. 367. **Vt.**—*Tillotson v. Prichard*, 60 Vt. 94, 14 Atl. 302, 6 Am. St. Rep. 95. **Eng.**—*Webb v. Russell*, 3 T. R. 393, 100 Eng. Reprint 639; *Walker's Case*, 3 Coke 23, 76 Eng. Reprint 676.

An action for breach of a covenant of warranty by deed conveying an interest in land, brought by the original covenants is transitory. But when the

action is brought by a remote grantee, it is a real action, and the venue must be laid in the county where the estate lies. *Burt & Brabb Lumb. Co. v. Bailey*, 175 Fed. 131, 137.

An action for breach of a covenant concerning the land, brought by the assignee of the covenant against the covenantor, is local and can be maintained only in the county where the land is located. *Clark v. Scudder*, 6 Gray (Mass.) 122.

Action for breach of covenant of warranty of title to land must be brought in the jurisdiction where the land lies. *Birney v. Haim*, 2 Litt. (Ky.) 262.

An action for breach of a covenant concerning land brought by the assignee of the covenant against the covenantor, is local, and can be maintained only in the county where the land is located. *Clark v. Scudder*, 6 Gray (Mass.) 122.

32. *Brass v. Vandecar*, 70 Neb. 35, 96 N. W. 1035; *Hesser v. Johnson*, 57 Neb. 155, 77 N. W. 406.

33. County court has no jurisdiction of an action for breach of covenant of warranty of title. (District court has jurisdiction.) No jurisdiction where title to real estate is drawn in question. *Birkel v. Norton*, 84 Neb. 175, 120 N. W. 927.

34. **Ill.**—*Southern Fire Brick Co. v. Garden City Sand Co.*, 223 Ill. 616, 79

IV. NECESSARY ALLEGATIONS BY PLAINTIFF.—A.

THAT THE COVENANT WAS SEALED.—It must appear from the declaration that the suit is founded upon a sealed instrument.³⁵ It is the execution by sealing that is important rather than that the party signed.³⁶ But if the instrument sued on is described in the declaration by some technical word importing a seal as “deed,” “indenture” or “writing obligatory,” it need not be expressly averred that the instrument was sealed.³⁷ And it has been held that if it is alleged that

N. E. 313, 9 L. R. A. (N. S.) 446; Willoughby v. Lawrence, 110 Ill. 11, 4 N. E. 356, 56 Am. Rep. 758. **Mass.** Ropes v. Upton, 125 Mass. 258. **N. Y.** Diamond Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; New York Bank Note Co. v. Hamilton Bank Note Co., 83 Hun 593, 31 N. Y. Supp. 1060.

See the title “Equity Jurisdiction and Procedure.”

Courts of equity have jurisdiction to restrain by injunction breaches of express negative covenants contained in contracts and leases, although such breaches will occasion no substantial injury, or even though the injury, if any, be recoverable at law. *Carlson v. Koener*, 226 Ill. 15, 19, 80 N. E. 562.

In *Deaver v. Gorman*, 73 N. J. Eq. 129, 67 Atl. 112, the court said: “A court of equity will restrain the violation of a covenant entered into by a grantee restrictive of the use of lands conveyed, not only against the grantee covenantor, but against all subsequent purchasers having notice of the covenant, whether it runs with the land or not. There is, however, this distinction: The original grantor, in imposing the covenant upon the grantee, either may or may not bind himself. If he does not bind himself, then his grantee, having no right of action against him, cannot pursue any other grantee, to whom he may subsequently convey the whole, or a part of the remaining lands.” See also, *Morrow v. Hasselman*, 69 N. J. Eq. 612, 61 Atl. 369; *Roberts v. Scull*, 58 N. J. Eq. 396, 43 Atl. 583; *Hayes v. Waverly & Pasaic R. Co.*, 51 N. J. Eq. 345, 27 Atl. 648; *Mulligan v. Jordon*, 50 N. J. Eq. 363, 24 Atl. 543; *De Gray v. Monmouth Beach Club House Co.*, 50 N. J. Eq. 329, 24 Atl. 388.

35. **Ala.**—*McVoy v. Wheeler*, 6 Port. 201. **Ark.**—*Hays v. Lasater*, 3 Ark.

565. **Ky.**—*Tribble v. Oldham*, 5 J. J. Marsh. 137. **Me.**—*Manning v. Perkins*, 86 Me. 419, 29 Atl. 1114. **N. J.**—*Smith v. Emery*, 12 N. J. L. 53; *Bilderback v. Pounder*, 7 N. J. L. 64; *Peirson v. Peirson*, 6 N. J. L. 168; *Ludlum v. Wood*, 2 N. J. L. 52. **N. Y.**—*Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, 13 Am. Rep. 556; *Macomb v. Thompson*, 14 Johns. 207; *Van Santwood v. Sandford*, 12 Johns. 197. **Vt.**—*McKay v. Darling*, 65 Vt. 639, 27 Atl. 324. **Va.** *Hollingsworths v. Dunbar*, 3 Munf. 168, 5 Am. Dec. 504. **Wis.**—*Davis v. Judd*, 6 Wis. 85. **Eng.**—*Moore v. Jones*, 2 Str. 814, 93 Eng. Reprint 866; *Atkinson v. Coatsworth*, 1 Str. 512, 93 Eng. Reprint 668; *Fitzgerald v. Cragg*, 1 Comyns 139, 92 Eng. Reprint 1003; *Bond v. Moyle*, 2 Vent. 106, 86 Eng. Reprint 336; *Putt v. Nosworthy*, 1 Vent. 135, 86 Eng. Reprint 93; *Cabell v. Vaughan*, 1 Wm. Saund. 291, 86 Eng. Reprint 389; *Ascue v. Hollingsworths*, Cro. Eliz. 461, 78 Eng. Reprint 699.

Seal sufficient where action brought. *Le Roy v. Beard*, 8 How. (U. S.) 451, 12 L. ed. 1151; *United States Bank v. Donnally*, 8 Pet. (U. S.) 361, 8 L. ed. 974.

Seal Will Not Be Presumed.—*Holmes v. Northern Pac. R. Co.*, 65 App. Div. 49, 72 N. Y. Supp. 476.

36. *Atlantic Dock Co. v. Leavitt*, *supra*.

37. *Jones v. Davis*, 22 Wis. 422; *Atkinson v. Coatsworth*, 8 Mod. 33, 88 Eng. Reprint 25.

In *Wineman v. Hughson*, 44 Ill. App. 22, 26, the court said: “While, as a general rule, the declaration should state that the contract sued on was under seal even where the terms ‘covenant’ or ‘demised’ are used, for these words do not import a seal, yet where to describe the instrument words of art are used, such as *indenture*, *deed*, or *writing obligatory*, which of themselves import that the instrument was

the defendant "covenanted," it must be inferred that it was by deed.³³

So where a statute has abolished the distinction between sealed and unsealed instruments, and has made a signature necessary, the test is whether or not the instrument upon which it is sought to maintain the action, is a deed.³⁹

Profert must be made, and oyer cannot be dispensed with though it is shown that the instrument is lost.⁴⁰

B. THAT IT WAS MADE WITH PLAINTIFF.—The declaration must show that the covenant was made with the plaintiff.⁴¹

C. THAT CONDITIONS PRECEDENT WERE PERFORMED.—A declaration in covenant must aver the performance of a condition precedent, or allege a readiness to perform at the time and place specified, or set forth a sufficient excuse for non-performance.⁴²

sealed by the party, the declaration will be good without averment of sealing."

In the absence of the words "indenture," "deed," or "writing obligatory," all of which import that an instrument was sealed, there must be in the declaration in an action of covenant, an express averment that the instrument sued on, was sealed. The word "covenant" or agreement, does not import that it was sealed. *Hays v. Lasater*, 3 Ark. 565.

38. *Dodd v. Atkinson*, Cas. Tem. Hard. 342, 95 Eng. Reprint 221.

39. In *Jerome v. Ortman*, 66 Mich. 668, 33 N. W. 759, "the plaintiffs sued the defendants in an action of covenant for the violation of the terms of an agreement which was executed without any actual seal or scroll, but which was declared to be the act of the parties, in witness whereof they thereunto set their hands and seals." The action of covenant was properly brought, as it was evident the parties intended the agreement to have the effect of an instrument under seal. *Campbell, C. J.*, said: "At common law the seal alone was the test of the existence of a deed. Our statutes contemplate a signature as equally necessary. The statute just referred to indicates that some other thing than a seal may be considered, and this can only be the intention of the parties as found in the instrument itself, and the purpose it was intended to serve."

40. *Smith v. Emery*, 12 N. J. L. 53; *Soresby v. Sparrow*, 1 Wils. 16, 95 Eng. Reprint 466, 2 Str. 1186, 93 Eng. Reprint 1117. See the title "**Profert**."

41. *Walker v. Kesner*, 86 Ill. App. 244.

A declaration in covenant must show with whom the covenant was made. *Keatly v. McLaugherty*, 4 Mo. 221.

A declaration in covenant that the defendant by deed dated the 5th of November, 1868, covenanted to pay the plaintiff the sum of \$200, etc., without stating that the defendant covenanted with the plaintiff, was held good on demurrer. *Hennessy v. Hennessy*, 30 U. C. Q. B. (Can.) 38.

42. **Ala.**—*Bailey v. White*, 3 Ala. 330; *Jones v. Sommerville*, 1 Port. 437. **Ark.**—*Childress v. Foster*, 3 Ark. 252. **Conn.**—*Wright v. Tuttle*, 4 Day 313, 325. **Ill.**—*Hoy v. Hoy*, 44 Ill. 469; *Dickhut v. Durrell*, 11 Ill. 72. **Ky.** *Hunter's Admrs. v. Miller's Exrs.*, 6 B. Mon. 612. **Mass.**—*Pomroy v. Gold*, 2 Metc. 500; *Couch v. Ingersoll*, 2 Pick. 292; *Tileston v. Newell*, 13 Mass. 406. **Mo.**—*Colgan v. Sharp*, 4 Mo. 263; *Keatly v. McLaugherty*, 4 Mo. 221. **N. J.**—*Harrison v. Vreeland*, 38 N. J. L. 366; *Shiner v. Roberts*, 20 N. J. L. 435, 43 Am. Dec. 636. **N. Y.**—*Glover v. Tuck*, 24 Wend. 153; *Dakin v. Williams*, 11 Wend. 69; *Frey v. Johnson*, 22 How. Pr. 316. **W. Va.** *Kern v. Zeigler*, 13 W. Va. 707. **Eng.** *Campbell v. Jones*, 6 T. R. 570, 101 Eng. Reprint 708; *Grey v. Friar*, 4 H. L. Cas. 565, 10 Eng. Reprint 583; *Graves v. Legg*, 2 C. L. R. 1266, 9 Exch. 709. **Can.**—*Walker v. Kelly*, 24 U. C. C. P. 174; *Chatham v. McCrear*, 12 U. C. C. P. 352; *Coatsworth v. Toronto*, 10 U. C. C. P. 73; *Tanner v. D'Everado*, 3 U. C. Q. B. 154.

In declaring on a covenant to pay

D. TENDER, WHERE CONDITIONS ARE DEPENDENT.—In cases of mutual concurrent covenants, where the acts are to be done simultaneously, the plaintiff in an action for breach must aver and show a tender of performance on his part to enable him to maintain the action.⁴³

Where covenants are independent, performance on the part of the plaintiff need not be averred.⁴⁴

“so as notice be given in writing,” it is not sufficient to say that it was given “according to the form and effect of the condition.”

In *Thomas v. Van Ness*, 4 Wend. (N. Y.), 549, the court said: “It is not always sufficient to aver *performance* in the words of the contract. The *intent* of the contract must be shown to have been performed; and where the words do not clearly and unequivocally express in terms that which in judgment of law they import, their legal import constitutes the contract, and that must be averred to have been done; and where it is necessary on the part of the plaintiff to aver performance, it must be set forth with such certainty as to enable the court to judge whether the intent of the covenant has been fulfilled.”

Where “there is a condition precedent to be performed by the plaintiff and no excuse for non-performance is alleged in the declaration, then an averment of performance is not only necessary, but it must be shown to be according to the intent of the parties to the contract, and must be precisely alleged, and with reasonable certainty so that the court may judge whether the intent of the parties has been duly performed.” *McLaughlin v. Hutchins*, 3 Ark. 207, 213.

When time enters into the performance of a condition precedent, the plaintiff must aver it accordingly in his declaration. *Shinn v. Roberts*, 20 N. J. L. 435, 43 Am. Dec. 636.

“If the liability of the defendant depends upon the performance of a prior covenant or condition on the part of the plaintiff, performance or a tender of performance must be averred” in the declaration or it will be bad on demurrer. *Courcier & Ravises v. Graham*, 1 Ohio 330, 342.

A declaration in covenant which omits to allege the happening of the event or condition upon which the obligation of the covenant was to be performed, is

insufficient. *Harris v. Lewis*, 5 W. Va. 575, 577.

A written notice given to a grantor, that a suit has been commenced against the grantee by declaration, giving date of service and attaching a copy of the declaration to such notice, and requesting the grantor to defend the suit under the covenants of warranty in his deed of the premises described in the declaration, giving the date of the deed, is a sufficient notice in writing of the pendency of such suit, and that the grantor is required by the grantee to defend it. *Cook v. Curtis*, 68 Mich. 611, 36 N. W. 692.

A covenant of special warranty against the acts of the grantor in a deed, his heirs and all persons claiming by, from, through or under him, is not breached by an eviction under a paramount title. *Dick v. McPherson*, 72 N. J. L. 332, 62 Atl. 383.

All covenants which relate to land and are for its benefit run with it, and may be enforced by each successive assignee into whose hands it may run by conveyance or assignment. *Louisville & N. R. Co. v. Illinois Cent. R. Co.*, 174 Ill. 448, 51 N. E. 824.

Voluntary yielding to dispossession may be sufficient. *Hebert v. Handy*, 29 R. I. 543, 72 Atl. 1102, *quoting from* *Hamilton v. Cutts*, 4 Mass. 349, 352, 3 Am. Dec. 222.

43. *Ky.*—*Hawley v. Mason*, 9 Dana 32, 33 Am. Dec. 522. *Ohio.*—*Courcier & Ravises v. Graham*, 1 Ohio 330, 342. *Eng.*—*Heard v. Wadham*, 1 East 619, 102 Eng. Reprint 239.

In case of dependent covenants, neither party can bring in an action against the other, without averring performance or some valid excuse equivalent thereto. *Shinn v. Roberts*, 20 N. J. L. 435, 43 Am. Dec. 636.

Alleging readiness to perform is not sufficient. *Frey v. Johnson*, 22 How. Pr. (N. Y.) 316, 325.

44. *Davis v. Wiley*, 4 Ill. 234; *Jod-*

E. **SUBSTANTIAL STATEMENT OF COVENANT.**—In an action of covenant it is not necessary to recite in the declaration the entire agreement, but only to describe substantially the material parts as to which breaches are alleged.⁴⁵ The declaration must show that the defendant entered into a covenant with plaintiff.⁴⁶

F. **ASSIGNING BREACHES.**—It must be alleged that the covenant contained in the instrument has been broken.⁴⁷

derell *v.* Cowell, Cas. Tem. Hard. 343, 95 Eng. Reprint 222; Benny *v.* Turner, 1 Mod. 61, 86 Eng. Reprint 731.

45. **Ky.**—Jackson *v.* Sagacer, 3 Mon. 27. **N. Y.**—Henry *v.* Cleland, 14 Johns. 400; Grannis *v.* Clark, 8 Cow. 36. **S. C.**—Killian *v.* Herndon, 4 Rich. L. 196. **Va.**—Backs *v.* Taylor, 6 Munf. 488; Buster's Exr. *v.* Wallace, 4 Hen. & M. 82. **Eng.**—Swallow *v.* Beaumont, 2 Barn. & Ald. 765, 107 Eng. Reprint 544.

A petition for breach of covenant of warranty of title contained in a deed of land must set forth in substance sufficient contents of such deed to show the covenant, a breach of which is complained of. Gano *v.* Green, 116 Ga. 22, 42 S. E. 371.

A petition for breach of a covenant of warranty of title to land is sufficient against a general demurrer if it sets forth substantially "that the defendant had sold and conveyed to the plaintiff certain land with a warranty of title, and that the plaintiff was compelled to pay to another a specific sum, in order to prevent being evicted from the premises, under an action of ejectment brought by the latter, who lawfully claimed the said premises by an older and better title than that of said defendant . . . whereby, in order to quiet petitioner's title, and to enable him to remain in quiet possession and enjoyment of the premises" was compelled to and did buy up the outstanding paramount title aforesaid. Bank of the State of Georgia *v.* O'Neal, 101 Ga. 673, 28 S. E. 973.

In pleading a breach of covenant of warranty of title to land, the entire deed should not be set out as a part of the pleading, but the covenant claimed to have been broken should be set out. McCampbell *v.* Vastine, 10 Iowa 538.

"In an action for breach of covenant of warranty of title to land, where

the deed containing the covenant is filed with the petition, it is sufficient to allege in the petition the substance of the covenant, without setting it out in the express terms used in the deed." Brady *v.* Peck, 99 Ky. 42, 35 S. W. 623, 34 S. W. 906.

In a complaint for breach of a covenant of seisin, in a conveyance of land, an allegation that such conveyance was for a valuable consideration, but not stating the amount thereof, if defective, is so because indefinite, and the remedy is by motion to make more definite and certain, and not by objection to evidence. Bartelt *v.* Brannsdorf, 57 Wis. 1, 14 N. W. 869.

In Price *v.* Fletcher, Cowp. 727, 98 Eng. Reprint 1330, the lease was set out *verbatim* and the declaration was referred to a master to strike out the superfluous parts. Lord Mansfield said that on the next instance of the kind he would inquire who drew the declaration.

It is sufficient to declare on a covenant according to its legal operation, and to assign breaches substantially in the words of the covenant. Withers *v.* Priekett, Litt. Sel. Cas. (Ky.) 192.

If material part omitted defendant should crave oyer and demur. Henry *v.* Cleland, 14 Johns. (N. Y.) 400.

46. Walker *v.* Kesner, 86 Ill. App. 244, where the court said that though the courts are tending toward liberality in pleading that justice may be done, yet they have not "so far departed from common law rules of pleading as to permit a recovery in covenant under a declaration which sets up a breach of implied warranty or a tort."

47. Ridgel *v.* Dale, 16 Ala. 36; Meriman *v.* Bush, 116 Pa. 276, 9 Atl. 345.

In an action of covenant on an official bond to recover penalties affixed by statute, it is necessary to aver in the declaration a failure to comply with the statute in default of which

If the covenant be in the disjunctive the plaintiff must allege a breach in both of the things, one of which is undertaken to be done.⁴⁸

In the Negative.—And if the covenant be not to permit any prisoner to escape, a general breach that the defendant suffered a particular prisoner to escape is good.⁴⁹

Separate Counts.—Where several breaches are assigned they should be set forth in separate counts.⁵⁰

Description of Land.—The declaration in an action on a real covenant must describe the land and title, with reasonable certainty,⁵¹ but need not give a detailed description.⁵²

Negating Defenses.—A declaration in covenant need not anticipate and negative matters of defense.⁵³

such penalties attached. *Lee v. State*, 22 Ark. 231.

Recovery in ejectment is not a breach of the covenant for quiet enjoyment which is broken only by eviction or actual ouster. There must be disturbance of possession. *Kerr v. Shaw*, 13 Johns. (N. Y.) 236.

48. *Rawlins v. Vincent*, Carth. 124, 90 Eng. Reprint 677; *Sherewood v. Nonne*, 1 Leon. 250, 74 Eng. Reprint 228.

49. *Coniers v. Smith*, 1 Lev. 78, 83 Eng. Reprint 306.

50. *Prestwood v. McGowin*, 128 Ala. 267, 29 So. 386, 86 Am. St. Rep. 136.

Each assignment of breach is regarded as a separate declaration. *Burroughs v. Clancy*, 53 Ill. 30, 33.

If there be one breach well assigned in a declaration, it cannot be held ill on a general demurrer. *McCoy & Shoots v. Hill*, 2 Litt. (Ky.) 372; *Adams v. Willoughby*, 6 Johns. (N. Y.) 65.

“The merits of each are to be considered without reference to the others. No one count can be aided by another; averments in one count cannot be applied to *sustain* another; and for the same reason they cannot be applied to *defeat* another. Each count like each *plea*, where there are several, must stand by itself, and be judged of independently.” *Swett v. Patrick*, 11 Me. 179, 181.

Contra.—In an action to recover damages for the breach of two or more covenants contained in a deed, it is not necessary that the breach of each covenant should be stated in a separate paragraph of the complaint,—and where several breaches have been stated in a single paragraph, the sufficiency

of each allegation of breach may be separately tested by a demurrer thereto, in the same manner and to the same extent, as though pleaded in separate paragraphs. *Sheetz v. Longlois*, 69 Ind. 491.

51. *Carter v. Denman's Exrs.*, 23 N. J. L. 260.

A declaration for breach of covenant in a deed, which omits to state the date of the deed, is insufficient. *Hanson v. Cowan*, 7 T. B. Mon. (Ky.) 574.

A declaration for breach of covenant of warranty must show that the title to the land with which the covenant runs is vested in the plaintiff. *Carter v. Denman's Exrs.*, 23 N. J. L. 260.

52. *Dundass v. Lord Weymouth*, Cowp. 665, 98 Eng. Reprint 1296. See also, *Price v. Fletcher*, Cowp. 727, 98 Eng. Reprint 1330, where setting out a lease *verbatim* called forth the condemnation of Lord Mansfield.

53. **U. S.**—*Wilcox v. Cohn*, 5 Blatchf. 346, 29 Fed. Cas. No. 17,640. **Ala.**—*Mobile & M. R. Co. v. Gilmer*, 85 Ala. 422, 5 So. 138. **Ind.**—*McClure v. McClure*, 65 Ind. 482; *Mason v. Cooksey*, 51 Ind. 519; *Kent v. Cantrall*, 44 Ind. 452. **Mass.**—*Stearns v. Barrett*, 1 Pick. 443, 11 Am. Dec. 223. **Wis.**—*LaPoint v. Cady*, 2 Chand. 202, 2 Pin. 515. **Eng.**—*Smith v. Wilson*, 8 East 437, 103 Eng. Reprint 410; *Davison v. Mure*, 3 Doug. 28, 99 Eng. Reprint 522; *Boone v. Eyre*, cited in *Duke*, etc. *v. Shore*, 1 H. Bl. 270, 273; *Thomas v. Cadwallader*, Willes 496. **Can.**—*Kay v. Gamble*, 6 U. C. Q. B. 267; *Tanner v. D'Everado*, 3 U. C. Q. B. 154.

See generally the title “**Declaration and Complaint.**”

Substantial Statement of Breach. — As a general rule, the plaintiff in an action of covenant may allege breaches generally, by simply negating the words of the covenant,⁵⁴ or by alleging the breach according to

54. **Ala.**—*DeJarnette v. Dreyfus*, 166 Ala. 138, 51 So. 932; *Prestwood v. McGowin*, 128 Ala. 267, 29 So. 386; *Sayre v. Sheffield, L. I. & C. Co.*, 106 Ala. 440, 18 So. 101; *Copeland v. McAdory*, 100 Ala. 553, 13 So. 545. **Ark.** *Tarwater v. Davis' Exr.*, 7 Ark. 153, 44 Am. Dec. 534. **Colo.**—*Seyfried v. Knoblauch*, 44 Colo. 86, 96 Pac. 993. **Ind.**—*Van Nest v. Kellum*, 15 Ind. 264; *Floom v. Beard*, 8 Blackf. 76. **Ia.** *Slocum v. Haun*, 36 Iowa 138; *Camp v. Douglas*, 10 Iowa 586; *McCampbell v. Vastine*, 10 Iowa 538. **Ky.**—*Bane's Heirs v. McMeekin*, 4 Bibb 27. **Me.** *Damren v. Trask*, 102 Me. 39, 65 Atl. 513; *Glover v. O'Brien*, 100 Me. 551, 554, 62 Atl. 656; *Montgomery v. Reed*, 69 Me. 510. **Mass.**—*Bacon v. Lincoln*, 4 Cush. 210, 50 Am. Dec. 765. **Mo.** *Evans v. Fulton*, 134 Mo. 653, 36 S. W. 230. **N. J.**—*Carter v. Denman's Exrs.*, 23 N. J. L. 260. **N. Y.**—*Woolley v. Newcomb*, 87 N. Y. 605; *Rickert v. Snyder*, 9 Wend. 416; *Potter v. Bacon*, 2 Wend. 583. **Ore.**—*Jennings v. Kiernan*, 35 Ore. 349, 352, 55 Pac. 443, 56 Pac. 72. **R. I.**—*Reinhalter v. Hutchins*, 26 R. I. 586, 60 Atl. 234. **S. C.** *Diseker v. Eau Claire Land & Imp. Co.*, 86 S. C. 281, 68 S. E. 529. **Eng.** *Basawin v. Cook*, 1 Mod. 223, 86 Eng. Reprint 843; *Farrow v. Chevalier*, Holt 176, 90 Eng. Reprint 995; *Glinister v. Audley*, 1 Keb. 58, 83 Eng. Reprint 809.

Particularity showing manner of breach in detail not necessary. *Jenkins v. Hancock*, 1 Sid. 30 (breach of a covenant not to allow an escape); *Coniers v. Smith*, 1 Lev. 78 (non-payment of rent on certain days); *Hodges v. Nicholas*, 1 Nels. Lutw. 357 (breach of a covenant to permit trade in a house).

In an action for breach of covenant, "the allegation of breach must be governed by the nature of the contract. It should be assigned in the words of the contract, or in words co-extensive with the sense and effect of it." *McLaughlin v. Hutchins*, 3 Ark. 207, 213.

"In covenant, the penal part of the obligations forms no part of the contract between the parties. But it is

upon the stipulations in the condition alone, that the action is founded, and it is not necessary to aver the payment of the penalty. The breaches must be assigned in the non-performance of the stipulations, without noticing the penalty." *McLaughlin v. Hutchins*, 3 Ark. 207, 214.

In *Copeland v. McAdory*, 100 Ala. 553, 556, 13 So. 646, the court said: In declaring for a breach of the covenant of seisin, or good right to convey, "all that is necessary is to negative the words of the covenant generally. No description of or reference to the outstanding or permanent title is necessary, nor is it necessary to aver an eviction, or ouster. The covenant is broken, if at all, as soon as it is made, and not by the occurrence of any future event."

An allegation that a covenantor of seisin had not a good title in fee simple is not equivalent to an averment of no title at all, and does not show a breach of the covenant. *Axtel v. Chase*, 77 Ind. 74, 19.

Damren v. Trask, 102 Me. 39, 65 Atl. 513, was an action of covenant broken upon a contract under seal, for the purchase of a quantity of clapboards. The plaintiffs in their declaration set out the covenant according to its terms, and alleged performance and breach as follows: "And the plaintiffs aver that, pursuant to such deed, they have done and performed all things by them according to the covenants aforesaid to be performed. Yet said defendant has not taken away from said mill the clapboards as aforesaid, and has not paid the plaintiffs therefor the sum of forty dollars per thousand, but wholly refuses and neglects to do so, and so has not kept his covenant aforesaid, but has broken the same." This was a sufficient assignment of the breach.

In assigning a breach of the covenant of seisin, the declaration must not only allege that the defendant was not seised, but it must show who was. *Wilford v. Rose*, 2 Root (Conn.) 14.

Nonpayment of rent is sufficiently averred by a declaration that the rent is due and owing and still remains

its legal effect.⁵⁵ If, however, the words of the covenant when separated from the rest of the instrument carry a different meaning than when read with the residue of the deed it will not do to assign in the words of the covenant.⁵⁶

The general rule obtains in assigning breaches of the covenants of seisin, and of good right to convey.⁵⁷ To ascertain whether or not a breach is well assigned the court will consider the covenant according to its spirit and intent.⁵⁸ If some breaches be well assigned and some not, judgment on demurrer to the whole will be on the breaches well assigned.⁵⁹

G. SPECIAL AVERMENTS. — EVICTION. — Where the action is brought upon a covenant of warranty of title to land, or for quiet enjoyment, the declaration must allege an actual or constructive eviction of the plaintiff or a disturbance of his possession by a paramount title. A

wholly in arrears and unpaid. *Dubois v. Van Orden*, 6 Johns. (N. Y.) 105.

55. **U. S.**—*Wilson v. Griswold*, 9 Blatchf. 267, 30 Fed. Cas. No. 17,806. **Del.**—*Randel, Jr., v. Chesapeake & D. Canal Co.*, 1 Harr. 151, 162. **Ill.**—*Chicago, M. & St. P. R. Co. v. Hoyt*, 37 Ill. App. 64, 67. **Ind.**—*Reagan v. Fox*, 45 Ind. 8. **Ky.**—*Cradlock v. Howell*, 5 J. J. Marsh. 206; *Moore's Exrs. v. White*, Litt. Sel. Cas. 152. **Mass.**—*Lent v. Padelford*, 10 Mass. 239, 6 Am. Dec. 119. **N. Y.**—*Barney v. Keith*, 4 Wend. 502; *Grannis v. Clark*, 8 Cow. 36. **Va.**—*Buster's Exrs. v. Wallace*, 4 Hen. & M. 82.

According to intent of parties. *Griffith v. Goodhand*, F. Raym. 464, 83 Eng. Reprint 242.

Koepke v. Winterfield, 116 Wis. 44, 92 N. W. 437, was an action for breach of a covenant of seisin. The complaint, among other things, alleged that the vendor never had possession, either actual or constructive, of the land conveyed, nor any title or interest therein, and that other persons named had the title in fee simple and lawful right to the land under record tax deeds; held to state a cause of action.

56. **Chicago, M. & St. P. R. Co. v. Hoyt**, 44 Ill. App. 48, citing, *Sicklemore v. Thistleton*, 6 Maule & Sel. 9, 105 Eng. Reprint 1146.

57. **Ala.**—*Copeland v. McAdory*, 100 Ala. 553, 13 So. 545. **Ind.**—*Van Nest v. Kellum*, 15 Ind. 264; *Floom v. Beard*, 8 Blackf. 76. **Ia.**—*Socum v. Haun*, 36 Iowa 138; *Camp v. Douglas*, 10 Iowa 586; *Brandt v. Foster*, 5 Iowa 287. **Me.**—*Montgomery v. Reed*, 69 Me.

510; *Blanchard v. Hoxie*, 34 Me. 376. **Mass.**—*Bacon v. Lincoln*, 4 Cush. 210, 50 Am. Dec. 765; *Marston v. Hobbs*, 2 Mass. 433, 3 Am. Dec. 61. **Mo.**—*Evans v. Fulton*, 134 Mo. 653, 36 S. W. 230. **N. Y.**—*Woolley v. Newcombe*, 87 N. Y. 605; *Rickert v. Snyder*, 9 Wend. 416; *Potter v. Bacon*, 2 Wend. 583.

In *Carter v. Denman's Exrs.*, 23 N. J. L. 260, the court said: "Where the covenant is to do or forbear a particular act, it is sufficient to assign the breach in the words of the contract. So in an action upon the usual covenants in a deed, that the grantor is seized, or that he has good right to convey, it is sufficient to assign the breach generally, by averring that the grantor was not seized, or that he had not good right to convey."

58. *Quackenboss v. Lansing*, 6 Johns. (N. Y.) 49, where it was said that the demurrer was grounded on a mere quibble. And see, *Burton's Exrs. v. Wallace*, 4 Hen. & M. (Va.) 82; *Griffith v. Goodhand*, T. Raym. 464, 83 Eng. Reprint 242.

In *Smith v. Sharp*, 5 Mod. 133, 87 Eng. Reprint 565, where the covenant was to convey to the plaintiff or his assigns a breach was held good though it omitted "or to his assigns." In *Aleberry v. Walby*, 1 Str. 229, 93 Eng. Reprint 489, the covenant was to pay or cause to be paid, and the breach was good though it omitted "or cause to be paid."

59. *Adams v. Willoughby*, 6 Johns. (N. Y.) 65.

declaration which merely negatives the words of such a covenant. is not sufficient.⁶⁰

60. Ala.—Prestwood *v.* McGowin, 128 Ala. 267, 272, 29 So. 386, 86 Am. St. Rep. 136; Copeland *v.* McAdory, 100 Ala. 553, 665, 13 So. 545; Griffin *v.* Reynolds, 17 Ala. 198; Banks *v.* Whitehead, 7 Ala. 83. **Ark.**—Womack *v.* Connor, 74 Ark. 348, 352, 85 S. W. 783; William Farrell Lumb. Co. *v.* Deshon, 65 Ark. 103, 44 S. W. 1036; Dillahunt *v.* Little Rock & F. S. R. Co., 59 Ark. 699, 27 S. W. 1002, 28 S. W. 657; Abbott *v.* Rowan, 33 Ark. 593; Higgins *v.* Johnson, 14 Ark. 309, 60 Am. Dec. 544; Walker *v.* Johnson, 13 Ark. 522. **Conn.**—Mitchell *v.* Warner, 5 Conn. 497; Giddings *v.* Canfield, 4 Conn. 482; Booth *v.* Starr, 1 Conn. 244, 6 Am. Dec. 233. **Ga.**—White *v.* Stewart, 131 Ga. 460, 62 S. E. 590; Clements *v.* Collins, 59 Ga. 124. **Ill.**—Keating *v.* Springer, 146 Ill. 481, 34 N. E. 803, 37 Am. St. Rep. 175, 22 L. R. A. 544; Brady *v.* Spruck, 27 Ill. 477. **Ind.**—Wilber *v.* Buchanan, 85 Ind. 42; Reese *v.* McQuilkin, 7 Ind. 450; Hannah *v.* Henderson, 4 Ind. 174; Mauzy *v.* Flint, 42 Ind. App. 386, 83 N. E. 757. **Ky.**—Jones *v.* Jones, 87 Ky. 82, 7 S. W. 886; Stannaford *v.* Hubbard, 33 Ky. L. Rep. 670, 110 S. W. 877. **Me.**—Blanchard *v.* Hoxie, 34 Me. 376. **Md.**—Crisfield *v.* Storr, 36 Md. 129, 11 Am. Rep. 480. **Mass.**—Brown *v.* Holyoke W. P. Co., 152 Mass. 463, 25 N. E. 966, 23 Am. St. Rep. 844; Skally *v.* Shute, 132 Mass. 367; Wait *v.* Maxwell, 4 Pick. 87; Marston *v.* Hobbs, 2 Mass. 433, 3 Am. Dec. 61. **Mich.**—Simons *v.* Diamond Match Co., 159 Mich. 241, 248, 123 N. W. 1132. **Minn.**—Wagner *v.* Finnegan, 54 Minn. 251, 55 N. W. 1129. **Miss.**—Dyer *v.* Britton, 53 Miss. 270, 279. **Mo.**—Cockrell *v.* Proctor, 65 Mo. 41; Pineland Mfg. Co. *v.* Guardian Trust Co., 139 Mo. App. 209, 122 S. W. 1133; Leet *v.* Gratz, 124 Mo. App. 394, 101 S. W. 696; Pence *v.* Gabbert, 63 Mo. App. 302, 306; Tracy *v.* Greffet, 54 Mo. App. 562; Holladay *v.* Menifee, 30 Mo. App. 207. **Neb.**—Sears *v.* Broadly, 66 Neb. 207, 212, 92 N. W. 214; Hampton *v.* Webster, 56 Neb. 628, 77 N. W. 50; Troxell *v.* Johnson, 52 Neb. 46, 71 N. W. 968; Cheney *v.* Straube, 35 Neb. 521, 524, 53 N. W. 479; Real *v.* Hollister, 20 Neb. 112, 29 N. W.

189. **N. J.**—Carter *v.* Denman's Exrs., 23 N. J. L. 260, 272; Kuhnen *v.* Parker, 56 N. J. Eq. 286, 38 Atl. 641. **N. Y.**—Kidder *v.* Vork, 12 Misc. 519, 33 N. Y. Supp. 663; Rickert *v.* Snyder, 9 Wend. 416; Sedgwick *v.* Hollenback, 7 Johns. 376. **N. C.**—Fishel *v.* Browning, 145 N. C. 71, 58 S. E. 759. **Ohio.**—Robinson *v.* Neil, 3 Ohio 325; Innes *v.* Agnew, 1 Ohio 386. **Ore.**—Jennings *v.* Kiernan, 35 Ore. 349, 55 Pac. 443, 56 Pac. 72. **Pa.**—Williams *v.* O'Donnell, 225 Pa. 321, 74 Atl. 205; Knepper *v.* Kurtz, 58 Pa. 480; Dobbins *v.* Brown, 12 Pa. 75; Chambers *v.* Reinhold, 33 Pa. Super. 266; Sager *v.* Patterson, 15 Pa. Super. 147; Clarke *v.* McAnulty, 3 Serg. & R. 364; Paul *v.* Witman, 3 Watts & S. 407; Patton *v.* McFarlane, 3 Pen. & W. 419. **R. I.**—Reinhalter *v.* Hutchins, 26 R. I. 586, 60 Atl. 234. **Tenn.**—Morrow *v.* Baird, 114 Tenn. 552, 559, 86 S. W. 1079; Allison *v.* Allison, 1 Yerg. 16; Crutcher *v.* Stump, 5 Hayw. 100. **Tex.**—Raines *v.* Calloway, 27 Tex. 678; Ward *v.* Nelson (Tex. Civ. App.), 131 S. W. 310. **Va.**—Marbury *v.* Thornton, 82 Va. 702, 1 S. E. 909. **Eng.**—Campbell *v.* Lewis, 3 B. & Ald. 392, 106 Eng. Reprint 706; Nash *v.* Palmer, 5 M. & S. 374, 105 Eng. Reprint 1088; Howell *v.* Richards, 11 East 633, 103 Eng. Reprint 1150; Dudley *v.* Follitt, 3 T. R. 584, 100 Eng. Reprint 746; Moore *v.* Jones, 2 Ld. Raym. 1536, 92 Eng. Reprint 496; Noble *v.* King, 1 H. Bl. 34.

In order to recover for a breach of the covenant of warranty, an eviction, either actual or constructive, must be alleged, and where it is alleged that the United States, or a state, is the owner of the paramount title, this is a sufficient allegation of a constructive eviction. Womack *v.* Connor, 74 Ark. 348, 352, 85 S. W. 783.

A petition or complaint for breach of warranty of title to land, must allege an actual eviction, or such facts as will show that title paramount has been asserted against the plaintiff, and that he has yielded to it, or it is in a situation requiring him to yield presently as a matter of legal duty. Joyner *v.* Smith, 132 Ga. 779, 65 S. E. 68.

Wright *v.* Nipple, 92 Ind. 310 was an action for breach of covenants of

a deed to land. The complaint alleged that third parties had brought an action for partition against the plaintiffs for an undivided one-third part of the land, which they claimed by a superior title, and in said action duly recovered a judgment for such interest in said land, held that an eviction of the plaintiff from one-third of said land was sufficiently alleged.

A petition for breach of the covenant of general warranty in a deed must allege an eviction, a surrender or an attorning by reason of a paramount title. *Sears v. Broady*, 66 Neb. 207, 92 N. W. 214.

Ravenal v. Ingram, 131 N. C. 549, 42 S. W. 967, was an action for breach of covenants of warranty, made by defendants in the following language: "Do hereby covenant to warrant and defend the title to the aforesaid described land against the claim, or claims of any and all persons claiming through or under us." "The plaintiff alleged that one Henry Stuart, at spring term, 1899, of Macon superior court, recovered a judgment for said land, and thereby the plaintiffs have been disturbed and deprived of their possession." This was defective, as "it requires more than a judgment of court to constitute a breach of warranty. There must be an ouster, or a disturbance of the possession equivalent to an ouster," and, further, that the omission to allege that said Stewart recovered upon a title derived from the plaintiff's grantors rendered it vitally defective.

A declaration for breach of a covenant of general warranty of title to land, which sets forth substantially that the defendant had no title at the time of sale, and that an ejectment had been brought, the plaintiff, by a stranger, of which plaintiff gave defendant notice, and that plaintiff had been afterwards evicted in due course of law, was held sufficient on demurrer. *Swenk v. Stout*, 2 Yeates (Pa.) 470.

Pigeon River Lumb. & Iron Co. v. Mims (Tenn.), 48 S. W. 385, 390, was an action based upon a warranty of title to real estate. Plaintiff's bill failed to show an eviction after the execution of the deed containing the covenant, but showed that at that time the land was already in the adverse possession of third parties claiming under a paramount title and so remained at the time of the commencement of

the action. Held that no eviction appeared from the bill.

In *Day v. Chism*, 10 Wheat. (U. S.) 449, 450, 6 L. ed. 363, the court said in reference to covenants of warranty of title to land: "In an action on such a covenant it is undoubtedly necessary to allege substantially an eviction by title paramount, but we do not think that any formal words are prescribed, in which this allegation is to be made. It is not necessary to say, in terms, that the plaintiff has been evicted by a title paramount to that of the defendants. In this case, we think such an eviction is averred substantially. The plaintiffs aver, 'that the said Obadiah had not a good and sufficient title to the said tract of land; and by reason thereof, the said plaintiffs were ousted and dispossessed of the said premises, by due course of law.' This averment, we think, contains all the facts which constitute an eviction by title paramount."

Chenault v. Thomas, 119 Ky. 130, 83 S. W. 109, was an action for breach of warranty in the conveyance of land, the allegation of the complaint with reference to eviction was as follows: "Plaintiff says that subsequently, in an action brought by Howe & Marks and Parmelia Fisher, *et al.*, as plaintiffs, against this plaintiff, *et al.*, as defendants, the Powell circuit court, by judgment duly rendered, adjudged that said Anderson and said Chenault, who made said deed jointly to this plaintiff as aforesaid, did not own said five-twelfths interest in said land, and adjudged the same to said plaintiffs in said action then pending in the Powell circuit court, and adjudged to said plaintiffs the possession of all of said land, save an undivided five twenty-fourths interest therein, thus evicting this plaintiff from the possession, and depriving him of the ownership of five twenty-fourths interest thereof, which had been conveyed to him as aforesaid." This allegation was held sufficient, the court saying: "While the word 'paramount' does not occur in the foregoing quotation from the petition, the language used is not susceptible of any other construction than that appellee was evicted by paramount title."

In *Glover v. O'Brien*, 100 Me. 551, 554, 62 Atl. 656, the court said: "It is undoubtedly a well-settled general rule respecting the assignment of

Statement of Paramount Title. — The paramount title under which eviction or ouster was enforced must be substantially set forth in the declaration or complaint.⁶¹ And it must appear that such title is superior to the title of any one else.⁶²

In Covenant Against Incumbrances. — A declaration for breach of a covenant against incumbrances, must set out the particular incumbrance which constitutes the breach.⁶³ And, where the covenant is

breaches of covenants, that the plaintiff may allege the breaches generally by simply negating the words of the covenant; but the exception to this rule is equally well recognized: that, when such a general assignment does not clearly and necessarily show a breach, special averments are required. . . . The covenants against incumbrances, and that of general warranty come within the exception, and breaches of those covenants must be specifically set forth, showing in the case of the former the nature of the incumbrance complained of, and in case of the latter a disturbance of title or possession by a paramount title, equivalent to an eviction."

A declaration for breach of covenant for the quiet enjoyment of leased premises, should set out the covenant and allege its breach. *Cassidy v. Richardson*, 74 N. H. 221, 66 Atl. 641.

In an action for breach of a covenant of warranty of title, it must be alleged that there has been an eviction by title paramount or action brought. *Kuntzman v. Smith*, 77 N. J. Eq. 30, 75 Atl. 1009.

61. **U. S.**—*Day v. Chism*, 10 Wheat. 449, 6 L. ed. 363. **Ala.**—*Copeland v. McAdory*, 100 Ala. 553, 556, 13 So. 545. **Ind.**—*Wilson v. Peelle*, 78 Ind. 384; *Sheetz v. Longlois*, 69 Ind. 491. **N. J.**—*Kellog v. Platt*, 33 N. J. L. 329. **Vt.**—*Knapp v. Marlboro*, 34 Vt. 235.

While it is necessary to specify the particular paramount title under which the covenantee has been evicted, it may be designated in general terms, and that an eviction was had by reason thereof, without attempting to detail the manner of the eviction, or by what particular means it was brought about or accomplished. *Jennings v. Kiernan*, 35 Ore. 349, 56 Pac. 72, 55 Pac. 443.

62. *Sheetz v. Langlois*, 69 Ind. 491.

In an action for breach of the cov-

enant of warranty of title, it is necessary for the complaint to show that the title to which possession was surrendered by the plaintiff was a paramount one. It is not sufficient to show that it was above or greater than that of the grantor, but it must be shown to be superior to all others. *Wilson v. Peelle*, 78 Ind. 384.

In an action for breach of a covenant of warranty of title, where it appears by the declaration that the plaintiff has yielded to a claim of title without suit, it must be alleged that the title to which he yielded was good. *McKillop v. Burton*, 82 Vt. 403, 409, 74 Atl. 78.

"The declaration in this action of covenant for breach of warranty against incumbrances, in which the plaintiff seeks to recover as damages the amount she says she was compelled to pay, as the cost of certain curbstones set adjoining the premises conveyed to her by the defendant, to prevent her estate being sold therefor, contains no averment of any demand upon the abutting owner before the same were certified to the tax assessors and included in the defendant's tax. This demand [under the statute] is an essential prerequisite to a valid assessment, as therein specified, and the omission of such averment is fatal to the plaintiff's claim that she was compelled to pay the same." *Bowers v. Narragansett Real Estate Co.*, 28 R. I. 329, 67 Atl. 324, 325.

63. **U. S.**—*LeRoy v. Beard*, 8 How. 451, 12 L. ed. 1151. **Ala.**—*DeJarnette v. Dreyfus*, 166 Ala. 138, 51 So. 932; *Prestwood v. McGowin*, 128 Ala. 267, 29 So. 386, 86 Am. St. Rep. 136. **Ark.**—*Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338. **Conn.**—*Mitchell v. Warner*, 7 Conn. 497. **Me.**—*Blanchard v. Hoxie*, 34 Me. 376. **Mass.**—*Wait v. Maxwell*, 4 Pick. 87; *Marston v. Hobbs*, 2 Mass. 433, 3 Am. Dec. 61. **Mo.**—*Shelton v.*

against incumbrances only which arise under or through the grantor, the declaration must allege that the incumbrance complained of originated from, by or under the grantor.⁶⁴ The same rules also apply to a complaint for breach of a covenant for quiet enjoyment.⁶⁵

Pease, 10 Mo. 474. Wis.—Jones v. Davis, 22 Wis. 421.

In *Henderson v. H. L. Berry Co.*, 145 Ala. 404, 39 So. 662, the complaint alleged a warranty against incumbrances, but failed to show any incumbrance. In alleging a breach of the warranty, it averred an existing outstanding paramount title at the date of the execution of the deed containing the warranty. This was bad on demurrer.

Brenen v. Kelly, 61 N. Y. Supp. 695, was an action for breach of a covenant against incumbrances. The complaint alleged that at the time of the delivery of the deed containing the covenant, there were unpaid taxes upon the property to the amount of \$116.86, together with the penalty and interest thereon for non-payment. The allegation disclosed an immediate breach of the covenant.

In a complaint for breach of a covenant against incumbrances on title to land, an allegation "that there was a valid and subsisting mortgage thereon for a large amount, to wit, \$1000," and that said mortgage was subsequently foreclosed in Illinois where the land was situated, and that the land was ordered sold, by decree of court, and was sold in pursuance thereof, was held sufficient to show that there was a valid incumbrance on the property. *Worley v. Hineman*, 6 Ind. App. 240, 33 N. E. 260.

64. *Griffin v. Reynolds*, 17 Ala. 198; *Sherwood v. Landon*, 57 Mich. 219, 23 N. W. 778.

The rule of the text was laid down in *Mayo v. Babcock*, 40 Me. 142, 144, where a covenant in a deed "That neither the grantor, nor his heirs, or any other person, or persons, claiming from or under them, or in their name, right or stead of them, shall or will, by any way or means, have, claim, or demand, any right or title to the premises, or their appurtenances, or to any part or parcel thereof forever."

In *Griffin v. Fairbrother*, 10 Me. 91, 96, the covenant alleged in the dec-

laration was a covenant of special warranty, to warrant and forever defend the premises to the grantee, his heirs and assigns against the lawful claims and demands of all persons claiming by, through or under grantor. The breach assigned was that the grantor had no right to sell and convey the premises in manner and form as set forth in the deed containing said covenant. On the face of the declaration no cause of action appeared, because the defendant did not covenant that he had good right to sell and convey the premises.

65. *Crisfield v. Storr*, 36 Md. 129, 148, 11 Am. Dec. 480; *Marston v. Hobbs*, 2 Mass. 433, 3 Am. Dec. 61. See cases last above cited.

In *Carter v. Denman's Exrs.*, 23 N. J. L. 260, 276, the court said: "Where a covenant is to do, or forbear a particular act, it is sufficient to assign the breach in the words of the contract. So, in an action upon the usual covenants of a deed, that the grantor is seized, or that he has good right to convey, it is sufficient to assign the breach generally, by averring that the grantor was not seized, or that he had not good right to convey. But in an action upon a covenant of warranty, it is not enough to aver in the negative of the covenant, that the grantor did not warrant and defend the premises. The declaration must go farther, and show an eviction by a person having lawful title paramount to that of the plaintiff. And the same rule applies to covenants for quiet enjoyment and against incumbrances."

In *Jennings v. Kiernan*, 35 Ore. 349, 352, 55 Pac. 443, the court said: "In assigning breaches of the usual covenants, accompanying the transfer of lands, the general rule is that the pleader may assign them generally, unless such an assignment does not amount to a breach. For instance, as against the covenant of seisin or that the grantor has good right to convey, it is sufficient to say that he was not seized, or had not good right to convey, for such an allegation necessarily

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negatives the undertaking of the covenant. But not so as it respects the covenant against incumbrances, the covenant of warranty, and quiet enjoyment, as the grantor does not covenant against all possible incumbrances, or all interruptions or claims or ousters, and it, therefore, becomes necessary to specify the incumbrance or title paramount by reason of which the covenantee or his assigns have been ousted or disturbed in the possession."

66. The plaintiff says, that on the _____ day of _____, 1888, one M. B., being seized in fee simple of certain lands described as follows, to wit: _____ conveyed the same to N. S. That at the date of said conveyance said M. B. was inter-married with one H. B., who did not join in said conveyance or otherwise release his dower in said premises; that about April 25th, 1889, M. B. died leaving said H. B. her widower, and said widower is still living. That on September 22, 1892, said N. S., for the consideration of three hundred dollars, by deed duly executed, and with covenants against incumbrances, and of general warranty conveyed said lands to said W. That thereafter said H. B., before the admeasurement of his said dower estate, sold and by deed duly executed, conveyed his dower interest in said lands to one Bechtol. That thereafter in a certain action pending in the court of common pleas of Allen county, Ohio, wherein said W. was plaintiff and said Bechtol was defendant, said Bechtol as grantee of said H. B., by her cross petition, demanded, and upon trial established her claim to dower in said lands, and the court in said action found the value in a gross amount of said dower interest to be \$----- and charged the amount so found as a lien upon said lands, and ordered that in default of payment, said lands be sold as upon execution, said order being of date the _____ day of _____.

Plaintiff further says that on the _____ day of _____ when said Bechtol filed her said cross petition in said action, he notified said N. S. of the pendency of said action and of the matters contained in said cross complaint and demanded that he defend against the claims of said cross com-

plaint, but the said N. S. failed and refused so to do, and said plaintiff was compelled to and did pay the amount of said lien in discharge thereof, and also paid attorney's fees and costs in said action in all amounting to \$-----, for which amount he prays judgment against the defendant.

Attorney for Plaintiff.

Weyer v. Sager, 21 Ohio C. C. 710, 12 Ohio Cir. Dec. 193.

On a Bill of Sale of Goods.—For that the said D (defendant) at _____, on _____, by his certain writing, sealed with his seal, and here in court to be produced, of that date, in consideration of _____, to him in hand paid by the plaintiff, did bargain, sell and deliver to the said plaintiff the goods and things in the schedule to the same writing subscribed, to have and to hold the same to the plaintiff and his executors, administrators and assigns, to the use of the plaintiff and his executors, administrators and assigns forever. And the said deed by said writing covenanted with the plaintiff, that he the said bargained premises to the plaintiff, his executors, administrators and assigns, would warrant and forever defend by said writing; as by said writing, with the schedule aforesaid annexed, more fully appears. And the plaintiff, in fact, says, that the said deed, at the time of making and sealing the writing aforesaid, had no interest or property in said goods or chattels, or any part thereof; but the true property thereof then was in B. C. And so the said D, though often requested, hath not kept his covenant aforesaid with the plaintiff, in this behalf made, and hath altogether denied, and yet doth deny to perform it to him." Parson's American Precedents, p. 327.

On a Note Under Seal.—For that the said A (defendant) on _____, at _____, by his deed of that date, in court to be produced, covenanted with the plaintiff to pay him, or his order, the sum of _____ on demand, with interest for the same until paid: yet the said A, though often requested, hath not paid the said sum of _____, nor the interest thereof, but wholly neglects and refuses so to do. And so the said A his said covenant hath

not kept, but hath broken the same." Parson's American Precedents, p. 321.

On a Charter Party.—For that whereas on —, at —, by a certain charter party of affreightment, indented, of that date, made and concluded upon between the said A and B (defendants) on the one part, and the plaintiff on the other, one part thereof under the hands and seals of the said A and B, in court to be produced; the plaintiff, for the considerations therein mentioned, did let to freight, unto the said A and B, the whole hull, &c. (as in the charter party), for a voyage from — to —, and thence back to —, the place of her discharge, the dangers of the seas excepted. And plaintiff among other things, did then covenant with the said A and B, that the said ship was then and there, and during said voyage should continue to be sound, strong, and well fitted for such a voyage. And the said A and B, in consideration thereof, did therein, among other things, covenant to pay to the plaintiff, his executors, &c., the sum of — for every ton aforesaid, for every calendar month, and so in proportion for a less time than a month, said ship should be in the service of said A and B upon said voyage, commencing from the date of said charter party and ending at the time of her discharge from the said voyage, at —; and that the whole of said hire should be paid within — days after her discharge from said voyage, at —; and that the said A and B would victual and man said ship during said voyage, and would pay port charges, and also would insure and pay the plaintiff the sum of —, being the sum the said ship was appraised at, and valued by the mutual consent of the parties, in case said ship, upon said voyage, or in any port or place in consequence thereof, should be seized for the supposed breach of any acts of trade, the restraints of pirates excepted. And it was therein mutually agreed between the said parties, that one G should be master of said ship during said voyage; and in case said ship should not be ready when loaded, that, in that case, the hire should cease until she should be ready: to the true performance of which covenants, the said parties therein bound themselves each unto the other in the penal sum of —. Now, the plaintiff avers, that

he has well and truly done and performed all things, in the said charter party on his part covenanted to be performed, and that the said ship, with her appurtenances, was, by the said A and B, taken into their service on —, and on — was loaded, and was then ready, and did proceed on said voyage to —, arrived safe there on —, and thence proceeded back to —, and on — arrived at —, viz., —, and was there, on the same day, discharged from the same voyage. And the plaintiff further avers, that the whole hire of said ship, with her appurtenances, during said voyage, amounted to the sum of —, whereof the said A and B thereafterwards, on the same day, had notice: Yet the said A and B, or either of them, though the said — days have expired, and though since requested, have never paid the said sum of —; but the said A and B their covenants aforesaid, in these particulars, have not kept, but altogether broken; and the said A and B, and each of them, still wholly denied to perform the same." Parson's American Precedents, p. 321.

By Lessor Against Lessee for Rent.

— to wit, A B complains of C D, being in the custody of the sheriff of —, of a plea of breach of covenant. For that whereas, heretofore, to wit, on the — day of —, A. D., at &c., by a certain indenture then and there made between the said A B of the one part, and the said C D of the other part (the counterpart of which said indenture sealed with the seal of the said C D, the said A B now brings here into court, the date whereof is the day and year aforesaid), the said A B did demise, lease, set and to farm let unto the said C D, his executors, administrators and assigns, a certain messuage or dwelling house, &c., situate, &c. (except as in the said indenture is excepted), to have and to hold the said messuage or dwelling house, &c., with the appurtenances (except as aforesaid), unto the said C D, his executors, administrators, and assigns, from the — day of —, then last past, to the full end and term of — years thence next ensuing, and fully to be complete and ended. Yielding and paying therefor yearly and every year, to the said A B, his heirs or assigns, the clear yearly rent or sum of \$—, pay-

V. PLEAS. A. NO GENERAL ISSUE. — Properly speaking, in an action of covenant there is no plea of the general issue; the defendant must plead specially either performance of the covenant, excuse for non-performance, or matters in discharge.⁶⁷

Non Est Factum. — The plea of *non est factum* in an action of covenant puts in issue only the proper execution of the deed containing the covenant.⁶⁸ But it has been held that the plea of *non est factum*

able quarterly, at the foremost usual feasts or days of payment of rent in the year, that is to say, on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December, in each and every year, by even and equal portions. And the said C D did thereby for himself, his executors, administrators and assigns covenant, promise and agree, to, and with the said A B, his heirs and assigns, that he the said C D, his executors, administrators or assigns, should and would well and truly pay, or cause to be paid, to the said A B, his heirs or assigns, the said yearly rent or sum of \$—— at the several days and times aforesaid. As by the said indenture reference being thereunto had will (amongst other things) more fully and at large appear. By virtue of which said demise, the said C D afterwards, to wit, on, &c. entered into and upon all and singular the said demised premises, with the appurtenances, and became and was possessed thereof, for the said term so to him thereof granted as aforesaid. And although the said A B hath always, from the time of making the said indenture, hitherto well and truly performed, fulfilled and kept all things in the said indenture contained on his part and behalf, to be performed, fulfilled and kept, according to the tenor and effect, true intent and meaning of the said indenture, to wit, at, &c. aforesaid. Yet protesting that the said C D hath not performed, fulfilled or kept, anything in the said indenture contained on his part and behalf, to be performed, fulfilled and kept, according to the tenor and effect, true intent and meaning thereof, the said A B saith, that after the making of the said indenture, and during the said term thereby granted, to wit, on, &c. at, &c. aforesaid, a large sum of money, to wit, the sum of \$—— of the rent aforesaid, for —— years

and a half of the said term then elapsed, became, and was, and still is in arrear and unpaid, to the said A B, contrary to the tenor and effect, true intent and meaning of the said indenture, and of the said covenant of the said C D, by him in that behalf, so made as aforesaid, to wit, at, &c. aforesaid. And so the said A B in fact saith, that the said C D (although often requested so to do) hath not kept his said covenant so by him made as aforesaid, but hath broken the same, and to keep the same with the said A B hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the said A B of \$—— and therefore he brings his suit, &c.” Parson’s American Precedents, p. 328.

67. *Winn v. Skipwith*, 14 Smed. & M. (Miss.) 14; *Oldenshaw v. Thompson*, 5 Maule & Sel. 164, 105 Eng. Reprint 1011.

Nil debet not proper. *Tyndal v. Hutchinson*, 3 Lev. 170, 83 Eng. Reprint 634.

“In the action of covenant, there is properly speaking, no general issue or plea amounting to a traverse of the whole declaration. . . . The defendant must, therefore, plead specially every matter of defense of which, under the circumstances of the case, he is at liberty to avail himself.” *Jones v. Johnson*, 10 Humph. (Tenn.) 184.

68. **D. C.**—*Clark v. Harmer*, 5 App. Cas. 114. **N. Y.**—*Legg v. Robinson*, 7 Wend. 194; *Gardner v. Gardner*, 10 Johns. 47; *Hebberd v. Delaplaine*, 3 Hill 187. **Ohio**—*Courcier & Ravises v. Graham*, 1 Ohio 330.

By this plea defendant denies only that the bond is his bond. It admits all other material averments, including the breach. The plea raises no issue as to the amount of the damages. *Leman v. United States Fidelity, etc. Co.*, 137 Ill. App. 258.

may be used to raise the general issue,⁶⁹ and even that these two pleas may be joined.⁷⁰

The omission of a material part of the covenant cannot be taken advantage of by the defendant as a variance under this plea; he should crave oyer and demur.⁷¹

General Denial.—It has been held a good plea to plead that the defendant has not broken his covenant as alleged in the declaration.⁷²

Statute of Limitations.—A plea that defendant did not, within the statutory period next before the bringing of the action, break the covenant as the plaintiffs both alleged, is a good plea of the statute of limitations.⁷³

Conditions Performed.—A plea of conditions performed should aver specifically the time, place and manner of performance.⁷⁴

Matter qualifying the covenant may be shown under this plea. *Howell v. Richards*, 11 East 633, 103 Eng. Re-print 1150.

69. "In an action of covenant there is strictly no plea which can be termed a general issue; but the plea of *non est factum*, the general issue in debt on specialty, is correctly used, to answer in this action the same end it does in debt." *Longley v. Norvall*, 2 Ill. 388, 389.

In *Granger's Admr. v. Granger*, 6 Ohio 35, 41, the court said: "The practice which has generally obtained in our courts, ever since the passage of the law allowing notices of set-off to be affixed to a plea of the general issue, has regarded *non est factum* in covenant, as a plea of the general issue, within the meaning of the legislature."

70. *Merry v. Gay*, 3 Pick. (Mass.) 388; *Alderman v. French*, 1 Pick. (Mass.) 1, 11 Am. Dec. 114; *Jackson v. Stetson*, 15 Mass. 48.

71. *Henry v. Cleland*, 14 Johns. (N. Y.) 400.

72. *Davis' Admr. v. Mullen's Admr.*, 86 Va. 256, 267, 9 S. E. 1095.

Where a plea in an action of covenant is as broad as the declaration, and responsive to it, it is not demurrable. *Burroughs v. Clancey*, 53 Ill. 30, 33.

In covenant the defendant may plead specially matter which would be admissible under the general issue. *Smith v. Justice*, 6 Phila. (Pa.) 234.

73. *Davis' Admr. v. McMullen's Admr.*, 86 Va. 256, 267, 9 S. E. 1095.

74. *Md.*—*Marshall v. Haney*, 9 Gill 251. *N. H.*—*Russell v. Fabyan*, 28

N. H. 543, 61 Am. Dec. 629. *R. I.* *Almy v. Greene*, 13 R. I. 350, 353; *Commercial Nat. Bank v. Gorham*, 11 R. I. 162, 165.

In an action of covenant for the conveyance of land, the defendant pleaded tender of a deed according to the true intent and meaning of the covenant. Held insufficient because the plea failed to make proof of the deed. *Sook v. Knowles*, 1 Bibb (Ky.) 283.

In *Farmers' & M. Tpk. Co. v. McCullough*, 25 Pa. 303, 304, the court said as to the plea of "covenants performed *absque hoc*, with leave, &c." The plea of covenants performed, although in substance a denial of the breach alleged, is an affirmative plea, and puts not the execution of the instrument in issue, nor do the words '*absque hoc*,' 'without this,' for these only put in issue the performance on the part of the plaintiff, as alleged in his *narr.* The words 'with leave, &c.' imply always an equitable defense, such as arises out of special circumstances."

A plea of general performance is insufficient. It should specifically and directly answer the breach of the covenant set out in the declaration. *Snow v. Horgan*, 18 R. I. 289, 27 Atl. 338.

As a general rule, a plea of conditions performed in an action of covenant, must show specially the time, place and manner of performance, and even though the subject to be performed should consist of several different acts, yet he must show performance of each. *Norfolk & Carolina R. Co. v. Suffolk Lumb. Co.*, 92 Va. 413,

B. NON-PERFORMANCE OF CONDITION PRECEDENT.—An allegation in a plea or answer that the plaintiff or covenantor failed to perform a necessary condition precedent, must specifically state in what such failure consisted.⁷⁵

C. EXCUSE FOR NON-PERFORMANCE.—Where the defense is that performance was excused by the act of the plaintiff, or otherwise, the plea must set forth specifically the facts relied on to constitute such excuse.⁷⁶

D. FRAUD AND NEGLIGENCE.—Fraud or negligence on the part of the covenantee when the covenant was made, may be pleaded in bar to an action of covenant.⁷⁷ A plea alleging fraud as to the execu-

437, 23 S. E. 737, *quoting* 4 Minor Inst. (3d ed.), p. 1202.

When a defendant in an action of covenant desires to rely on performance of the covenants, as a defense to the action, he must specially plead the same, showing the time and manner of such performance. A general allegation of performance is not sufficient. *Arnold v. Cole*, 42 W. Va. 663, 26 S. E. 312.

75. "In an action for breach of covenant, the defendant cannot plead generally, that there is a condition precedent in the covenant to be performed by the plaintiff before he can maintain his action. . . . He must set forth specially the condition which the plaintiff is bound to perform, with the time and manner in which it is to be done, with an averment that the defendant is ready and willing, and hath offered to perform his part of the agreement." *McLaughlin v. Hutchins*, 3 Ark. 207, 212.

Livingston v. Anderson, 30 Fla. 117, 124, 11 So. 270, was an action for breach of covenants in a building contract. The declaration alleged performance of all covenants on the part of the plaintiff, and alleged that the defendant had not performed and kept the same on his part, to wit: "Has not paid to Anderson (plaintiff) the said sum of \$4,500 according to the form and effect of said articles of agreement, and still refuses to pay the same to his damage \$5,000." To this declaration the defendant filed a plea as follows: "'And now comes the defendant, by his attorney, and says that the plaintiff has not performed and carried out the contract set forth in his declaration, as he agreed to do, and did not perform the work therein men-

tioned in a faithful and workmanlike manner.' " This was insufficient because it did not specifically state wherein the plaintiff failed in the performance of the covenants on his part.

76. *Ky.*—*Hoofman v. Sharp*, 1 J. J. Marsh. 489. *Ohio.*—*Holt v. McDonough*, 3 Ohio C. C. 177, 2 Ohio Cir. Dec. 100. *Va.*—*Chewning v. Wilkinson*, 95 Va. 667, 29 S. E. 680.

A plea to a declaration for breach of covenant, which sets up an excuse for non-performance, and then avers full performance, is void for duplicity. *Star Brick Co. v. Risdale*, 34 N. J. L. 428.

In an action of covenant for rent, the defendant pleaded that prior to the execution of the lease, third parties "entered into and expelled the plaintiffs from the demised premises, and continued their possession down to the day of the demise, claiming title thereto *adverse to the plaintiffs*." This was insufficient because "the plea does not allege the eviction to have been in virtue of any right or title to the premises *paramount* to the title of the plaintiffs; neither does it in any way attempt to connect the defendant or any of those under whom he claimed title, with the disseizor's claim of title." *University of Vermont v. Joslyn*, 21 Vt. 52, 60.

77. *Prestwood v. Carlton*, 162 Ala. 327, 50 So. 254, was an action for breach of covenants of warranty contained in a lease of certain lands. The breaches assigned were in substance that the covenants were broken in that the lessor had no title to certain lands leased, but that such lands at the time of the lease were owned and possessed by named parties other than the lessor. The defendant pleaded in substance,

tion of a covenant is sufficient.⁷⁸ But an allegation of fraud as to the consideration of a covenant sets up no defense.⁷⁹

E. ACCORD AND SATISFACTION.—Accord and satisfaction is a proper plea in an action for breach of a covenant against incumbances.⁸⁰

F. SET-OFF.—Where the covenant is for a money demand, set-off may be pleaded in an action for breach thereof.⁸¹

G. ADMISSION OF BREACH.—Where facts stated in an answer establish a breach of the covenant sued on, the plaintiff need not offer evidence thereon.⁸²

H. CONCLUSION OF PLEA.—Where the facts stated in a plea amount to a denial of the plaintiff's declaration, the plea should conclude to the country.⁸³

that if there was such want of title or possession in him at the time of the lease to any part of the premises as was alleged in the complaint, it was due to the negligence or fraud of plaintiff's intestate in failing to get the correct numbers, or in getting improper description of the lands. That plaintiff's intestate undertook to get such description, and the defendant did not even know the description by numbers, and plaintiff's intestate stated that he had gotten the correct description, and he wrote the lease and inserted said description therein, and presented the lease to the defendant stating that it described only his lands, and the defendant not knowing any better, but relying upon said statement of plaintiff's intestate, executed the lease. This was held to be a good plea in bar to the action.

78. *Slocum v. Despard*, 8 Wend. (N. Y.) 615, 620.

To an action of covenant on a deed, the fraud, covin and misrepresentations of the plaintiff may be pleaded in general terms. *Lacey v. Spencer*, 3 U. C. Q. B. (Can.) 169.

A plea to a declaration in covenant, alleging generally that the covenant was obtained by the fraud of the plaintiff is sufficient, although it is better to specify the fraud in the plea. *Sharp v. White*, 1 J. J. Marsh. (Ky.) 107.

79. A plea in an action of covenant, that the defendant's covenant was obtained by false and fraudulent representations as to particular facts, constitutes no defense. Fraud as to the consideration cannot be set up to avoid an agreement under seal, but only

fraud as to its execution. *Slocum v. Despard*, 8 Wend. (N. Y.) 615, 620.

Failure of Consideration.—A plea that the consideration of the covenant has failed in whole or in part, is bad on demurrer, as the question of consideration cannot be inquired into. *Niven's Admr. v. Merrick*, 1 Overt. (Tenn.) 314, 3 Am. Dec. 757.

80. *Jenkins v. Hopkins*, 9 Pick. (Mass.) 543.

81. *Roebuck v. Tennis*, 5 T. B. Mon. (Ky.) 82.

Where a plea of set-off is made to a declaration in covenant, it must set up a subsisting debt. *Roebuck v. Tennis*, 5 T. B. Mon. (Ky.) 82.

82. In *Eames v. Armstrong*, 142 N. C. 506, 55 S. E. 405, the complaint alleged a breach of the covenant of seisin as to two tracts of land; the answer admitted the execution of the deed containing the covenant as to both tracts, and denied the breach, but in a further defense set up new matter which established the breach as to one of the tracts. Held that the plaintiff was thereby relieved from proving the breach as to that tract.

Default—Damages.—Upon failure of the defendant to answer in an action for breach of a covenant of seisin, an assessment of damages is necessary, and the defendant has a right to appear at such assessment and offer evidence pertinent to the question of damages, or in mitigation thereof. *Bartelt v. Braunsdorf*, 57 Wis. 1, 14 N. W. 869.

See the title "Default."

83. *Overton v. Crabb*, 4 Hayw. (Tenn.) 109.

In *Star Brick Co. v. Ridsdale*, 34 N.

VI. VERDICT AND JUDGMENT. — GENERAL VERDICT. — A general verdict for the plaintiff, in an action of covenant, cannot be sustained where several breaches are assigned, some of which are defective.⁸⁴

Judgment Against One Defendant. — Where of two defendants, one is found to be an infant, judgment may be entered against the other.⁸⁵

VII. RECOVERY OF COSTS AND EXPENSES. — Costs and expenses of litigation paid by a grantee of land in defending his title which had been covenanted, or in prosecuting a suit for possession which had been covenanted, but never actually given, are recoverable in an action for breach of a real covenant.⁸⁶

J. L. 428, "the declaration assigned for cause of action, among other breaches of covenant, that the defendants failed and refused to burn for the plaintiffs one hundred and twenty thousand bricks, or any other number, per week, during the season specified in the agreement, with an express averment that the plaintiffs made and manufactured and had them ready to burn, and notified the defendants thereof." The plea of defendants averred "that plaintiffs did not make and manufacture and have ready to burn, and notify the defendants to burn, one hundred and twenty thousand bricks per week, but refused so to do, and that the defendants have always well and truly kept all other covenants in said agreement mentioned on their part to be performed, and concluding with a verification." The plea was bad, for concluding with a verification, when it should have concluded to the contrary.

84. If several breaches be assigned in an action of covenant, some of which are defective, and a general verdict is given for the plaintiff, the judgment should be arrested on motion, or reversed in error, for the jury may have assessed damages on the faulty breach. *Wilson's Admr. v. Bowens*, 2 T. B. Mon. (Ky.) 86.

85. In an action of covenant against two defendants where one pleads infancy, and it be found for him, the plaintiff may enter a *nolle prosequi* against him, and have judgment against the other defendant. *Kurtz v. Becker*, 5 Cranch C. C. 671, 14 Fed. Cas. No. 7,951.

86. *Conn.*—*Butler v. Barnes*, 61 Conn. 399, 406, 24 Atl. 328; *Sterling v. Peet*, 14 Conn. 254. *Ga.*—*Wimberly*

v. Collier, 32 Ga. 13. *Ill.*—*Harding v. Larkin*, 41 Ill. 413; *Walsh v. Durin*, 34 Ill. App. 146. *Ind.*—*Worley v. Hine-man*, 6 Ind. App. 240, 33 N. E. 260. *Ia.*—*Alexander v. Staley*, 110 Iowa 607, 611, 81 N. W. 803; *Meservey v. Snell*, 94 Iowa 222, 62 N. W. 767, 58 Am. St. Rep. 391; *Swartz v. Ballou*, 47 Iowa 188, 29 Am. Rep. 470. *Kan.*—*Stebbins v. Wolf*, 33 Kan. 765, 7 Pac. 542; *McKee v. Bain*, 11 Kan. 569, 579; *Dale v. Shively*, 8 Kan. 276; *Jewett v. Fisher*, 9 Kan. App. 630, 58 Pac. 1023. *Ky.*—*Mercantile Tr. Co. v. South Park Residence Co.*, 94 Ky. 271, 22 S. W. 314; *Blackwell v. McBride*, 14 Ky. L. Rep. 760. *La.*—*Tear v. Williams*, 2 La. Ann. 868. *Me.*—*Williamson v. Williamson*, 71 Me. 442. *Mass.*—*Leffingwell v. Elliott*, 8 Pick. 455, 19 Am. Dec. 343. *Mich.*—*Webb v. Holt*, 113 Mich. 338, 71 N. W. 637. *Minn.*—*Allis v. Mininger*, 25 Minn. 525. *Miss.*—*Brooks v. Black*, 68 Miss. 161, 8 So. 332, 24 Am. St. Rep. 259, 11 L. R. A. 176. *Mont.*—*Taylor v. Holter*, 1 Mont. 688. *Neb.*—*Walton v. Campbell*, 51 Neb. 788, 71 N. W. 737; *Cheney v. Straube*, 35 Neb. 521, 53 N. W. 479. *Nev.*—*Dalton v. Bowker*, 8 Nev. 190. *N. H.*—*Winnipegosee Paper Co. v. Eaton*, 65 N. H. 13, 18 Atl. 171. *N. Y.*—*Hymes v. Esty*, 133 N. Y. 342, 31 N. E. 105; *Richert v. Snyder*, 9 Wend. 414; *Charman v. Tatum*, 54 App. Div. 61, 66 N. Y. Supp. 275; *Grantier v. Austin*, 66 Hun 157, 20 N. Y. Supp. 968. *Ore.*—*Stark v. Olney*, 3 Ore. 88. *Pa.*—*Anderson v. Washabaugh*, 43 Pa. 115; *Robinson v. Bakewell*, 25 Pa. 424. *Vt.*—*Pitkin v. Leavitt*, 13 Vt. 379. *Eng.*—*Williams v. Burrell*, 1 C. B. 402, 50 E. C. L. 402; *Smith v. Compton*, 3 Barn. & Ald. 407, 110 Eng. Reprint 146; *Child v. Stenning*, L. R. 11 Ch. Div. 82; *Rolph*

Contra.—In some jurisdictions costs and expenses are not recoverable.⁸⁷ And in Missouri there is considerable confusion in the various decisions of the courts upon the subject.⁸⁸

v. Crouch, L. R. 3 Exch. 44. **Can.**—*Maybee v. Turley*, 27 U. C. Q. B. 444; *Stuart v. Mathieson*, 23 U. C. Q. B. 135; *Clark v. Robertson*, 8 U. C. Q. B. 372; *Brennan v. Servis*, 8 U. C. Q. B. 191; *Stubbs v. Martindale*, 7 U. C. C. P. 52.

See generally the title “Costs.”

Reasonable costs and expenses incurred in resisting an eviction are recoverable in an action for breach of a covenant of warranty of title to real estate. *Webb v. Holt*, 113 Mich. 338, 341, 71 N. W. 637.

Costs and expenses of litigation in defending title are recoverable in an

action for breach of a covenant to warrant and defend title to real estate though not stated in the plaintiff's declaration. *Tarbell v. Tarbell*, 60 Vt. 486, 15 Atl. 104.

87. U. S.—*Barlow v. Delaney*, 40 Fed. 97. **Ind.**—*Gibbs v. Ely*, 13 Ind. App. 130, 41 N. E. 351. **Tex.**—*Hedrick v. Smith*, 77 Tex. 608, 14 S. W. 197; *Clark v. Mumford*, 62 Tex. 531; *McClelland v. Moore*, 48 Tex. 355.

88. *Hazelett v. Woodruff*, 150 Mo. 534, 543, 51 S. W. 1048; *Matheny v. Stewart*, 108 Mo. 73, 17 S. W. 1014; *Lambert v. Estes*, 99 Mo. 604, 13 S. W. 284; *Hutchins v. Roundtree*, 77 Mo. 500.

COVERTURE.—See Husband and Wife; Parties.

Vol. VI

CREDITORS' SUITS

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CROSS-REFERENCES:

Corporations;
Decedents' Estates;

Executors and Administrators;
Fraudulent Conveyances.

I. NATURE OF THE PROCEEDING.—A creditor's suit is not an original suit, but ancillary and dependent upon and supplementary to the original suit.¹

There are two classes of creditor's bills which although resembling each other, are clearly distinguishable. The first is where the creditor seeks to satisfy his judgment out of the equitable assets of the debtor which cannot be reached on execution.² The second class of cases is where property legally liable to execution has been fraudulently conveyed or encumbered by the debtor, and the creditor brings the action to set aside the conveyance or encumbrance as an obstruction to the enforcement of his lien.³ The distinction as to the two classes of cases is fully borne out by many of the authorities.⁴

II. PRELIMINARY REQUISITES FORMING BASIS OF SUIT.

A. LEGAL REMEDIES MUST BE EXHAUSTED.—**1. General Rule.** It is a general rule that in order to maintain a creditor's suit it must

1. *Freeman v. Howe*, 24 How. (U. S.) 450, 460, 16 L. ed. 749. See also *McCartney v. Bostwick*, 32 N. Y. 53.

The equity jurisdiction exercised in the prosecution of creditor's suits is under special statutory authority, authorizing a court to grant ancillary relief to judgment creditors in aid of their remedies at law. There are two classes of cases in which this remedy can be invoked; in one case the party has no remedy at law; in the other, he has no remedy in equity, until his remedies at law are exhausted. *McCartney v. Bostwick*, 32 N. Y. 53.

2. *Miller v. Davidson*, 8 Ill. 518; *State Bank of Ceresco v. Belk*, 68 Neb. 517, 94 N. W. 617.

Generally in this class of cases "action cannot be brought until the creditor has exhausted his remedy at law by the issue of an execution, and its return unsatisfied. This is required because equity will not aid the creditor to collect his debt until the legal assets are exhausted, for until this is done he may have an adequate remedy at law." *State Bank of Ceresco v. Belk*, 68 Neb. 517, 94 N. W. 617.

3. *State Bank of Ceresco v. Belk*, 68 Neb. 517, 94 N. W. 617.

"In the latter class of cases the prevailing doctrine is that it is not necessary to allege that an execution has been returned unsatisfied, or that the debtor has no other property out of which the judgment can be satisfied; for that is not the ground upon which the court of equity assumes to grant

relief in such cases, but upon the theory that the fraudulent conveyance is an obstruction which prevents the creditor's lien from being efficiently enforced upon the property." *State Bank of Ceresco v. Belk*, 68 Neb. 517, 94 N. W. 617.

For a treatment of this class of cases see the title "Fraudulent Conveyances."

4. Ill.—*Fusze v. Stern*, 17 Ill. App. 429. Miss.—*Williams v. Hubbard*, Walk. Ch. 28. Neb.—*State Bank of Ceresco v. Belk*, 68 Neb. 517, 94 N. W. 617. N. Y.—*Beek v. Burdett*, 1 Paige 305, 19 Am. Dec. 436. Wis.—*Cornell v. Radway*, 22 Wis. 260.

In *Williams v. Hubbard*, *supra*, the court said: "There are two classes of cases in which a judgment creditor may come into this court for relief: First, in aid of his execution at law, as to set aside an incumbrance or a transfer of property made to defraud creditors; second, to have his judgment paid out of choses in action or other property of his debtor not liable to execution. Relief is given in these two classes of cases on different principles—in the first class on the ground of fraud, and in the other on the ground that the complainant has exhausted his remedy at law, and that it is inequitable and unjust for the debtor, under such circumstances, to refuse to apply any choses in action or other property belonging to him, not liable to execution, in payment of the judgment."

appear that the creditor has exhausted the legal remedies available.⁵

5. U. S.—Taylor *v.* Bowker, 111 U. S. 110, 4 Sup. Ct. 397, 28 L. ed. 368; Terry *v.* Anderson, 95 U. S. 628, 24 L. ed. 365; Virginia Board of Public Wks. *v.* Columbia College, 17 Wall. 521, 21 L. ed. 687; Nesbit *v.* North Georgia Elec. Co., 156 Fed. 979; Davidson-Wesson Imp. Co. *v.* Parlin & Orendorff Co., 141 Fed. 37, 72 C. C. A. 525; Childs *v.* N. B. Carlstein Co., 76 Fed. 86; Brown *v.* John V. Farwell Co., 74 Fed. 764; Streight *v.* Junk, 59 Fed. 321, 8 C. C. A. 137; Walser *v.* Seligman, 13 Fed. 415, 21 Blatch. 130.

Ala.—Turrentine *v.* Koopman, 124 Ala. 211, 27 So. 522; Henderson *v.* Farley, 123 Ala. 547, 26 So. 226, 82 Am. St. Rep. 140; Marble City L. & F. Co. *v.* Golden, 110 Ala. 376, 17 So. 935; Mixon *v.* Dunklin, 48 Ala. 455.

Ark.—Branch *v.* Horner, 28 Ark. 341.

Cal.—Lyden *v.* Spohn-Patrick Co., 155 Cal. 177, 100 Pac. 236; Mattison, etc. Mfg. Co. *v.* Conley, 144 Cal. 483, 77 Pac. 1042; Mesmer *v.* Jenkins, 61 Cal. 151.

D. C.—Clark *v.* Bradley Coal, etc. Co., 6 App. Cas. 437; Hess *v.* Horton, 2 App. Cas. 81.

Ga.—Lawson *v.* Virgin, 21 Ga. 356.

Ill.—Rice *v.* McJohn, 244 Ill. 264, 91 N. E. 448; Detroit Copper & Brass Rolling Mills *v.* Ledwidge, 162 Ill. 305, 44 N. E. 751; Durand *v.* Gray, 129 Ill. 9, 21 N. E. 610; Gore *v.* Kramer, 117 Ill. 176, 7 N. E. 504; Miller *v.* Davidson, 8 Ill. 518, 44 Am. Dec. 715; Crawford *v.* Cook, 55 Ill. App. 351; Harrison *v.* Hill, 37 Ill. App. 30.

Ind.—Towns *v.* Smith, 115 Ind. 480, 16 N. E. 811.

Ia.—Peterson *v.* Gittings, 107 Iowa 306, 77 N. W. 1056; Ware *v.* Delahaye, 95 Iowa 667, 64 N. W. 640.

Kan.—Clark *v.* Bert, 2 Kan. App. 407, 42 Pac. 733, it must appear that there is no property real or personal sufficient on execution to satisfy the judgment.

Me.—Baxter *v.* Moses, 77 Me. 465, 1 Atl. 350, 52 Am. Rep. 783; Howe *v.* Whitney, 66 Me. 17; Corey *v.* Greene, 51 Me. 114; Webster *v.* Clark, 25 Me. 313.

Md.—Balls *v.* Balls, 69 Md. 388, 16 Atl. 18; Clagett *v.* Worthington, 3 Gill 83.

Mass.—Holland *v.* Cruft, 20 Pick. 321.

Mich.—Smith *v.* Thompson, Walk. 1; Eldred *v.* Camp, 1 Harr. 162.

Minn.—Moffatt *v.* Tuttle, 35 Minn. 301, 28 N. W. 509; Wadsworth *v.* Schisselbauer, 32 Minn. 84, 19 N. W. 390.

Miss.—Fleming *v.* Grafton, 54 Miss. 79; Hamilton *v.* Mississippi College, 52 Miss. 65; Pulliam *v.* Taylor, 50 Miss. 551; Vasser *v.* Henderson, 40 Miss. 519, 90 Am. Dec. 351; Prewett *v.* Land, 36 Miss. 495; Scott *v.* McFarland, 34 Miss. 363; Brown *v.* State Bank, 31 Miss. 454.

Mo.—Humphreys *v.* Atlantic Milling Co., 98 Mo. 542, 10 S. W. 140; Alnutt *v.* Leper, 48 Mo. 319; Burnham, Munger & Co. *v.* Smith, 82 Mo. App. 35; Carp *v.* Chipley, 73 Mo. App. 22; Wilkinson *v.* Goodin, 71 Mo. App. 394 (or it must appear that such remedies are inadequate).

Mont.—Wilson *v.* Harris, 21 Mont. 374, 54 Pac. 46; Twell *v.* Twell, 6 Mont. 19, 9 Pac. 537.

Neb.—Fuchs *v.* Chambers, 89 Neb. 538, 131 N. W. 975; Thompson *v.* La Rue, 59 Neb. 614, 81 N. W. 612; Weaver *v.* Cressman, 21 Neb. 675, 33 N. W. 478.

N. H.—Tappan *v.* Evans, 11 N. H. 311.

N. J.—Huselson *v.* Durie, 77 N. J. Eq. 437, 77 Atl. 1042; Kinmouth *v.* White, 61 N. J. Eq. 358, 48 Atl. 952.

N. M.—Stanton *v.* Catron, 8 N. M. 355, 45 Pac. 884.

N. Y.—Beardsley Scythe Co. *v.* Foster, 36 N. Y. 561, 3 Trans. App. 215, 34 How. Pr. 97; Dunlevy *v.* Tallmadge, 32 N. Y. 457; Heyl *v.* Taylor, 137 App. Div. 641, 122 N. Y. Supp. 279; Genesee River Nat. Bank *v.* Mead, 18 Hun 303; Skinner *v.* Stuart, 39 Barb. 206; Howell *v.* Cooper, 37 Barb. 582; Sloan *v.* Waring, 55 How. Pr. 62; Hubbard *v.* United States Tel. Co., 62 Misc. 538, 115 N. Y. Supp. 1016; Gavazzi *v.* Dryfoos, 47 Misc. 15, 95 N. Y. Supp. 199.

N. C.—Kirkpatrick *v.* Means, 40 N. C. 220; Bethell *v.* Wilson, 21 N. C. 610. See also, Dawson Bank *v.* Harris, 84 N. C. 206.

Ohio.—Hays *v.* New Baltimore Tpk. Co., 1 Handy 281, 12 Ohio Dec. (Reprint) 142.

Ore.—Multnomah St. R. Co. *v.* Harris, 13 Ore. 198, 9 Pac. 402.

R. I.—McKenna *v.* Crowley, 16 R. I. 364, 17 Atl. 354; Smith *v.* Millett, 12 R. I. 59.

S. C.—Brooks *v.* Brooks, 12 S. C. 422; Screven *v.* Bostick, 2 McCord Eq. 410, 16 Am. Dec. 664.

Tenn.—Embree *v.* Reeve, 6 Humph. 37.

Tex.—Taylor *v.* Gillean, 23 Tex. 508.

Utah.—Rolapp *v.* Ogden & N. W. R. Co., 37 Utah 540, 110 Pac. 364.

Vt.—Rice *v.* Barnard, 20 Vt. 479, 50 Am. Dec. 54.

Va.—Rhodes *v.* Cousins, 6 Rand. 188, 18 Am. Dec. 715, if it affects real estate he must have obtained a judgment at law, and to subject per-

sonal estate a judgment and execution. See also, *Virginia P. & P. Co. v. Fisher*, 104 Va. 121, 51 S. E. 198. Wash.—*Thompson v. Caton*, 3 Wash. Ter. 31, 13 Pac. 185. Wis.—*Meissner v. Meissner*, 68 Wis. 336, 32 N. W. 51; *German Bank v. Leyser*, 50 Wis. 258, 6 N. W. 809.

Statutes Declaratory of Common Law.—It is held that the statutes providing for creditors' suits are merely declaratory of the common law and should be construed with reference to the established rules thereof. *Peterson v. Gittings*, 107 Iowa 306, 77 N. W. 1056.

History and Application of Rule. The rule stated in the text is an old one and existed in England and was followed by the New York Chancery court before the provision of the Revised Statutes (2 R. S., 174, §38) requiring the issuance and return of an execution wholly or partly unsatisfied. There is no distinction between ordinary cases of a judgment creditor seeking relief by creditor's bill and one seeking to set aside a fraudulent conveyance as to the necessity for the issuance and return of execution. *Adsit v. Butler*, 87 N. Y. 535.

Rule Uniform.—In the class of cases "where the creditor comes to obtain satisfaction of his judgment out of the property of his debtor which cannot be reached by execution at law; that is, where he proposes to appropriate equitable assets to the satisfaction of the judgment," the holding is uniform both "in England and in this country that the creditor must show as a condition on which he will be relieved, that he has pursued his remedy at law fruitlessly; that is, that he recovered judgment, and had execution returned *nihil*." *Fleming v. Grafton*, 54 Miss. 79, citing, *Cuyler v. Moreland*, 6 Paige (N. Y.) 273; *Bethell's Extrs. v. Wilson*, 21 N. C. 610; *Neate v. Duke of Marlborough*, 3 Myl. & C., 407, 40 Eng. Reprint 983.

Reason of Rule.—"It is because there can be no levy, or right of lien, on the chose in action, or other equitable assets, that a court of equity lays hold of it and applies it to the judgment. The right to exert the jurisdiction attaches on the fact that there is no property that the execution will reach. But the filing of the bill after a return on the legal process of *nihil*,

gives to the creditor a *specific lien* and a preference over all the other creditors." *Fleming v. Grafton*, 54 Miss. 79. See also, *Edgell v. Haywood*, 3 Atk. 352, 26 Eng. Reprint 1003.

Exception is made where the action is to set aside a fraudulent conveyance (*Turrentine v. Koopman*, 124 Ala. 211, 27 So. 522; *Mansur, etc. Imp. Co. v. Jones*, 143 Mo. 253, 45 S. W. 41), or when the suit relates to the estate of a deceased person (*Virginia Board of Public Wks. v. Columbia College*, 17 Wall. (U. S.) 521, 21 L. ed. 687). See also the titles "*Decedents' Estates*," "*Executors and Administrators*," "*Fraudulent Conveyances*."

Sufficient if it appears that the legal remedies are inadequate. *Wilkinson v. Goodin*, 71 Mo. App. 394.

Failure To Give Indemnity Bond.—Where a levy was made on personally but was released because of plaintiff's inability to give an indemnity bond which was demanded by the sheriff, it was held he had exhausted his legal remedies and could maintain a creditor's suit. *Carr v. Parker*, 10 Mo. App. 364.

How Manifested.—The exhaustion of legal remedies is manifested by a return of execution unsatisfied. *Carter Bros & Co. v. Coleman*, 82 Ala. 177, 2 So. 354.

It has been held that it is not sufficient that a plaintiff has "obtained judgment and issued execution, but he must show that it cannot be enforced without the aid of a court of equity." *Sereven v. Bostick*, 2 McCord Eq. (S. C.) 410, 16 Am. Dec. 664.

In Maryland, except it be a case where the rule is changed by statute if it be sought to subject real estate to the payment of a debt, there must be a judgment; if personal property is pursued there must be an execution. *Balls v. Balls*, 69 Md. 388, 16 Atl. 18.

Demand.—When the legal remedies have been exhausted there is no necessity for a demand and a refusal to apply property to the judgment before instituting the action. *Treadwell v. Brown*, 44 N. H. 551.

Distinction Between Creditor's Bill and Bill To Set Aside Fraudulent Conveyance.—Under a creditor's bill seeking to satisfy the debt out of an equitable estate it must appear that the complainant "has exhausted his remedy at law by obtaining a judgment,

execution thereon, and the return of the execution 'no property found.' When the action is one to set aside a fraudulent conveyance the creditor may proceed as soon as he obtains judgment and without issuing execution thereon." *Dawson v. First Nat. Bank*, 228 Ill. 577, 81 N. E. 1128, citing numerous local cases.

The relief afforded in these cases is of a different character; under the latter, the only relief granted is to set aside the incumbrances or conveyances therein specified as fraudulent, while under the former any equitable estate of the defendant may be reached. *Rice Co. v. McJohn*, 244 Ill. 264, 91 N. E. 448.

Pursuit of Remedy Against Maker and Indorser.—In an action on a promissory note on which there is an indorser, the creditor must pursue his remedy against the indorser before he can pursue any remedy in equity. *Nesbit v. North Georgia Elec. Co.*, 156 Fed. 979.

Insufficient Allegations.—An averment in a complaint that judgment was recovered against the defendant on a day stated, and that execution was issued and returned unsatisfied, neither date being stated; that the judgment was revived by *scire facias* on a date named, was held insufficient, it not sufficiently appearing that all the legal remedies had been exhausted. That whether an execution had been issued within seven years from its rendition was wholly conjectural, and that it was quite certain that no execution was issued after the judgment was revived on *scire facias*. *Crawford v. Cook*, 55 Ill. App. 351.

An allegation that "on or about December 18, 1900, 'an order was made by the United States district court for the northern district of New York in the matter of the said Alvin J. Belden, a bankrupt, restraining all further proceedings in said action . . . until the determination of the question whether said Alvin J. Belden should be discharged from his debts; that said order is in full force and effect, and by reason thereof plaintiff in this action is restrained and prevented from recovering a judgment against said Alvin J. Belden, therein,' etc., was held insufficient, there being no authority to make such an order. *Brown v. Barker*, 68 App. Div. 592, 74 N. Y. Supp. 43.

An averment, that at the time the suit was instituted the debtor was in possession of the property, is insufficient, for in such a case the right to levy on the property was clear. *Leicher v. Keeney*, 98 Mo. App. 394, 22 S. W. 145.

"The bill must charge that the judgment debtor has no property subject to execution at law, and if the complainants charge and show in their bill that property of the debtor subject to execution existed at the time he filed his bill," such bill is demurrable. *Merchants' Nat. Bank v. Sabin*, 34 Fed. 492.

In Iowa, it is held that until the statute has been complied with so as to make the judgment of a superior court a judgment of the district court, the remedy at law has not been exhausted and it cannot be made the basis of a creditor's suit involving real estate. *Peterson v. Gittings*, 107 Iowa 306, 77 N. W. 1056.

In Massachusetts, when the property sought cannot be attached or taken on an execution at law, the creditor need not first reduce his claim to judgment but may bring his action in equity in the first instance. *Sandford v. Wright*, 164 Mass. 85, 41 N. E. 120. This "proceeding has been regarded as in the nature of an equitable trustee process, as distinguished from a creditor's bill." *Phoenix Ins. Co. v. Abbott*, 127 Mass. 558.

Necessity for Direct Allegation and Proof.—"It is undoubtedly the law that as a general rule, a judgment creditor, before he can invoke the aid of a court of equity in aid of his judgment, must allege and prove that he has exhausted his legal remedies. But the facts need not always be directly proved or alleged. This may be and is often done by inference." *Rolapp v. Ogden & N. W. R. Co.*, 37 Utah 540, 110 Pac. 364. See also, *Dunham v. Cox*, 10 N. J. Eq. 437, 467.

The regularity of the proceedings at law will not be examined into in the equity action. *Mich.*—*Williams v. Hubbard*, 1 Mich. 446. *N. Y.*—*Iselin v. Henlein*, 16 Abb. N. C. 73, 2 How. Pr. (N. S.) 211; *Clark v. Dakin*, 2 Barb. Ch. 36; *Barnard v. Darling*, 1 Barb. Ch. 218; *Stoars v. Kelsey*, 2 Paige 418. *Wis.*—*How v. Kane*, 2 Pinn. 531, 54 Am. Dec. 154.

When Action Not Maintainable Though Remedies Exhausted.—If after

2. Necessity for Judgment.—It must appear from the complaint that a judgment has been obtained against the debtor.⁶ Such judg-

the recovery of the judgment and the issuance and return of an execution, the debtor turns over to his creditor ample property to pay the debt if it was converted into money, a court of equity will not entertain a bill to find other property which had been transferred in another direction. *Preston v. Colby*, 117 Ill. 477, 4 N. E. 375.

Legal Remedies in State as Affecting Federal Jurisdiction.—The fact that there may be legal remedies available to plaintiff in the state court cannot affect the equity jurisdiction of the federal courts, nor their right to entertain a creditor's suit. *First Nat. Bank v. Steinway*, 77 Fed. 661.

Action in Federal Court Based on State Statute.—The fact that the action might be prosecuted in the state courts without requiring the exhaustion of the legal remedies, will not justify an action in equity in the federal court until such remedies are exhausted. *Davidson-Wesson Impl. Co. v. Parlin & Orendorff Co.*, 141 Fed. 37, 72 C. C. A. 525. To same effect, *Mississippi Mills v. Cohn*, 150 U. S. 202, 14 Sup. Ct. 75, 37 L. ed. 1052; *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. ed. 358; *New Orleans v. Louisiana Const. Co.*, 129 U. S. 45, 9 Sup. Ct. 223, 32 L. ed. 607; *D. A. Tompkins Co. v. Catawba Mills*, 82 Fed. 780.

Rights of Surety.—A surety who has paid the debt of his principal has no greater rights than any other general creditor and must first exhaust his legal remedies before instituting a creditor's suit. *McConnel v. Dickson*, 43 Ill. 99. And see, *Mugge v. Ewing*, 54 Ill. 236.

6. U. S.—*Taylor v. Bowker*, 111 U. S. 110, 4 Sup. Ct. 397, 28 L. ed. 368; *Nesbit v. North Georgia Elec. Co.*, 156 Fed. 979. See also, *Hollins v. Brierfield C. & I. Co.*, 150 U. S. 371, 14 Sup. Ct. 127, 37 L. ed. 1113; *Childs v. N. B. Carlsten Co.*, 76 Fed. 86. **Ala.** *Marble City L. & F. Co. v. Golden*, 110 Ala. 376, 17 So. 935; *Turney's Admr. v. Morrow*, 26 Ala. 339; *Roper v. McCook*, 7 Ala. 318. **Colo.**—*Hood v. Saunders*, 11 Colo. 106, 17 Pac. 102; *Neuman v. Dreifurst*, 9 Colo. 228, 11 Pac. 98; *Burdsall v. Waggoner*, 4 Colo.

256. **Fla.**—*Post v. Roach*, 26 Fla. 442, 7 So. 854. **Ga.**—*Dodge v. Pyrolusite Manganese Co.*, 69 Ga. 665. **Ill.**—*Detroit Copper & Brass Rolling Mills v. Ledwidge*, 162 Ill. 305, 44 N. E. 751; *Russell v. Chicago Tr. Sav. Bank*, 139 Ill. 538, 29 N. E. 37, 17 L. R. A. 345; *Preston v. Colby*, 117 Ill. 477, 484, 4 N. E. 375; *Dormueil v. Ward*, 108 Ill. 216; *Goemmel v. Arnett*, 100 Ill. 34, 42. **Ia.**—*Clark v. Raymond*, 84 Iowa 251, 50 N. W. 1068. **Ky.**—*Brown v. Ferguson*, 5 Ky. L. Rep. 420; *Anderson v. Bradford*, 5 J. J. Marsh. 69; *Scott v. Wallace*, 4 J. J. Marsh. 654; *Halbert v. Grant*, 4 T. B. Mon. 580. **Me.**—*Baxter v. Moses*, 77 Me. 465, 1 Atl. 350, 52 Am. Rep. 783; *Howe v. Whitney*, 66 Me. 17; *Griffin v. Nitcher*, 57 Me. 270. **Mass.**—*Carver v. Peck*, 131 Mass. 291. **Mich.**—*Hatch v. Dougherty*, 145 Mich. 569, 108 N. W. 986; *Jenks v. Horton*, 114 Mich. 48, 72 N. W. 20. **Miss.**—*Hamilton v. Mississippi College*, 52 Miss. 65; *Vasser v. Henderson*, 40 Miss. 519, 90 Am. Dec. 351; *Brown, Bros. & Co. v. Bank of Mississippi*, 31 Miss. 454. **Mo.**—*Humphreys v. Atlantic Milling Co.*, 98 Mo. 542, 10 S. W. 140. **Neb.**—*Moore v. Omaha Life Assn.*, 62 Neb. 497, 87 N. W. 321. **N. J.**—*Haggerty v. Nixon*, 26 N. J. Eq. 42. **N. M.**—*Stanton v. Catron*, 8 N. M. 355, 45 Pac. 884. **N. Y.**—*Adee v. Bigler*, 81 N. Y. 349; *Estes v. Wilcox*, 67 N. Y. 264; *Cornell v. Savage*, 49 App. Div. 429, 63 N. Y. Supp. 540; *Clinton v. South Shore Nat. Gas & F. Co.*, 61 Misc. 339, 113 N. Y. Supp. 289; *Burnett v. Gould*, 27 Hun 366. **N. C.**—*Hook, Skinner & Co. v. Fentress*, 62 N. C. 229; *Kirkpatrick v. Means*, 40 N. C. 220; *Frost v. Reynolds*, 39 N. C. 494; *Bethell v. Wilson*, 21 N. C. 610. **Okla.**—*Miller v. Melone*, 11 Okla. 241, 250, 67 Pac. 479, 56 L. R. A. 620. **Ore.**—*Williams v. Commerical Nat. Bank*, 49 Ore. 492, 90 Pac. 1012, 91 Pac. 443, 11 L. R. A. (N. S.) 857. **Tenn.**—*McKeldin v. Gouldy*, 91 Tenn. 677, 20 S. W. 231. **Vt.**—*Rice v. Barnard*, 20 Vt. 479, 50 Am. Dec. 54.

Compare, Fink v. Patterson, 21 Fed. 602, in which it is said that in Virginia on an omnibus creditor's bill when it is brought for all creditors and not di-

rected at property alone, but all the assets of the defendant, a judgment is not a prerequisite.

Attachment Sufficient.—In Iowa, the courts have recognized a practice permitting a creditor's bill to be maintained before judgment, where lands have been seized under an attachment. *Taylor v. Branscombe*, 74 Iowa 534, 38 N. W. 400. But this doctrine has been held to be limited to where real estate is involved and not to personally. *Ware v. Delahaye*, 95 Iowa 667, 676, 64 N. W. 640. And in *Boggs v. Douglass*, 89 Iowa 150, 56 N. W. 412, it is held that the levy of an attachment upon property fraudulently conveyed to another, without more, will not operate to create a lien as against creditors so as to create an exception to the rule.

In Minnesota, the complaint must state that the debtor resided in the county where the judgment was docketed. If he be a non-resident, or not found, the place of his last residence must be alleged. *Wadsworth v. Schiselbauer*, 32 Minn. 84, 19 N. W. 390.

In New York, when jurisdiction of a non-resident debtor is obtained by the issuance of an attachment under which a valid levy was made but which was subsequently abandoned by the creditor, a creditor's suit on the judgment rendered therein cannot be maintained as no property was in fact levied upon, and under the statute such a judgment can only be enforced against the property attached. *Capital City Bank v. Parent*, 134 N. Y. 527, 31 N. E. 976, 18 L. R. A. 240.

Cross-Bill.—The same rule applies where a creditor seeks to file a cross-bill in the nature of a creditor's bill. *Goff v. Kelly*, 74 Fed. 327.

Arbitration Award.—An award under an arbitration agreement is equivalent to a judgment. *Sanborn v. Maxwell*, 18 App. Cas. (D. C.) 245.

Exception to Rule.—The following are stated as being exceptions to the rule: "Where a party not subject to garnishment is indebted to an insolvent person, a court of equity will aid a creditor of such insolvent in appropriating this credit to the satisfaction of his demand, even though he had not reduced his claim in the first instance to a judgment in a court of law. . . . When it is impossible to obtain a

judgment on account of the absence or non-residence of the debtor; or where there is no dispute as to the debt and the debtor died notoriously insolvent; or where the fund to be reached is a trust fund for the benefit of all creditors, as the assets of an insolvent corporation or limited partnership; or where it is sought by a creditor to enforce a lien." *Burnham, Munger & Co. v. Smith*, 82 Mo. App. 35.

In *Russell v. Clark*, 7 Cranch (U. S.) 69, 80, 3 L. ed. 271, Chief Justice Marshall said: "If a claim is to be satisfied out of a fund, which is accessible only by the aid of a court of chancery, application may be made, in the first instance to that court, which will not require that the claim should be first established in a court of law." See also, *Miller v. Davidson*, 8 Ill. 518; *O'Brien v. Coulter*, 2 Blackf. (Ind.) 421.

A creditor's bill may be filed to enforce a decree in equity. *Twell v. Twell*, 6 Mont. 19, 9 Pac. 537.

If after judgment is obtained the judgment debtor turns over to his creditor "ample property to pay the debt if it was converted into money," there would then be no necessity of going into a court of equity, and in such case equity demands that it should be exhausted before the creditor can be permitted to invoke the aid of an equity court for the purpose of reaching other assets. *Preston v. Colby*, 117 Ill. 477, 4 N. E. 375. See also, *Barret v. Reed*, *Wright* (Ohio) 700.

The obtaining of a judgment and issuing execution after filing of bill, insufficient (*Edgar v. Clevenger*, 3 N. J. Eq. 258), or that an action was pending which might result in a judgment in favor of plaintiff (*Post v. Roach*, 26 Fla. 442, 7 So. 854).

Validity of State Statutes Waiving Requisites.—The enactment of a law by a state giving a simple contract creditor a right to go into a court of equity without first obtaining a judgment and a return of no property is not violative of any constitutional right. *Buford v. Holley*, 28 Fed. 680.

Decrees in Equity.—A creditor's bill may be brought on a judgment of a court of equity on which execution has been issued and returned *nulla bona*. *Clement B. & Co. v. Oceana Circuit Judge*, 119 Mich. 605, 78 N. W. 666.

ment must be a valid judgment.⁷ Should the judgment on which the creditor's suit is based be subsequently set aside or vacated on appeal, the creditor's suit based thereon will be dismissed.⁸

3. When Judgment Dispensed With.—a. *Generally.*—This requisite may be dispensed with when it appears from the averments in the complaint that it is impossible to obtain a judgment.⁹

b. *Non-Resident, Absent or Absconding Debtor.*—So it has been held that a creditor's bill may be maintained without judgment in case the debtor is a non-resident,¹⁰ has absented himself from the state,¹¹

7. Fla.—*Wilhelm v. Locklar*, 46 Fla. 575, 35 So. 6, 100 Am. St. Rep. 111; *Epstein v. Ferst*, 35 Fla. 498, 17 So. 414. **Ga.**—*Coates & Co. v. Allen*, 71 Ga. 787. **Ill.**—*Anderson v. Hawhe*, 115 Ill. 33, 3 N. E. 566. **Mich.**—*Nugent v. Nugent*, 70 Mich. 52, 37 N. E. 706; *Millar v. Babcock*, 29 Mich. 556.

Where an action was brought against a railroad company which was at the time in the hands of a receiver (appointed by the same court) to which action the receiver was not a party, and a money judgment is recovered therein, such judgment is not void on the ground of want of jurisdiction. If such judgment is kept alive until after the discharge of the receiver and the return of the assets to the company, it may be made the basis of a creditor's suit against the company and other persons claiming an interest in the property, which was made the subject of the action. *Mather v. Cincinnati R. T. Co.*, 3 Ohio C. C. 284.

A judgment that is merely irregular and not absolutely void is a sufficient foundation for the bill. *Griffin v. McGavin*, 117 Mich. 372, 75 N. W. 1061, 72 Am. St. Rep. 564.

8. Kudrna v. Ainsworth, 65 Neb. 711, 91 N. W. 711; *Butchers' & Drovers' Bank v. Willis*, 1 Edw. Ch. (N. Y.) 645.

The mere taking of an appeal from the judgment, however, has no effect on the equity action. *Jenner v. Murphy*, 6 Cal. App. 434, 92 Pac. 405.

9. U. S.—*National Tube Works v. Ballou*, 146 U. S. 517, 13 Sup. Ct. 165, 36 L. ed. 1070. **Ill.**—*Greenway v. Thomas*, 14 Ill. 271. **Minn.**—*Williams v. Kemper*, 99 Minn. 301, 109 N. W. 242. **Tenn.**—*McKeldin v. Gouldy*, 91 Tenn. 677, 20 S. W. 231, where it appears that personal service of process cannot be made and no original attachment at law will lie.

Compare, Walser v. Seligman, 13 Fed. 415, 21 Blatchf. 330, in which it is said: "If a creditor's bill can be maintained in this jurisdiction whenever it appears that the debtor has no leviable property and like this corporation, is moribund, it can be also when the debtor is shown to be beyond the reach of the process of the court. It would doubtless be convenient for creditors in many instances if they were permitted to maintain a creditor's bill upon such a theory, but in the absence of legislation, or any satisfactory precedent, the right to do so cannot be recognized."

10. Ga.—*Pope v. Solomons, Williams & Co.*, 36 Ga. 541. **Ind.**—*Quarl v. Abbett*, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662; *Kipper v. Glancey*, 2 Blackf. 356. **Ia.**—*Taylor v. Branscombe*, 74 Iowa 534, 38 N. W. 400. **Ky.**—*Anderson v. Bradford*, 5 J. J. Marsh. 69; *Scott v. McMillen*, 1 Litt. 302. **Mich.**—*Earle v. Grove*, 92 Mich. 285, 52 N. W. 615. **Minn.**—*Williams v. Kemper*, 99 Minn. 301, 109 N. W. 242. **Mo.**—*Burnham, M. & Co. v. Smith*, 82 Mo. App. 35. **Neb.**—*Weaver v. Cressman*, 21 Neb. 675, 33 N. W. 478. **N. Y.**—*Bateman v. Hunt*, 46 Misc. 346, 94 N. Y. Supp. 861. **Va.**—*Peay v. Morrison's Exrs.*, 10 Gratt. 149.

Some courts have, however, refused to recognize this exception. *Smith v. Moore*, 35 Ala. 76; *Reese v. Bradford*, 13 Ala. 837; *Ballou v. Jones*, 13 Hun (N. Y.) 629 (in the absence of an allegation of insolvency).

11. Ind.—*Kipper v. Glancey*, 2 Blackf. 356. **Ky.**—*Scott v. McMillen*, 1 Litt. 302. **Mich.**—*Earle v. Grove*, 92 Mich. 285, 52 N. W. 615. **R. I.**—*Merchants' Nat. Bank v. Paine*, 13 R. I. 592. **S. C.**—*Farrar v. Haselden*, 9 Rich. Eq. 331.

In some jurisdictions the courts have refused to relax this rule. *Smith*

or is an absconding debtor so that no personal judgment can be obtained against him and his property cannot be reached by the ordinary statutory process.¹²

c. *Insolvent Debtor*.—In some jurisdictions an exception is also made when it appears from the complaint that the debtor is insolvent,¹³ though in others allegations of insolvency do not change the rule requiring the necessity of a judgment, the issuance of an execution and its return *nulla bona*.¹⁴

d. *Undisputed Claim*.—Where the claim of the creditor is undisputed or is admitted by the debtor, it has been held that a creditor may maintain the action without first reducing his claim to judgment.¹⁵

e. *When Judgment Would Effect No Benefit*.—In some jurisdictions the rule requiring a judgment, execution and return *nulla bona* will not be dispensed with, although it be made to appear that no benefit would result to the creditor from them.¹⁶ In others, the issuance and return of execution are held to be immaterial, if it appear on the admitted facts, that it would be an idle ceremony and prove of no benefit.¹⁷

f. *When Creditor Possesses Specific Lien*.—In some jurisdic-

v. Moore, 35 Ala. 76; Reese v. Bradford, 13 Ala. 837; Greenway v. Thomas, 14 Ill. 271.

12. Mich.—Earl v. Grove, 92 Mich. 285, 52 N. W. 615. Mo.—Humphreys v. Atlantic Milling Co., 98 Mo. 542, 10 S. W. 140; Pendleton v. Perkins, 49 Mo. 565; Webb & Co. v. Midway Lumb. Co., 68 Mo. App. 546. R. I.—Merchants' Nat. Bank v. Paine, 13 R. I. 592.

13. Ill.—Blair v. Illinois Steel Co., 159 Ill. 350, 42 N. E. 895, 31 L. R. A. 269, where corporation insolvent in hands of receiver. Compare Patterson v. Lynde, 112 Ill. 196. Mo.—Burnham, M. & Co. v. Smith, 82 Mo. App. 35; Webb & Co. v. Midway Lumb. Co., 68 Mo. App. 546. Ore.—Fleischner v. First Nat. Bank, 36 Ore. 553, 54 Pac. 884, 60 Pac. 603, 61 Pac. 345. Tenn.—Stahlman v. Watson, 39 S. W. 1055.

Allowance of claim by insolvency court is equivalent to a judgment. Ruggles v. Cannedy, 127 Cal. 290, 53 Pac. 911, 59 Pac. 827, 46 L. R. A. 371. See also Plume & A. Mfg. Co. v. Baldwin, 87 Fed. 785.

14. U. S.—Nesbit v. North Georgia El. Co., 156 Fed. 979; Bickford v. McComb, 88 Fed. 428; Streight v. Junk, 59 Fed. 321, 8 C. C. A. 137, 16 U. S. App. 608. Ala.—Marble City L. & F. Co. v. Golden, 110 Ala. 376, 17 So. 935. Ark.—Meux v. Anthony, 11 Ark. 411, 52 Am. Dec. 274. Mo.—McCoy v.

Connecticut F. Ins. Co., 87 Mo. App. 73; Kent v. Curtis, 4 Mo. App. 121. N. Y.—Adee v. Bigler, 81 N. Y. 349; Estes v. Wilcox, 67 N. Y. 264. Ohio. Hayes v. New Baltimore Tpk., etc. Co., 1 Handy 281, 12 Ohio Dec. (Reprint) 142. Pa.—Suydam v. Northwestern Ins. Co., 51 Pa. 394. R. I.—Ginn v. Brown, 14 R. I. 524. Wis.—Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909. See also Taylor v. Gillean, 23 Tex. 508.

Limitation of Rule.—An allegation upon information and belief that the defendant is insolvent, held insufficient. Huselton v. Durie, 77 N. J. Eq. 437, 77 Atl. 1042.

15. D. A. Tompkins Co. v. Catawba Mills, 82 Fed. 780; Taylor v. Riggs, 8 Kan. App. 323, 57 Pac. 44 (where defendants were insolvent).

16. National Tradesmen's Bank v. Wetmore, 124 N. Y. 241, 26 N. E. 548; Estes v. Wilcox, 67 N. Y. 264; Clinton v. South Shore N. G. & F. Co., 61 Misc. 339, 113 N. Y. Supp. 289.

Where the statute makes these preliminaries requisite, the fact that the debtor is insane will not be an excuse for failing to comply therewith. Faivre v. Gillman, 84 Iowa 573, 51 N. W. 46.

17. Sage v. Memphis & L. R. R. Co., 125 U. S. 361, 8 Sup. Ct. 887, 31 L. ed. 694.

tions if the creditor has a specific lien or be in a situation to perfect a lien against the property which is the subject-matter of his action, a judgment is not essential.¹⁸

4. Dormant Judgment.—A creditor's suit cannot be maintained on a dormant judgment, proceedings to revive the same being first necessary.¹⁹ And though a creditor's suit be commenced within the statutory time, such action does not prolong the life of the judgment, and if the period expires during the pendency of the action, it has been held that the relief sought is gone.²⁰

18. Ala.—*Marble City L. & F. Co. v. Golden*, 110 Ala. 376, 17 So. 935; *Roper v. McCook*, 7 Ala. 318. **Ga.**—*Dodge v. The Pyrolusite Manganese Co.*, 69 Ga. 665. **Ia.**—*Peterson v. Gittings*, 107 Iowa 306, 77 N. W. 1056; *Hensen's Empire Fur Factory v. Teabout*, 104 Iowa 360, 73 N. W. 875; *Favre v. Gillman*, 84 Iowa 573, 51 N. W. 46; *Goode v. Garrity*, 75 Iowa 713, 38 N. W. 150; *Buchanan v. Marsh*, 17 Iowa 494. **Ky.**—*Kroger v. Roger Wheel Co.*, 1 Ky. L. Rep. 419. **Mo.**—*McCoy v. Connecticut F. Ins. Co.*, 87 Mo. App. 73. **N. H.**—*Sheafe v. Sheafe*, 40 N. H. 516. **Wis.**—*Meissner v. Meissner*, 68 Wis. 336, 32 N. W. 51. And see *Hollins v. Brierfield C. & I. Co.*, 150 U. S. 371, 14 Sup. Ct. 127, 37 L. ed. 1113; *Artman v. Giles*, 155 Pa. 409, 26 Atl. 668.

Attachment.—An attachment may give a specific lien sufficient as a basis for the action. **Cal.**—*Scales v. Scott*, 13 Cal. 76. **Ky.**—*Brown v. Ferguson*, 5 Ky. L. Rep. 420. **Mont.**—*Montana Nat. Bank v. Merchants' Nat. Bank*, 19 Mont. 586, 49 Pac. 149, 61 Am. St. Rep. 532. **Neb.**—*Weil v. Lankins*, 3 Neb. 384.

See, however, as to fraudulent conveyances, *Cogburn v. Pollock*, 54 Miss. 639; *Francis v. Lawrence*, 48 N. J. Eq. 508, 22 Atl. 259. Compare *Melville v. Brown*, 16 N. J. L. 363, and see the title "**Fraudulent Conveyances.**"

In some states an attachment does not confer such a lien. *Detroit, etc. Rolling Mills v. Ledwidge*, 162 Ill. 305, 44 N. E. 751; *Morton v. Grafflin*, 68 Md. 545, 13 Atl. 341, 15 Atl. 298. And see *Fisher v. Tallman*, 74 Mo. 39.

19. Mo.—*Mellier v. Bartlett*, 106 Mo. 381, 17 S. W. 295, *approving* *Mullen v. Hewitt*, *infra*; *Mullen v. Hewitt*, 103 Mo. 639, 15 S. W. 924 (where judgment was recovered in 1877—execution was issued and returned unsatisfied in 1878 and creditor's suit

began in 1888). **N. D.**—*Merchants' Nat. Bank v. Braithwaite*, 7 N. D. 358, 75 N. W. 244. **Okla.**—*Miller v. Melone*, 11 Okla. 241, 67 Pac. 479, 56 L. R. A. 620.

In *Mellier v. Bartlett*, *supra*, the court said: "Since the decision in this court of *Mullen v. Hewitt*, *supra*, the supreme court of the United States has reviewed this same question in *Scott v. Neeley*, 140 U. S. 106, 11 Sup. Ct. Rep. 27, p. 712, Judge Field says: 'In all cases where a court of equity interferes to aid the enforcement of a remedy at law, there must be an acknowledged debt, or one established by a judgment rendered, accompanied by a right to the appropriation of the property of the debtor for its payment, or to speak with greater accuracy, there must be, in addition to such acknowledgment or established debt, an interest in the property or a lien thereon created by contract or by some distinct legal proceeding. *Smith v. Ft. Scott*, etc. R. Co., 99 U. S. 398, 401, 25 L. ed. 437; *Jones v. Green*, 1 Wall. 330, 17 L. ed. 553; *Wiggins v. Armstrong*, 2 Johns. Ch. 144.'"

That the judgment is dormant is no objection where it would prove of no benefit to issue execution. *Brown v. Long*, 36 N. C. 190, 36 Am. Dec. 43.

20. Minn.—*Dole v. Wilson*, 39 Minn. 330, 40 N. W. 161; *Newell v. Dart*, 28 Minn. 248, 9 N. W. 732. See also *Reed v. Siddall*, 94 Minn. 216, 102 N. W. 453. **N. D.**—*Merchants' Nat. Bank v. Braithwaite*, 7 N. D. 758, 75 N. W. 244. **S. D.**—*Ruth v. Wells*, 13 S. D. 482, 83 N. W. 568, 79 Am. St. Rep. 902.

Compare *McAfee v. Reynolds*, 130 Ind. 33, 28 N. E. 423, 30 Am. St. Rep. 194, 18 L. R. A. 211, in which a contrary view is expressed. See also *Brown v. Long*, 36 N. C. 190, 36 Am. Dec. 43 (this action was to reach

5. Necessity for Execution.—a. *Issuance and Return.*—The weight of authority is to the effect that a creditor's action cannot be maintained until an execution has been issued and an attempt has been made to collect the judgment thereunder,²¹ and the plaintiff must

equitable assets); *Cincinnati v. Hafer*, 49 Ohio St. 60, 30 N. E. 197.

This rule is without application where the creditor has acquired a specific lien. *Coulson v. Saltsman*, 71 Neb. 495, 98 N. W. 1055.

21. U. S.—National Tube Works Co. v. Ballou, 146 U. S. 517, 523, 13 Sup. Ct. 165, 36 L. ed. 1070; Taylor v. Bowker, 111 U. S. 110, 4 Sup. Ct. 397, 28 L. ed. 368; Jones v. Green, 1 Wall. 330, 17 L. ed. 553; Adler v. Fenton, 24 How. 407, 16 L. ed. 696; Day v. Washburn, 24 How. 352, 16 L. ed. 712. **Ala.**—Turrentine v. Koopman, 124 Ala. 211, 27 So. 522; Marble City L. & F. Co. v. Golden, 110 Ala. 376, 17 So. 935. **Cal.**—Herrlich v. Kaufmann, 99 Cal. 271, 33 Pac. 587, 37 Am. St. Rep. 50; Calkins v. Howard, 2 Cal. App. 233. **Colo.**—Burdall v. Waggoner, 4 Colo. 256. **Fla.**—Post v. Roach, 26 Fla. 442, 7 So. 854, if real property there must be a judgment; if personal property, judgment and execution. **Ill.**—Detroit, etc. Rolling Mills v. Ledwidge, 162 Ill. 305, 44 N. E. 751; Russell v. Chicago Tr. & Sav. Bank, 139 Ill. 538, 29 N. E. 37, 17 L. R. A. 345; Durand v. Gray, 129 Ill. 9, 21 N. E. 610; Preston v. Colby, 117 Ill. 477, 4 N. E. 375. **Ind.**—Baker v. State, 109 Ind. 47, 9 N. E. 711; Mitchell v. Bray, 106 Ind. 265, 6 N. E. 617. **Kan.**—Moyer v. Riggs, 8 Kan. App. 234, 55 Pac. 494. **Ky.**—Brown v. Ferguson, 5 Ky. L. Rep. 420 (except under attachment); Kroger v. Roger Wheel Co., 1 Ky. L. Rep. 419 (in absence of specific lien); Anderson v. Bradford, 5 J. J. Marsh. 69; Halbert v. Grant, 4 T. B. Mon. 580. **Me.**—Baxter v. Moses, 77 Me. 465, 1 Atl. 350, 52 Am. Rep. 783; Howe v. Whitney, 66 Me. 17; Griffin v. Nitcher, 57 Me. 270. **Mich.**—First Nat. Bank v. Dwight, 83 Mich. 189, 47 N. W. 111. **Minn.**—Cochran v. Cochran, 96 Minn. 523, 105 N. W. 183; Wadsworth v. Schisselbauer, 32 Minn. 84, 19 N. W. 390. **Miss.**—Darcey v. Lake, 46 Miss. 109; Vasser v. Henderson, 40 Miss. 519, 90 Am. Dec. 351; Prewett v. Land, 36 Miss. 495. **Mo.**—Turner v. Adams, 46 Mo. 95. **Mont.**—Raymond v. Blanegrass, 36

Mont. 449, 93 Pac. 648, 15 L. R. A. (N. S.) 976; Wilson v. Harris, 21 Mont. 374, 54 Pac. 46. **Neb.**—Weaver v. Cressman, 21 Neb. 675, 33 N. W. 478. **N. H.**—Tappen v. Evans, 11 N. H. 311. **N. J.**—Glorieux v. Schwartz, 53 N. J. Eq. 231, 28 Atl. 470, 34 Atl. 1134, where personalty involved. **N. M.**—Stanton v. Catron, 8 N. M. 355, 45 Pac. 884. **N. Y.**—Adsit v. Butler, 87 N. Y. 585; Adeo v. Bigler, 81 N. Y. 349; Fox v. Moyer, 54 N. Y. 125; Dunlevy v. Tallmadge, 32 N. Y. 457; Crippin v. Hudson, 13 N. Y. 161; Chataqua County Bank v. White, 6 N. Y. 236; McElwaine v. Willis, 9 Wend. 548; Clinton v. South Shore N. G. & F. Co., 61 Misc. 339, 113 N. Y. Supp. 289. **N. C.**—Bethell's Exr. v. Wilson, 21 N. C. 610. **N. D.**—Paulson v. Ward, 4 N. D. 100, 58 N. W. 792, merely a formal requirement. **Okla.**—Miller v. Melone, 11 Okla. 241, 250, 67 Pac. 479, 56 L. R. A. 620. **R. I.**—McKenna v. Crowley, 16 R. I. 364, 17 Atl. 354. **Wis.**—Level Land Co. No. 3 v. Sivyver, 112 Wis. 442, 88 N. W. 317; Meissner v. Meissner, 68 Wis. 336, 32 N. W. 51; German Bank v. Leyser, 50 Wis. 258, 6 N. W. 809.

Compare Case v. Beauregard, 101 U. S. 690, 25 L. ed. 1004, where the complainant brought a bill in equity before securing judgment at law, but the defendant made no objection. The case was tried on its merits and complainant failed and his bill dismissed. Subsequently he obtained a judgment and issued execution which was returned *nulla bona*, and then filed a new bill, identical with his former bill, with the additional averments of the obtaining of judgment and the issuing of execution. The defendant pleaded *res adjudicata*, and the court sustained the plea, though recognizing the rule laid down in the text, deciding that inasmuch as this case had been tried on its merits under the former bill without objection by defendant, and the complainant failed to recover, the matter was *res adjudicata*, and complainant could not again try the matter in the second suit. The court in *Brown v. John V.*

by affirmative allegation, furthermore make it appear that the execu-

Farwell Co., *supra*, referring to this case, said: It will be seen that this case was an exceptional one, "and does not militate against the general rule, which seems to be well established in the federal practice, that the complainant must obtain judgment and issue execution, and thus show he has exhausted his legal remedy." Schofield v. Ute Coal & Coke Co., 92 Fed. 269, in which the court said "that this is not the only method of establishing this fact," and cites among others Case v. Beauregard, *supra*.

Issuance of Second Execution.—After the return of an execution *nulla bona* a plaintiff may file a creditors' bill, although he has subsequently issued another execution to another county which has not been returned, unless such execution has been levied upon sufficient property to satisfy the judgment. Brown v. Bates, 10 Ala. 432; Cuyler v. Moreland, 6 Paige (N. Y.) 273.

Proper Issuance of Execution.—It must appear that the execution was issued in the proper jurisdiction. Ill. Durand v. Gray, 129 Ill. 9, 21 N. E. 610. Ia.—Drahos v. Kopesky, 132 Iowa 497, 109 N. E. 1021. Ky.—Nashville, C. & St. L. R. Co. v. Mattingly, 101 Ky. 219, 40 S. W. 673; Crabb v. Hill, 17 Ky. L. Rep. 44, 30 S. W. 415. Mich.—Preston v. Wilcox, 38 Mich. 578. N. H.—Bay State Iron Co. v. Goodall, 39 N. H. 223, 75 Am. Dec. 219. N. Y.—Fox v. Moyer, 54 N. Y. 125; Cooper v. Clason, 2 Edm. Sel. Cas. 320. N. D.—Minkler v. U. S. Sheep Co., 4 N. D. 507, 62 N. W. 594, 33 L. R. A. 546. S. D.—Minneapolis Threshing Co. v. Hanrahan, 9 S. D. 520, 70 N. W. 656. Tenn.—Embree v. Reeve, 6 Humph. 37. Wis.—Northwestern Iron Co. v. Central Tr. Co., 90 Wis. 570, 63 N. W. 752, 64 N. W. 323.

Allegation in Complaint.—The complaint must contain such an allegation, this being a jurisdictional requisite. Adsit v. Butler, 87 N. Y. 585.

Availing Issuance and Return of Execution.—It is not necessary that in averring the issuance and return of execution on the judgment, that the bill should show that the execution was issued to the county wherein defendant resided. If in fact it was not so issued and defendant had property in

the county of his residence out of which it might have been satisfied, that is a matter of defense. Nix v. Winter, 35 Ala. 309.

Waiver by Appearance.—This is a defect bearing on the jurisdiction of the subject-matter and is fatal error in every stage of the case and cannot, therefore, be cured by any waiver or course of proceeding by the parties. Baxter v. Moses, 77 Me. 465, 476, 1 Atl. 350; Brown v. Bank of Mississippi, 31 Miss. 454.

Alias Execution.—The issuance of an *alias* execution after filing the bill will not avail the creditor, the defect being jurisdictional. Grenell v. Ferry, 110 Mich. 262, 68 N. W. 144.

When Judgment Debtor Insolvent.—"Where it is shown that the judgment debtor was insolvent, and that the issue of an execution would necessarily be of no practical utility, its issue might be dispensed with." Turner v. Adams, 46 Mo. 95. See also: Ill.—McDowell v. Cochran, 11 Ill. 31. Ia.—Postlewait v. Howes, 3 Iowa 365. Mo.—Merry v. Fremon, 44 Mo. 518.

There is, however, authority to the contrary. Lawson v. Grubbs, 44 Ga. 466; Beardsley Scythe Co. v. Foster, 36 N. Y. 561.

Statutory Lien.—"In those states where a judgment is itself a lien upon land, an execution need not issue. In such case equity will proceed to make the lien effectual." Baxter v. Moses, 77 Me. 465, 475, 1 Atl. 350, 52 Am. Rep. 783. See also, Tappan v. Evans, 11 N. H. 311.

Execution After Death of Judgment Debtor.—Where a judgment was recovered in 1871, and the debtor died in 1873, and no execution was issued until after the death of the judgment debtor, the return of the sheriff *nulla bona* is not a compliance with this rule as the return of the officer after the judgment debtor's death is not an equivalent nor does it show that the judgment could not have been collected of him while living. Howe v. Whitney, 66 Me. 17.

In Missouri, "where judgment has been recovered and the debtor is insolvent, the issuance and return of an execution is unnecessary." Humphreys v. Atlantic Milling Co., 98 Mo. 542, 10 S. W. 140.

tion issued on such judgment has been returned unsatisfied,"

22. **U. S.**—Cates *v.* Allen, 149 U. S. 451, 13 Sup. Ct. 883, 977, 37 L. ed. 804; National Tube Works Co. *v.* Ballon, 146 U. S. 517, 13 Sup. Ct. 165, 36 L. ed. 1070; Scott *v.* Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. ed. 358; Brown *v.* John V. Farwell Co., 74 Fed. 764; Morrow Shoe Mfg. Co. *v.* New England Shoe Co., 57 Fed. 685, 6 C. C. A. 508. But see, Freedman's Sav. & Tr. Co. *v.* Earle, 110 U. S. 710, 4 Sup. Ct. 226, 28 L. ed. 301, as to rule where it is sought to reach equitable assets. **Ala.**—Turrentine *v.* Koopman, 124 Ala. 211, 27 So. 522; Marble City L. & F. Co. *v.* Golden, 110 Ala. 376, 17 So. 935; Brown *v.* Bates, 10 Ala. 432. **Cal.**—Matteson, etc. Mfg. Co. *v.* Conley, 144 Cal. 483, 77 Pac. 1042; Herrlich *v.* Kaufmann, 99 Cal. 271, 33 Pac. 857, 37 Am. St. Rep. 50; Calkins *v.* Howard, 2 Cal. App. 233, 83 Pac. 280 (return of sheriff *prima facie* evidence of no other property available to satisfy judgment). **Colo.**—Burdsall *v.* Waggoner, 4 Colo. 256. **Ill.**—Detroit, etc. Rolling Mills *v.* Ledwidge, 162 Ill. 305, 44 N. E. 751; Russell *v.* Chicago Tr. & Sav. Bank, 139 Ill. 538, 29 N. E. 37, 17 L. R. A. 345; Durand & Co. *v.* Gray, 129 Ill. 9, 21 N. E. 610; Preston *v.* Colby, 117 Ill. 477, 4 N. E. 375; Dormeuil *v.* Ward, 108 Ill. 216. **Ia.**—Clark *v.* Raymond, 84 Iowa 251, 50 N. W. 1068; Pearson *v.* Maxfield, 51 Iowa 74, 50 N. W. 77; Gordon *v.* Worthley, 48 Iowa 429. **Kan.**—Moyer *v.* Riggs, 8 Kan. App. 234, 55 Pac. 494. **Ky.**—Brown *v.* Ferguson, 5 Ky. L. Rep. 420 (except under an attachment); Kroger *v.* Roger Wheel Co., 1 Ky. L. Rep. 419; Halbert *v.* Grant, 4 T. B. Mon. 580. **Me.**—Baxter *v.* Moses, 77 Me. 465, 1 Atl. 350, 52 Am. Rep. 783; Corey *v.* Greene, 51 Me. 114; Webster *v.* Clark, 25 Me. 313. **Mich.**—Studley *v.* Ann Arbor Sav. Bank, 112 Mich. 181, 70 N. W. 426; Eldred *v.* Camp, 1 Harr. 162. **Minn.**—Cochran *v.* Cochran, 96 Minn. 523, 105 N. W. 183; Wadsworth *v.* Schisselbauer, 32 Minn. 84, 19 N. W. 390. **Miss.**—Fleming *v.* Grafton, 54 Miss. 79; Allen *v.* Montgomery, 48 Miss. 101; Vasser *v.* Henderson, 40 Miss. 519, 90 Am. Dec. 351; Prewett *v.* Land, 36 Miss. 495. **Mo.**—Turner *v.* Adams, 46 Mo. 95. **Mont.**—Wilson *v.* Harris, 21 Mont. 374, 54 Pac. 46. **Neb.**—Weaver *v.* Cressman, 21 Neb. 675, 33 N. W. 478. **N. M.**—Stanton *v.* Catron,

8 N. M. 355, 45 Pac. 884. **N. Y.**—Harvey *v.* Brishin, 143 N. Y. 151, 38 N. E. 108; Dunlevy *v.* Tallmadge, 32 N. Y. 457; Crippen *v.* Hudson, 13 N. Y. 161; McElwaine *v.* Willis, 9 Wend. 548; Clinton *v.* South Shore N. G. & F. Co., 61 Misc. 339, 113 N. Y. Supp. 289. **N. C.**—Kirkpatrick *v.* Means, 40 N. C. 220; Frost *v.* Reynolds, 39 N. C. 494. **N. D.**—Paulson *v.* Ward, 4 N. D. 100, 58 N. W. 792, merely a formal requirement. **Ohio.**—Hayes *v.* New Baltimore, etc. Tpk. Co., Handy 281, 12 Ohio Dec. (Reprint) 142. **Okla.**—Miller *v.* Melone, 11 Okla. 241, 67 Pac. 479, 56 L. R. A. 620. **Ore.**—Williams *v.* Commercial Nat. Bank, 49 Ore. 492, 90 Pac. 1012, 91 Pac. 443, 11 L. R. A. (N. S.) 857. **R. I.**—McKenna *v.* Crowley, 16 R. I. 364, 17 Atl. 354. **Tenn.**—Embree *v.* Reeve, 6 Humph. 37. **Wis.**—Level Land Co. No. 3 *v.* Sivyer, 112 Wis. 442, 88 N. W. 317; German Bank *v.* Leyser, 50 Wis. 258, 6 N. W. 809.

If execution be outstanding an action would be prematurely begun. Vanderpool *v.* Notley, 71 Mich. 422, 39 N. W. 574.

Under special circumstances the court will instead of requiring proof of a return of the execution *nulla bona* allow other sufficient proof of the exhaustion of legal remedies. Hook *v.* Fentress, 62 N. C. 229.

Debtor Held Under Body Execution. When the body of the debtor is held under an execution it is a bar to any proceeding on the judgment. Tappan *v.* Evans, 11 N. H. 311.

Return Nulla Bona Conclusive as Exhausting Legal Remedies.—Sheriff's return *nulla bona* is conclusive on the question that the legal remedies have been exhausted. **U. S.**—Jones *v.* Green, 1 Wall. 330, 17 L. ed. 553; Bidwell *v.* Huff, 103 Fed. 362. **Colo.**—Goddard *v.* Fishel-Schlichten Imp. Co., 9 Colo. App. 306, 48 Pac. 279. **Ill.**—Lewis *v.* Lanphere, 79 Ill. 187. **Ky.**—Clements *v.* Waters, 90 Ky. 96, 13 S. W. 431. **Me.**—Baxter *v.* Moses, 77 Me. 465, 1 Atl. 350, 52 Am. Rep. 783. **Minn.**—Williams *v.* Kemper, 99 Minn. 301, 109 N. W. 242; Spooner *v.* Travelers' Ins. Co., 76 Minn. 311, 79 N. W. 305, 77 Am. St. Rep. 651. **Mo.**—Wade *v.* Ringo, 62 Mo. App. 414. **Mont.**—Whiteside *v.* Hoskins, 20 Mont. 361, 51 Pac. 739. **Neb.**—Nebraska Nat. Bank *v.* Hallowell, 63 Neb. 309, 88 N.

W. 556; *Coffield v. Parmenter*, 2 Neb. (Unof.) 42, 96 N. W. 283. **N. J.**—*Manning v. Jagels*, 71 N. J. Eq. 41, 63 Atl. 492. **Ore.**—*Wyatt v. Wyatt*, 31 Ore. 531, 49 Pac. 855. **W. Va.**—*Hall v. McGregor*, 65 W. Va. 74, 64 S. E. 736, unless there be fraud or collusion in procuring such return. **Wis.**—*Hopkins v. Joyce*, 78 Wis. 443, 47 N. W. 722. See also, *Oppenheimer v. Collins*, 115 Wis. 283, 91 N. W. 690, 60 L. R. A. 406.

Compare, *Mackey v. Wallace*, 26 Tex. 526, holding that an averment of a return *nulla bona* "is not an allegation that the creditor has not property subject to execution," and that "it was incumbent on the creditor to negative by averment the existence of property before he could invoke the equitable powers of the court."

An Allegation that the debtor had no property subject to execution is not a sufficient compliance with the requirement that there must be an execution and a return *nulla bona*. **D. C.**—*Shea v. Dulin*, 3 McArthur 339. **Ill.**—*Albright v. Herzog*, 12 Ill. App. 557. **R. I.**—*Stone v. Westcott*, 18 R. I. 517, 28 Atl. 662.

Sufficient Return.—See the following cases. **Ill.**—*Thompson v. Yates*, 61 Ill. App. 262. **Ia.**—*Ticonic Bank v. Harvey*, 16 Iowa 141. **Mich.**—*Williams v. Hubbard*, 1 Mich. 446. **Tenn.**—*House v. Swanson*, 7 Heisk. 32. **Wis.**—*Daskam v. Neff*, 79 Wis. 161, 47 N. W. 1132.

Abandonment of Remedy.—In *Stanton v. Catron*, 8 N. M. 355, 45 Pac. 884, it appeared that plaintiff had pursued his remedy "by obtaining the judgment and issuing the execution, making the levy and advertising the property for sale, but at this latter point the complainant seems to have abandoned his remedy, turned back and given up the pursuit before ascertaining what could be accomplished by the sale of the property under his advertisement. This shows that the complainant has not exhausted his remedy at law, but has abandoned it before ascertaining what could be accomplished under it."

Return of Execution.—A creditor's suit cannot be maintained where it appears from the sheriff's return that a levy was made and released under instruction of the creditor's attorney and the same was thereupon returned unsatisfied. *Buckeye Engine Co. v. Doray*

Brew. Co., 47 Fed. 6. See also the following cases: **Ill.**—*Stirlen v. Jewett*, 165 Ill. 410, 46 N. E. 259 (where return was made at request of judgment creditor); *Scheubert v. Honel*, 152 Ill. 313, 38 N. E. 913 (where execution contained an endorsement by the attorney directing the sheriff to return same *nulla bona* forthwith); *Hartley v. Atkins*, 64 Ill. App. 502 (where attorney instructed sheriff to return execution). But see, *Howe v. Babcock*, 72 Ill. App. 68; *Pecos Irrig. & Imp. Co. v. Olson*, 63 Ill. App. 313; *Illinois Malleable Iron Co. v. Graham*, 55 Ill. App. 266, that a request to return is not a bar to the action where sheriff makes personal demand on debtor and demand is refused and sheriff is unable to find any property to levy on. **Ia.**—*Baxter v. Pritchard*, 113 Iowa 422, 85 N. W. 633. **Ky.**—*Johnson v. Elkins*, 90 Ky. 163, 13 S. W. 448, 8 L. R. A. 552, return by coroner of an execution not directed to him. **N. M.**—*Albright v. Texas, S. F. & N. R. Co.*, 8 N. M. 422, 46 Pac. 448. **N. C.**—*Canaday v. Nuttall*, 37 N. C. 265.

Omission in Statute as Modification of Rule.—Where upon a revision of the statutes an equitable remedy provided for in an earlier statute is retained but in the revision no mention is made of the necessity for the issuance and return of execution as a condition precedent, which provision was contained in the earlier statute, it is not to be presumed that by such omission the legislature thereby intended to abrogate or modify an established rule of equity requiring the issuance and return of execution as prerequisites. *Taylor v. Bowker*, 111 U. S. 110, 4 Sup. Ct. 397, 28 L. ed. 368.

Return Prior to Return Day.—In many states the statutes fix the time within which the execution is to be returned, the day on which such time expires being frequently referred to as the return day. The return prior to such day has been held to have no effect on the right of a creditor to immediately institute his action in equity. **U. S.**—*Suydam v. Beals*, 4 McLean 12, 23 Fed. Cas. No. 13,653; *Bassett v. Orr*, 27 Biss. 296, 2 Fed. Cas. No. 1,095. **D. C.**—*Barth v. Heider*, 7 D. C. 71. **Ill.**—*Bowen v. Parkhurst*, 24 Ill. 257; *Young v. Clapp*, 40 Ill. App. 312, *affirmed*, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372. **Ky.**—*Dana v. Banks*, 6 J. J. Marsh. 219. **Miss.**—*Ward v.*

or that such execution has been returned partially satisfied.²³

b. *When Execution Unnecessary.*—An execution has been held to be unnecessary where by statute the judgment itself is a lien,²⁴ or where the property is of such a nature (such as choses in action) that an execution would be of no effect,²⁵ or where the debtor is a non-resident of the state and has no attachable property in the state.²⁶ In jurisdictions where the judgment itself is a lien on real estate, it has been held an execution need not issue.²⁷

Whitfield, 64 Miss. 754, 2 So. 493. **N. Y.**—Renaud v. O'Brien, 35 N. Y. 99; Rider v. Mason, 4 Sandf. Ch. 351; Field v. Chapman, 15 Abb. Pr. 434, 444. **N. C.**—Whitehead v. Hellen, 74 N. C. 679. **Wis.**—Davelaar v. Blue Mound Invest. Co., 110 Wis. 470, 86 N. E. 185.

In *Knauth v. Bassett*, 34 Barb. (N. Y.) 31, 40, it is held that a return prior to the expiration of sixty days is not a bar to the action and refers to the fact that the early New York cases to the contrary were not applicable to the present system and were based on a rule of the former chancery court. In *Forbes v. Waller*, 25 N. Y. 430, the court said it would not consider the question.

There is, however, authority to the contrary. *Stafford v. Hulbert*, Harr. Ch. (Mich.) 435; *Thayer v. Swift*, Harr. Ch. (Mich.) 430; *Steward v. Stevens*, Harr. Ch. (Mich.) 169; *Beach v. White*, Walk. Ch. (Mich.) 495; *Smith v. Thompson*, Walk. Ch. (Mich.) 1. But in *Williams v. Hubbard*, 1 Mich. 446, a return a day too soon was held not to bar an action, and under the later Michigan statute (How. St. 7664a) executions may be made returnable not less than twenty nor more than ninety days from their issuance. It is held that a return in less than twenty days is not sufficient. *First Nat. Bank v. Dwight*, 83 Mich. 189, 47 N. W. 111.

Nor does a return after the return day affect the right to institute a creditor's suit. *Platt v. Cadwell*, 9 Paige (N. Y.) 386.

Collusive Return.—If return be fraudulent or collusive, remedies are not exhausted. *Forbes v. Waller*, 25 N. Y. 430.

A demand on the debtor to pay the execution is unnecessary. *Reinhardt v. Kennedy*, 106 Ill. App. 96; *Thompson v. Marsh*, 61 Ill. App. 269.

Compare Metz v. McAvoy Brew. Co.,

98 Ill. App. 584, where it is intimated a demand was necessary.

Execution After Assignment of Judgment.—Where before the assignment of the judgment an execution is returned *nulla bona*, an assignee of the judgment may institute a creditor's suit without first issuing an execution in his own name. **Ill.**—*Dimond v. Rogers*, 203 Ill. 464, 67 N. E. 968. **Mich.**—*Rankin v. Rothschild*, 78 Mich. 10, 43 N. W. 1077. **N. Y.**—*Gleason v. Gage*, 7 Paige 121 (in which *Wakeman v. Russel*, 1 Edw. Ch. 509 is explained); *Strange v. Longley*, 3 Barb. Ch. 650.

23. Ala.—*Turrentine v. Koopman*, 124 Ala. 211, 27 So. 522. **Colo.**—*Burd-sall v. Waggoner*, 4 Colo. 256. **Ill.**—*Alexander v. Tams*, 13 Ill. 221, the statute permitting the action when the execution is returned wholly or partly unsatisfied. **Ky.**—*Weatherford v. Myers*, 2 Duv. 91. **N. Y.**—*Adsit v. Butler*, 87 N. Y. 585.

24. Lazarus Jewelry Co. v. Steinhart, 112 Fed. 614, 50 C. C. A. 393. See also *Rose v. Lloyd*, 1 Clark (Pa.) 309, as to when execution is not necessary.

25. Vandever v. Stryker, 8 N. J. Eq. 175 (where it was sought to subject an equitable interest of the defendant's in real estate to the judgment); *Brown v. Long*, 36 N. C. 190, 36 Am. Dec. 43.

26. Weaver v. Cressman, 21 Neb. 675, 33 N. W. 478.

27. Me.—*Baxter v. Moses*, 77 Me. 465, 1 Atl. 350, 52 Am. Rep. 783; *Howe v. Whitney*, 66 Me. 17; *Griffin v. Nitcher*, 57 Me. 270. **Miss.**—*Brown v. Bank of Mississippi*, 31 Miss. 454. **N. H.**—*Tappan v. Evans*, 11 N. H. 311. **N. Y.**—*Adsit v. Butler*, 87 N. Y. 585; *Adee v. Bigler*, 81 N. Y. 349. **R. I.**—*Smith v. Millett*, 12 R. I. 59.

In *Baxter v. Moses*, 77 Me. 465, 475, 1 Atl. 350, 52 Am. Rep. 783, the court

6. **When Liability Joint.**—If there be a joint liability a creditor's suit cannot be maintained until the creditor has exhausted his legal remedies against all joint debtors.²⁸

7. **When General Creditors Join With Judgment Creditor.** General creditors may join with a judgment creditor as plaintiffs in the prosecution of the action, without first obtaining a judgment.²⁹

8. **Action Against Dissolved Corporation.**—The remedies at law hereinbefore spoken of need not be invoked as a condition precedent where a corporation has been dissolved or disincorporated, or has ceased to do business.³⁰

9. **When Court Has Legal and Equitable Jurisdiction.**—In some of the jurisdictions where both law and equity are administered by the one court, it is held that these preliminary requisites are unnecessary, as judgment for the debt and the necessary equitable aid to obtain payment out of the debtor's property can be had in the original action.³¹

10. **Nature of Judgment.**—a. *Domestic Judgment.*—The judg-

in referring to the statement of the general rule stated in the text, cites *Pomeroy's Eq. Jur.* §1415, wherein that author refers to the uniformity of the rule, but points out that there is some conflict as to what steps must be taken towards enforcing or perfecting the judgment before he is entitled to institute this suit, which that author explains as follows: "Much of the conflict doubtless results from the effect judgments and writs of execution have in different states. The rule seems to be sustained by the weight of authority that before a creditor's suit can be brought to reach choses in action and *personal* property in such a shape or form or under such conditions that no levy can be made at law, execution must have been issued and a return of *nulla bona* made."

28. **Cal.**—*Lupton v. Lupton*, 3 Cal. 120. **Ind.**—*Kyle v. Frost*, 29 Ind. 382; *Wilson v. Dale*, 5 Ind. 163. **Ky.**—*Proctor v. Bell's Admr.*, 97 Ky. 98, 30 S. W. 15. **N. Y.**—*Howard v. Sheldon*, 11 Paige 558; *Voorhees v. Howard*, 4 Abb. App. Dec. 503; *Field v. Hunt*, 22 How. Pr. 329, 13 Abb. Pr. 320.

If there is any excuse for not proceeding to final execution against one or more joint debtors, as that he is out of the jurisdiction, a bankrupt, a surety, or the like, the facts relied on should be stated in the complaint in the equitable action. *Field v. Hunt*,

22 How. Pr. (N. Y.) 329, 13 Abb. Pr. 320.

When Corporation a Joint Debtor. Where a judgment is recovered against joint debtors one of which is a corporation, and an execution thereon is returned unsatisfied, an action on the judgment may be instituted without reference to execution against the other debtor, under a statute which provides "that when a judgment has been obtained against a corporation and an execution issued thereon has been returned unsatisfied, then the judgment creditor may proceed to sequester the stock, property and effects of such corporation, and the court may appoint a receiver of the same." *Davelaar v. Blue Mount Invest. Co.*, 110 Wis. 470, 86 N. W. 185.

29. **Mo.**—*A. G. Edwards & Son Brokerage Co. v. Rosenheim*, 74 Mo. App. 621; *Carp v. Chipley*, 73 Mo. App. 22. **N. C.**—*Tabb v. Williams*, 57 N. C. 352. **S. C.**—*State v. Foot*, 27 S. C. 340, 3 S. E. 546. **Utah.**—*Enright v. Grant*, 5 Utah 334, 15 Pac. 268.

30. *Pullman v. Stebbins*, 51 Fed. 10 (But see *Walser v. Seligman*, 13 Fed. 415, 21 Blatchf. 130); *Nunnally v. Strauss*, 94 Va. 255, 26 S. E. 580.

31. *Huntington v. Jones*, 72 Conn. 45, 43 Atl. 564; *Vail v. Hammond*, 60 Conn. 374, 22 Atl. 954, 25 Am. St. Rep. 330. See also *De Lacy v. Hurst*, 83 Ga. 223, 9 S. E. 1052, which was an action to set aside a fraudulent conveyance.

ment in order to be the basis of a creditor's suit must have been obtained within the jurisdiction where the creditor's suit is brought, unless otherwise provided by statute,³² or unless facts be alleged showing that it is impossible to obtain such judgment.³³

b. *Federal Court Judgments.*—An action in the nature of a creditor's bill may be maintained in a state court upon a judgment rendered by a federal court.³⁴ In some jurisdictions the courts take

32. *National Tube Wks. v. Ballou*, 146 U. S. 517, 13 Sup. Ct. 165, 36 L. ed. 1070, in which it was held that where a judgment was obtained in Connecticut an action could not be brought thereon in the United States Circuit Court for the Southern District of New York, it being necessary to base the action on a New York judgment.

In *First Nat. Bank v. Steinway*, 77 Fed. 661, it was held that an action might be maintained in the federal court for the Western District of Pennsylvania on a judgment recovered in the court of common pleas No. 2 of Allegheny County, Pennsylvania. See also *Vanderveer v. Stryker*, 8 N. J. Eq. 175.

In *United States v. Ingate*, 48 Fed. 251, it was held that a creditor's suit could not be maintained in the federal court in the Southern District of Alabama on a judgment rendered in the district court for the Northern District of Mississippi. See also *Union Trust Co. v. Boker*, 89 Fed. 6; *Walser v. Seligman*, 13 Fed. 415, 21 Blatchf. 130 (where the United States Circuit Court for the Southern District of New York refused to permit an action in that court on a judgment recovered in Missouri); *Clafin v. McDermott*, 12 Fed. 375, 20 Blatchf. 522 (where the United States Circuit Court in New York refused to entertain an action based on a judgment recovered in California).

Compare *Handley v. Smith*, 130 U. S. 417, 11 Sup. Ct. 530, 35 L. ed. 227 (holding that a creditor's suit is maintainable in the federal court in Tennessee on a judgment rendered in the state courts of Kentucky. This case is followed in *Merchants' Nat. Bank v. Chattanooga Constr. Co.*, 53 Fed. 314; *Stutz v. Handley*, 41 Fed. 537. See also *Buckeye Engine Co. v. Dorau Brew. Co.*, 47 Fed. 6 (holding that an action may be maintained in federal courts in Washington on a judgment rendered by the courts of that

state); *Wilkinson v. Yale*, 6 McLean 16, 29 Fed. Cas. No. 17,678.

Necessity for Domestic Judgment. Action cannot be brought on a judgment rendered in another state until judgment is recovered in the state where the action is brought. **Fla.**—*Carter v. Bennett*, 6 Fla. 214. **Ia.**—*Buchanan v. Marsh*, 17 Iowa 494. **Miss.**—*Farned v. Harris*, 11 Smed. & M. 366. **Neb.**—*First Nat. Bank v. Sloman*, 42 Neb. 350, 60 N. W. 589, 47 Am. St. Rep. 707; *Weaver v. Cressman*, 21 Neb. 675, 33 N. W. 478. **N. J.**—*Davis v. Dean*, 26 N. J. Eq. 436. **N. C.**—*McLure v. Benceni*, 37 N. C. 513, 40 Am. Dec. 437. **Tenn.**—*Broughton v. Slusher*, 2 Tenn. Ch. App. 305.

Following the rule that the creditor must have judgment that is a lien on real estate, these proceedings cannot be based upon a foreign judgment until by some proper proceeding the creditor reinstate his lien. *Peterson v. Gittings*, 107 Iowa 306, 77 N. W. 1056; *Importers, etc., Nat. Bank v. Quackenbush*, 143 N. Y. 567, 38 N. E. 728.

33. *National Tube Wks. v. Ballou*, 146 U. S. 517, 13 Sup. Ct. 165, 36 L. ed. 1070.

34. **U. S.**—*Feidler v. Bartleson*, 161 Fed. 30, 88 C. C. A. 194; *Alkire Grocery Co. v. Richesin*, 91 Fed. 79. **Ala.**—*Brown v. Bates*, 10 Ala. 432. **Ia.**—*Peterson v. Gittings*, 107 Iowa 306, 77 N. W. 1056. **Kan.**—*Chicago & A. Bridge Co. v. Fowler*, 55 Kan. 17, 39 Pac. 727. **Miss.**—*Bullitt v. Taylor*, 34 Miss. 708, 743. **Neb.**—*First Nat. Bank v. Sloman*, 42 Neb. 350, 60 N. W. 589. **N. J.**—*Vanderveer v. Stryker*, 8 N. J. Eq. 175. **Wis.**—*Ballin v. Merchants' Exch. Bank*, 78 Wis. 404, 47 N. W. 516, 10 L. R. A. 742, where the judgment was obtained in a federal court in Wisconsin. And see *Burt v. Arnold*, 50 Mo. App. 8.

The cases holding the affirmative of the proposition do so on three grounds: (1) That a judgment of the federal

a contrary view and hold that an action cannot be maintained on such judgment.³⁵

c. *Judgment of Court Not of Record*.—Ordinarily this action cannot be sustained on a judgment rendered by a justice of the peace which has not been docketed in the county clerk's office or with such other officer as may be designated by statute, as such judgment does not become a lien on real estate until so docketed, and until so filed and docketed the creditor has not complied with the rule requiring him to first exhaust his legal remedies.³⁶ But when so

court sitting within the state in which the action of the state court is invoked is a lien upon the real estate sought to be reached by the creditor's bill; (2) that judgments rendered by federal courts are treated as domestic judgments at least within the boundaries of the state in which the judgments are rendered; (3) that plaintiffs in these judgments are entitled to the same remedies by attachment, execution or other means as plaintiffs in judgments rendered by state courts. *Peterson v. Gittings*, 107 Iowa 306, 77 N. W. 1056.

35. Ill.—*Ladd v. Judson*, 174 Ill. 344, 51 N. E. 838, 66 Am. St. Rep. 267; *Winslow v. Leland*, 128 Ill. 304, 21 N. E. 588; *Steere v. Hoagland*, 39 Ill. 264. See cases in *Wait on Fraudulent Conveyances* (3rd ed.) §78. Compare *Dilworth v. Curts*, 139 Ill. 508, 29 N. E. 861, holding that this matter is one of evidence and not of jurisdiction. Ia.—*Peterson v. Gittings*, 107 Iowa 306, 77 N. W. 1056. N. Y.—*Tarbell v. Griggs*, 3 Paige 207 (the New York court of chancery refused jurisdiction where the judgment was rendered in the United States Circuit Court for the Southern District of New York); *Davis v. Bruns*, 23 Hun 648.

In *Patterson v. Lynde*, 112 Ill. 196, a judgment was recovered in Oregon and an action thereon brought in the United States Circuit Court for the Northern District of Illinois and judgment recovered. It was held that even a "judgment of the Circuit Court of the United States cannot thus be enforced in the district in which it is obtained."

36. Ia.—*Green v. Forney*, 134 Iowa 316, 111 N. W. 976; *Drahos v. Kopesky*, 132 Iowa 497, 109 N. W. 1021; *Peterson v. Gittings*, 107 Iowa 306, 77 N. W. 1056. Ky.—*Behan v. Warfield*, 90 Ky. 151, 13 S. W. 439; *Clements v. Waters*, 90 Ky. 96, 13 S. W. 431; *Mansfield*

v. Wilkinson, 16 Ky. L. Rep. 276, 27 S. W. 808. N. Y.—*Crippen v. Hudson*, 13 N. Y. 161; *Coe v. Whitbeck*, 11 Paige 42; *Dix v. Briggs*, 9 Paige 595; *Brinkerhoff v. Brown*, 4 Johns. Ch. 671. See also *Wilson v. Dale*, 5 Ind. 163.

In Iowa "the judgments of the superior court are to be treated as judgments of the district court only when transcripts thereof are filed in the district court of the county in which the superior court has jurisdiction." Thereafter they are in all respects considered as judgments of that court. Unless this is done the judgments are only enforceable against personal property, and no creditor's action involving real estate can be predicated on such a judgment unless it be filed in the district court. *Drahos v. Kopesky*, 132 Iowa 497, 109 N. W. 1021. See also *Green v. Forney*, 134 Iowa 316, 111 N. W. 976, where on the showing made it was held no creditor's bill could be maintained.

In *Peterson v. Gittings*, 107 Iowa 306, 77 N. W. 1056, the original petition "recited that a transcript of the superior court judgment had been filed in the office of the clerk of the district court, and that the same was of record in Judgment Docket 14, p. 87 of the district court records. In response to a demurrer, which was confessed, plaintiff filed, as an amendment to her petition, a certified transcript of the judgment rendered by the superior court." There was no evidence that this transcript had ever been filed except as an amendment to the petition, and no showing that a memorandum thereof was ever entered upon the judgment docket of the district court. It was held that the statute had not been complied with as the judgment did not become a judgment of the district court until it was filed with the clerk of that court, and a

docketed the creditor becomes as much entitled to the aid of a court of equity as though the judgment was originally recovered in a court of record.³⁷

11. Filing Supplemental Bill Alleging Jurisdictional Facts. That the plaintiff in a creditor's suit has obtained a judgment, issued execution thereon, and that such execution has been returned no property, have been held to be jurisdictional requirements, the lack of which cannot be cured by the filing of a supplemental bill, there being nothing on which a supplemental bill can be based.³⁸ Nor will the filing of a supplemental pleading confer jurisdiction, where the judgment on which the creditor's suit was brought was set aside after the commencement of the creditor's suit.³⁹

B. SUBSTITUTE REMEDIES.—1. Supplementary Proceedings.—In a number of jurisdictions in which by statute there is provision for supplementary proceedings, it is held that where there are such statutory proceedings they must be pursued,⁴⁰ those proceedings being intended as a substitute for the creditor's bill as formerly used in chancery.⁴¹ In most of the jurisdictions, however, the courts do

memorandum entered on his judgment docket noting the time of filing thereof.

Personal Property.—*Falker v. Linehan*, 88 Iowa 641, 55 N. W. 593 (relating to personal property); *Bailey v. Burton*, 8 Wend. (N. Y.) 339 (the creditor's bill related to personal property which had been taken under execution issued by a justice and upon which there was a lien by reason of the levy). The above cases are frequently cited against the proposition stated in the text, but for the reasons stated are not applicable.

Improper Docketing.—Where a judgment was obtained in a superior court and a transcript thereof was filed with the clerk of the district court of another county, it was held insufficient and that the transcript should have been filed with the clerk of the district court of the county where the judgment was rendered. *Drahos v. Kopesky*, 132 Iowa 497, 109 N. W. 1021.

37. Ill.—*Ballentine v. Beall*, 4 Ill. 204. **1a.**—*Peterson v. Gittings*, 107 Iowa 306, 77 N. W. 1056. **Ky.**—*Newdigate v. Jacobs*, 9 Dana 13; *Heiatt v. Barnes*, 5 Dana 220; *Weatherford v. Myers*, 2 Duv. 91.

38. *Brown v. Bank of Mississippi*, 31 Miss. 454.

The Iowa statutes (Code §§2969, 3150, 3151) provide that *after* judgment proceedings may be brought to

subject property of the defendant to the judgment, and in such case a lien is created on any property of a defendant held by any third person, described in the petition, the lien to date from the time the third person is served with notice and a copy of the petition. Under this statute an action cannot be brought before judgment is obtained, though in said action a notice as above set forth is served on the third party, nor will a supplemental petition filed *after* judgment is obtained create such a lien, though the third party appear. *Ware v. Delahaye*, 95 Iowa 667, 64 N. W. 640.

39. *Butchers' & Drovers' Bank v. Willis*, 1 Edw. Ch. (N. Y.) 645.

40. *Herrlich v. Kaufmann*, 99 Cal. 271, 33 Pac. 857; *Taylor v. Persse*, 15 How. Pr. (N. Y.) 417.

41. Cal.—*Nordstrom v. Corona City Water Co.*, 155 Cal. 206, 100 Pac. 242; *Matteson Mfg. Co. v. Conley*, 144 Cal. 483, 77 Pac. 1042; *Herrlich v. Kaufmann*, 99 Cal. 271, 33 Pac. 857; *High v. Bank of Commerce*, 95 Cal. 386, 30 Pac. 556, 29 Am. St. Rep. 121; *Habeneicht v. Lissak*, 78 Cal. 351, 20 Pac. 874, 12 Am. St. Rep. 63; *Pacific Bank v. Robinson*, 57 Cal. 520, 40 Am. Rep. 120; *McKenzie v. Hill*, 9 Cal. App. 78, 98 Pac. 55. **N. Y.**—*Importers' & Traders' Nat. Bank v. Quackenbush*, 143 N. Y. 567, 33 N. E. 728; *Lynch v. Johnson*, 48 N. Y. 27. **N. C.**—*Coates v. Wilkes*, 92 N. C. 376; *Rand v. Rand*,

not go to the length of asserting that a creditor's bill cannot be sustained therein under any circumstances, and admit that where the statutory proceeding would not afford adequate relief, it is still proper to pursue this remedy.⁴²

2. Writ of Garnishment.—The writ of garnishment has also been held to be in the nature of a substitute for a creditor's bill.⁴³

3. Writ of Attachment.—The remedy of foreign attachment under the Maine statute, does not exclude a resort to a creditor's suit.⁴⁴

C. RAISING OBJECTION OF FAILURE TO EXHAUST LEGAL REMEDIES. The objection that plaintiff has failed to exhaust his legal remedies before instituting his action may be taken by demurrer.⁴⁵ And while under some circumstances it may be sufficient to take the objection that the plaintiff has not exhausted his legal remedies in the answer, and a failure to do so is a waiver thereof,⁴⁶ it is, however, held that such objection should be specially called to the attention of the court at the very outset by a motion or proceeding to dismiss the bill, and not merely by a statement thereof in the answer,⁴⁷ and that if the party whose duty it is to call the court's attention thereto,

78 N. C. 12. **N. D.**—*Merchants' Nat. Bank v. Braithwaite*, 7 N. D. 358, 75 N. W. 244. **Wis.**—*Smith v. Weeks*, 60 Wis. 94, 18 N. W. 778; *Clark v. Berghenthal*, 52 Wis. 103, 8 N. W. 865.

In **Colorado** it has been held that this is now the exclusive remedy, the legislature having repealed the provision as to creditors' bills upon the adoption of the Code, nor can it be pursued as a common law remedy. *Hexter v. Clifford*, 5 Colo. 168.

In **Indiana** it is said that while these proceedings may in a measure be a substitute for a creditors' bill, so extraordinary and summary a remedy should be confined to cases clearly within the provisions of the statute. *Burt v. Hoettinger*, 28 Ind. 214. See also *Cushman v. Gephart*, 97 Ind. 46.

In **New York** "the provisions of the Code relating to proceedings supplementary to execution furnish a substitute for the creditor's bill as formerly used, and the service of the order under those provisions takes the place of the commencement of a suit under the old system." *Reynolds v. Aetna Life Ins. Co.*, 160 N. Y. 635, 648, 55 N. E. 305.

In **Wisconsin** it was held in *Seymour v. Briggs*, 11 Wis. 196, and *Graham v. La Crosse & M. R. R. Co.*, 10 Wis. 459, that the statute had abrogated this remedy, but they were restored by the Laws of 1860, ch. 303. *Wil-*

liams v. Sexton, 19 Wis. 42; *Winslow v. Dousman*, 18 Wis. 456.

42. *Phillips v. Price*, 153 Cal. 146, 94 Pac. 617; *Herrlich v. Kaufmann*, 99 Cal. 271, 276, 33 Pac. 857; *Swift v. Arents*, 4 Cal. 390; *Bennett v. McGuire*, 58 Barb. (N. Y.) 625; *Catlin v. Dougherty*, 12 How. Pr. (N. Y.) 457; *Goodyear v. Betts*, 7 How. Pr. (N. Y.) 187; *Gavazzi v. Dryfoos*, 47 Misc. 15, 95 N. Y. Supp. 199. See also *Wahlheimer v. Truslow*, 106 App. Div. 73, 94 N. Y. Supp. 137.

Supplementary Proceedings.—It is held not to be necessary for a judgment creditor to resort to supplementary proceedings as a prerequisite to the institution and maintenance of an appropriate suit in equity. *Wilson v. Harris*, 21 Mont. 374, 410, 54 Pac. 46; *Hulley v. Chedie*, 22 Nev. 127, 36 Pac. 783.

43. *La Crosse Nat. Bank v. Wilson*, 74 Wis. 391, 399, 43 N. W. 153.

44. *Baxter v. Moses*, 77 Me. 465, 1 Atl. 350.

45. *Phillips v. Price*, 153 Cal. 146, 94 Pac. 617.

46. *Dodge v. Wright*, 48 Ill. 382; *Stout v. Cook*, 41 Ill. 448; *Johnson v. Miller*, 50 Ill. App. 60, 73.

As to waiver, see *Hollins v. Brierfield C. & I. Co.*, 150 U. S. 371, 380, 14 Sup. Ct. 127, 37 L. ed. 1113.

47. *Johnson v. Miller*, 50 Ill. App. 60, 73.

fails so to do, all costs made subsequent to the time when a motion to dismiss might have been made will be imposed on him.⁴⁸

D. WHEN RESORT TO LEGAL REMEDY UNNECESSARY. — When the creditor's claim is one which in the first instance requires the aid of a court of equity, it is not necessary that such claim be first established in a court of law.⁴⁹

III. PARTIES. — A. GENERALLY. — As a creditor's suit is, in its nature, equitable, it is essential that all persons interested in the subject of the action or whose equitable or legal title would be affected, be made parties to the suit.⁵⁰

48. *Johnson v. Miller*, 50 Ill. App. 60, 73.

49. U. S.—*Russell v. Clark*, 7 Cranch 69, 3 L. ed. 271. Ind.—*O'Brien v. Coulter*, 2 Blackf. 421. Pa.—*Miffin Co. Nat. Bank v. Fourth Street Nat. Bank*, 22 Pa. Co. Ct. 495. And see *Kent v. Curtis*, 4 Mo. App. 121.

That the debtor owes for goods sold and delivered is not such a case. *Detroit Copper & B. Rolling Mills v. Ledwidge*, 162 Ill. 305, 44 N. E. 751.

It has never been decided in Illinois "that the mere fact that assets of a debtor out of which satisfaction is sought can only be reached through a court of equity, will give that court jurisdiction in the absence of a judgment at law, and the uniform holding that . . . such a judgment must be averred and proved is irreconcilable with any such decision. If a case can arise in which relief may be sought in equity in the first instance, it must appear that the complainant's demand is of such an equitable character that it can only be established in a court of chancery, otherwise the right of the defendant to a trial by jury upon a legal claim would be taken away, and the reason for the rule, as above stated, destroyed." *Ladd v. Judson*, 174 Ill. 344, 51 N. E. 838, 66 Am. St. Rep. 267.

50. See cases generally throughout this subsection, and *McGhee v. Importers, etc., Bank*, 93 Ala. 192, 9 So. 734; *State v. Superior Court*, 14 Wash. 686, 45 Pac. 670.

A creditor's bill should be brought on behalf of the plaintiff and all other judgment creditors except those made defendant and should make formally defendants in the suit all creditors who have obtained judgments in the court of record in the counties in which the debtor owns lands which are

sought to be subjected to the payment of their judgments; also all creditors who have obtained judgments in courts of record in the counties in which the debtor owns land; also all creditors who have obtained judgments in courts of record or before justices in any part of the state and had them docketed on the judgment lien docket. But when some judgment creditors shall have been omitted as a formal party defendant, unless objection be made specially to proceedings in the cause until such party is made a formal defendant the court would not record such omission as a ground for reversing, if the bill had been brought on behalf of the plaintiff and all other judgment creditors as such omitted parties defendants would be regarded as informal parties plaintiff. *Neely v. Jones*, 16 W. Va. 625, 37 Am. Rep. 794.

Where it appears that there was another "surety on the bond, upon which the judgment sought to be enforced by the complainant was recovered, and that a separate judgment for the debt was obtained against his personal representative at the same time that the judgment against the principal and the other sureties was recovered," the personal representative and the widow who was the sole legatee and devisee were proper and necessary parties. *Wytheville Ice Co. v. Frick*, 96 Va. 141, 30 S. E. 491.

Necessity for Representation of Infants.—See *Ewin's Admr. v. Ferguson's Admr.*, 33 Gratt. (Va.) 548.

Where a tenant in possession of the land in controversy has a written contract with the defendant in a creditor's suit of date prior to complainant's judgment and by reason of which he has expended money and labor and assumed liabilities and obligations with

B. WHO MAY MAINTAIN.—1. In General.—A defendant or his trustee to whom land is conveyed, may maintain an action to set aside a void judgment when the same is a cloud upon the title to real estate,⁵¹ and a receiver of a judgment debtor may recover usurious premiums paid by his judgment debtor.⁵²

It has been held that a divorced wife may maintain an action in the nature of a creditor's bill to have a fraudulent sale of her former husband's property set aside and subject the same to the payment of her alimony as adjudged in the divorce proceeding.⁵³

A suit does not abate when he by whom it was commenced, or anyone who has afterwards come in and taken the position of a plaintiff, dies, if there be at any time any other unsatisfied creditor standing as plaintiff,⁵⁴ but such a bill may not be obtained by one who assails for fraud a title which he has been instrumental in establishing and was a concurrent participant in making.⁵⁵

2. By an Assignee.—A bill in the nature of a creditor's bill may be filed by the assignee of the creditor in order to subject the debtor's property to the payment thereof.⁵⁶ And in one jurisdic-

other parties and, so far as it appears, the court in making its decree ignored his interest, it erred without first ascertaining the tenant's rights and providing for their protection. *Moore v. Bruce*, 85 Va. 139, 7 S. E. 195.

Against Executors and Devisees.—A judgment creditor may file a bill against the executors and devisees of his deceased debtor to subject real estate to the payment of his judgment without first pursuing debtors of his debtor. *Suckley's Admr v. Rotchford*, 12 Gratt. (Va.) 60, 65 Am. Dec. 240.

"The mere arrangement of parties on the record in an equity case in order that those united in interest may appear as plaintiffs, and those adverse thereto may appear as defendants, the former standing for the subject-matter of the action upon sufficient facts alleged, pertains to mere judicial administration and is under the supreme control of the court within the boundaries of sound judicial discretion." *Harrington v. Gilchrist*, 121 Wis. 127, 99 N. W. 909.

51. *Ambler v. Leach*, 15 W. Va. 677.

By Trustee To Reach Life Insurance Policy of Former Trustee.—When it was alleged that one of the defendants was a trustee and while such converted certain moneys belonging to the trust estate to his own use and that he was removed as trustee, and the plaintiff

in this creditor's suit was appointed in his place and procured a judgment against him for the amount converted and had an execution issued and returned therein; that, while defendant was trustee and insolvent, his wife procured a policy of insurance upon his life payable to her and if she did not survive, then to her children, and if none survived the husband, then to his administrators; that the husband paid all the premiums wrongfully and in fraud of creditors and the relief prayed for is that the plaintiff's rights and interest as a judgment creditor in this policy be ascertained and declared, the husband, the wife, the child, and the insurance company being made parties defendant, the court held that although the husband still lived, the court had the "power upon these facts to adjust, determine and declare the rights and interests of the plaintiff, as a judgment creditor of the husband, though the plaintiff may not be able to realize anything from such a contract until it has matured." *Stokes v. Amerman*, 121 N. Y. 337, 24 N. E. 819.

52. *Polen v. Bushnell*, 18 Abb. Pr. (N. Y.) 301.

53. *Twell v. Twell*, 6 Mont. 19, 9 Pac. 537.

54. *Austin v. Cochran*, 3 Bland (Md.) 337.

55. *Bunce v. Bailey*, 39 Mich. 192.

56. See cases generally throughout

tion the court holds that an assignor would not be able to sustain a creditor's suit in his own name as his petition would be entirely adverse to the claims of the assignee.⁵⁷

Where the complainant parts with his interest before the commencement of the creditor's suit, the defendant must raise the objection that the third party was a necessary party either by plea or by an answer; but where the complainant parts with his interest subsequent to the commencement of the suit the defendant may move to dismiss unless the assignee is made a party.⁵⁸ Even in a jurisdiction in which the rule is followed that the suit should be brought in the name of the assignor, it has been held that an assignee may bring it in his own name when the assignor is dead and his administrator is in another state.⁵⁹

C. PARTIES PLAINTIFF.—1. **Party in Interest.**—The real party in interest is the proper party plaintiff to bring a creditor's suit.⁶⁰

this subsection and especially *Russell v. Randolph*, 26 Gratt. (Va.) 705.

A bill in the nature of a creditor's bill may be "filed by the plaintiffs who claim that they have acquired, by successive assignments from the original creditors, a lien upon certain lands, which the debtor has conveyed in fraud of the original creditors," especially when "the plaintiffs have long been in possession of the land; that the records of the case, through which the original purchaser at the execution sale claimed to have acquired the legal title to the lands, have been lost, and that their title though perfectly good in equity, may be technically insufficient at law" for relief against such debts. *Wehrman v. Conklin*, 155 U. S. 314, 15 Sup. Ct. 129, 39 L. ed. 167.

Where the complainant had endorsed the note upon which judgment was rendered and procured another to guarantee the payment thereof, and had paid the amount of the judgment himself and took an assignment thereof, he became subjected to all the rights of his assignor and can maintain a creditor's suit therein. *Crawford v. Logan*, 97 Ill. 396.

When an assignee without interest has a judgment entered in his name, a creditor's suit may be prosecuted in his name, since the defendant is deprived of no defense that would be available if the action were brought in the name of the beneficiary. *Atkinson v. Foster*, 134 Ill. 472, 25 N. E. 528.

The object of the statute is to save the demand existing against a fraudulent grantor, and it is immaterial who holds one or when he acquires it, and an assignee therefor is substituted in the place of a creditor. *Cook v. Ligon*, 54 Miss. 652.

57. *Andrews v. Kibblee*, 12 Mich. 94.

58. *Hathaway v. Scott*, 11 Paige (N. Y.) 173.

59. *Cobb v. Thompson*, 1 A. K. Marsh. (Ky.) 507.

60. See cases generally throughout this subsection, and especially *Postlewait v. Howes*, 3 Iowa 365.

When a creditor's bill is brought seeking to marshal the assets of the corporation alleged to be solvent and praying a sale of all its property and the application of all its assets to the payment of its debts, after these shall have been marshaled, all creditors must come in, but the frame of the bill dispenses with them as formal parties and they may be called in at an early date. *Tompkins Co. v. Catawba Mills*, 82 Fed. 780.

Bill of Discovery.—It is required that in every equity suit all persons who have legal rights in the subject in dispute, as well as all persons having the equitable right should be made parties to the suit, but in a bill of discovery under the statute, the appellant is not entitled to have the bill dismissed because not brought in the name of the parties who, it alleges, are the owners of the judgments. *Merchants, etc. Imp. Co. v. Chicago Ex. Bldg. Co.*, 108 Ill. App. 54.

Hence, where a creditor's bill is brought in the name of the judgment creditor, or the bill alleges that the judgment is now the property of the complainant, such judgment creditor or complainant is the proper party plaintiff.⁶¹

If judgment has been rendered in favor of the plaintiff as administrator and the execution is sued out in his name, he may prosecute the creditor's bill for the collection of the judgment regardless of the person to whom he should account for the amount recovered,⁶² and it has been held that there is no such thing as bringing a creditor's suit in the name of one party for the use of another.⁶³

2. Suing in Behalf of All Creditors.—Whether or not a complainant may bring a creditor's suit in his own behalf alone, or in behalf of all other creditors, depends, in general, upon the nature and purpose of the suit.⁶⁴

A creditor must sue in behalf of himself and all other creditors when he seeks to subject a common trust fund which has been set aside for him and others, to the payment of his demands,⁶⁵ or when he asks

61. *Postlewait v. Howes*, 3 Iowa 365.

Where a creditor's bill is brought in the name of the judgment creditor it is sufficient, and the fact that the indorser of the note in judgment, stated in giving his testimony that the suit was being carried on for his benefit, does not change the matter, for, as he was the indorser of the note, if the judgment was made out of the property of the judgment debtor, he could not be responsible as such indorser. *Mann v. Ruby*, 102 Ill. 348.

62. *Walker v. Montgomery*, 236 Ill. 244, 86 N. E. 240.

63. *Kellam v. Sayer*, 30 W. Va. 198, 3 S. E. 589; *Grove v. Judy*, 24 W. Va. 274.

64. See cases generally throughout this subsection, and see also, *infra*, III, A, 1, b.

65. *McDougald v. Dougherty*, 11 Ga. 570; *Fisher v. Worth*, 45 N. C. 63.

Demands Upon a Common Fund. Whenever there are creditors or other persons having demands (which are cognizable in equity of equal standing) upon a common fund or estate out of which they claim to be paid, the proper course is for them to unite in one bill in behalf of all and such a bill is not multifarious. *Petree v. Lansing*, 66 Barb. (N. Y.) 357; *Lenlilhon v. Moffat*, 1 Edw. Ch. (N. Y.) 451; *Egberts v. Wood*, 3 Paige (N. Y.) 517, 24 Am. Dec. 236; *Greene v. Breck*, 10 Abb. Pr. (N. Y.) 42.

To enable a creditor to sue on behalf of himself and all others who stand in the same relation with him to the subject of the suit, it must appear, that the relief sought by him is, in its nature, beneficial to all those whom he undertakes to represent and that the object of the bill is not merely to establish any existing priorities among them as creditors. *Hammond v. Hammond*, 2 Bland (Md.) 306.

"All Other Creditors" Need Not Be Judgment Creditors.—If a bill is brought in behalf of the plaintiff and all other creditors of the debtor, it is not necessary that all the other creditors be judgment creditors for though none but a judgment creditor can institute an action all creditors are entitled to share in the equitable assets created thereby. *State v. Foot*, 27 S. C. 340.

It is within the discretion of the court to entertain a bill brought by one creditor in behalf of all when the interest of all the creditors in the question is the same, where a bill is brought by plaintiff on behalf of himself and numerous other creditors of defendant to enforce a trust. *Libby v. Norris*, 142 Mass. 246, 7 N. E. 919.

Effect of Suit for All Creditors Upon Pending Suits.—When in a suit for administration of assets a decree is made for an account of outstanding claims against the estate, it operates as a suspension of all other pending suits of creditors who must come in under

for an accounting and an administration of the assets of the debtor,⁶⁶ or when he seeks in a bill against an administrator to set aside as fraudulent a conveyance by an intestate debtor.⁶⁷

In some jurisdictions the bill will be considered as being brought for all when the relief asked for contemplates their being brought in,⁶⁸ or where under the statute other creditors may come in.⁶⁹

3. For Himself, or for Himself and Others. — In other instances

the decree, which is considered a decree in favor of all the creditors. *Stevenson v. Taverners*, 9 Gratt. (Va.) 398.

When Others Fail To Come In. While other creditors might if they desired intervene and the proceeds of the fund assigned for the benefit of one creditor, when restored by the decree of court, would be distributed equally pro rata among all the creditors, yet, unless they came in voluntarily, the plaintiff by whose work and diligence the misapplied fund is returned is entitled to the fruits of his vigilance. *Williams v. Jones*, 23 Mo. App. 132.

When Plaintiff Ought To Be Allowed To Join Others.—One who brings a bill to subject land to the payment of his judgment lien, there being an undefined class having a like interest with the plaintiff, ought to be allowed to sue on behalf of himself and all other judgment creditors without making them formal parties. *Neely v. Jones*, 16 W. Va. 625, 37 Am. Rep. 794.

No Preference Attaches to Complainant When Others Made Parties.—When a plaintiff does not seek to recover his debts out of the land of the defendant testator but to make the land assets for the payment of all the debts of the testator it gives him no preference, and it is, to all intents and purposes, a creditor's bill in behalf of all creditors and allowable. *Sinclair v. McBryde*, 88 N. C. 438.

Interests of Complainants Are Separate.—When neither of the judgment creditors suing has an interest which exceeds the sum of \$2000, the suit cannot be maintained although the common fund exceed that amount, for their interests are separate and distinct, and the joinder of parties is permitted by the indulgence of the court for its convenience and to save expense.

Seaver v. Bigelow, 5 Wall. (U. S.) 208, 18 L. ed. 595.

66. *Child & N. B. v. Carlstin Co.*, 76 Fed. 86; *Pullman v. Stebbins*, 51 Fed. 10.

A creditor who brings his suit against a debtor to enforce the lien of his judgment against his debtor's land should sue on behalf of himself and all other judgment creditors, excepting those made defendants, for all persons interested in the subject-matter involved in the suit, who are to be affected by the proceedings, should be made parties however numerous they may be. *Poppenheimer v. Roberts*, 24 W. Va. 702; *Livesay v. Peamster*, 21 W. Va. 83; *Norris, Caldwell & Co. v. Bean*, 17 W. Va. 655.

A creditor's proceeding in equity to subject lands descended or devised and when an administration of the real estate is sought, must sue on behalf of himself and all other creditors. *Scott v. Ware*, 64 Ala. 174.

In a suit to subject property willed to the debtor to the payment of his debts, where it does not appear that there are other creditors, the judgment creditor may bring his bill alone, for by that he acquires a prior lien upon the equitable assets. *Rugely & Harrison v. Robinson*, 19 Ala. 404.

67. *Caswell v. Caswell*, 28 Me. 232.

68. *Hurn v. Keller*, 79 Va. 415; *Piedmont & Arlington Ins. Co. v. Maurey*, 75 Va. 508.

Where a complaint shows that there are other creditors, all of whom should have been associated as plaintiffs, the court held it to be a creditor's suit, and all the creditors are, or may come in and be parties and share in the recovery. *Long v. Bank of Yanceyville*, 81 N. C. 42; *Wilson v. Bank of Lexington*, 72 N. C. 621.

69. *Gibson v. McCormick*, 10 Gill & J. (Md.) 65.

it has been held that a creditor may bring the suit either for himself or in behalf of himself and others.⁷⁰

A suit may be brought by a judgment creditor alone where the purpose of the suit is simply to reach any property that the judgment debtor may have and there is no attempt to reach any specific property,⁷¹ and where the purpose is to set aside a fraudulent conveyance or assignment of property by the debtor.⁷²

When a debtor becomes insolvent, and a creditor's suit has not been brought in behalf of all creditors, any creditor may bring a suit for himself to enforce the payment of his debt;⁷³ and he may also bring a creditor's suit for himself alone when he seeks to have property covered by a trust deed subjected to the trust deed and then to the payment of his judgment,⁷⁴ as, also, when he seeks to enforce an equitable lien on certain land,⁷⁵ or when he brings a suit against certain stockholders to enforce their payment of subscriptions of stock to the debtor corporation.⁷⁶

70. *Ballentine v. Beall*, 4 Ill. 203; *Edmeston v. Lyde*, 1 Paige (N. Y.) 637, 19 Am. Dec. 454; *Hammond v. Hudson River L. & M. Co.*, 20 Barb. (N. Y.) 378.

Under the code while judgment creditors may unite to set aside a conveyance in fraud of creditors, it is not a rule of obligation but one conferring authority merely, and judgment creditors so situated are not necessary parties. *White's Bank of Buffalo v. Farthing*, 101 N. Y. 344, 4 N. E. 734.

As to a Fraudulent Assignment by a Partnership.—Where an action was brought to set aside for fraud an assignment by a partnership in trust for the benefit of creditors, the court held that such an action must be brought so as to make all partnership creditors parties, or expressly for the benefit not only of the plaintiff, but of all the partnership creditors who will come in and contribute to the expense of the suit. *Cox v. Platt*, 32 Barb. (N. Y.) 126.

71. *Mass.*—*Pettibone v. Toledo*, etc. R. Co., 148 Mass. 411, 19 N. E. 337. *N. J.*—*Annin v. Annin*, 24 N. J. Eq. 184. *N. Y.*—*Wakeman v. Grover*, 4 Paige 23.

As to priority obtained thereby, see *Seymore v. McAvoy*, 121 Cal. 438, 53 Pac. 946, 41 L. R. A. 544. See also *Elmore v. Spear*, 27 Ga. 193, as to priority gained by a bill to reach legal assets.

72. *U. S.*—*Burt v. Keyes*, 4 Fed. Cas. No. 2,212. *Cal.*—*Baker v. Bartol*, 6

Cal. 483. *Mass.*—*Sanger v. Bancroft*, 12 Gray 365; *Crompton v. Anthony*, 13 Allen 33, citing *Silloway v. Columbia Ins. Co.*, 8 Gray 199. *N. J.*—*Whitney v. Robbins*, 17 N. J. Eq. 360; *Way v. Bragaw*, 16 N. J. Eq. 213, 84 Am. Dec. 147; *Smith v. Summerfield*, 108 N. C. 284, 12 S. E. 997.

Under the Statute.—*Silloway v. Columbia Ins. Co.*, 8 Gray (Mass.) 199.

Privilege Must Be Extended to All Creditors To Join.—Under the statute, creditors' bills may be filed at the instance of any creditor, the privilege being extended to all to appear and be made parties in a reasonable time. In this case the defendant was seeking to move his property without the state in fraud of creditors. *Orton v. Madden*, 75 Ga. 83.

73. *Greene v. Breck*, 32 Barb. (N. Y.) 73.

74. *Freedman's Sav. & Trust Co. v. Earle*, 110 U. S. 710, 4 Sup. Ct. 226, 28 L. ed. 301. See, however, *Laidley v. Hinchman*, 3 W. Va. 423, holding that when a creditor seeks to have the real estate of the defendant subjected to the payment of his judgment and there is a trust deed upon it, all the true creditors must be made parties to the suit.

75. *Tallmadge v. Scill*, 21 Barb. (N. Y.) 34.

76. *Marsh v. Burroughs*, 1 Woods 463, 16 Fed. Cas. No. 9,112.

In an action to compel subscribers to pay up their subscriptions to stock in an insolvent corporation to the satis-

4. Joinder of Parties Plaintiff.—Where there are a number of judgment creditors of the same debtor, who have had executions returned unsatisfied, they may join as parties plaintiff in a single creditor's suit to subject their debtor's property to the payment of their judgments.⁷⁷ And when some of the complainants have judgments

in favor of the plaintiff's judgment, a defect for misjoinder of parties plaintiff for not bringing the suit in behalf of all creditors must be taken advantage of by special demurrer, where it appears upon the face of the pleadings; or by answer, if other creditors should be joined, or such misjoinder is waived. *Tatum v. Rosenthal*, 95 Cal. 129, 30 Pac. 136, 29 Am. St. Rep. 97.

77. *Brown & Dimmock v. Bates*, 10 Ala. 432; *Bullet v. Stewart*, 3 B. Mon. (Ky.) 115.

The provision of the statute which prohibits the commencement of a suit when the amount in controversy does not exceed \$100, is fulfilled by the amount of all judgments exceeding that amount. *Sizer v. Miller*, 9 Paige (N. Y.) 605; *Dix v. Briggs*, 9 Paige (N. Y.) 595.

If all complainants seek the discovery of property which may be subject to the payment of their judgments and ask that the executor and trustee be required to discharge certain alleged duties, their alleged rights of action rest upon substantially the same grounds, and they may join as plaintiff in one action under the section of the code permitting "all persons having an interest in the subject of the action and in obtaining the relief demanded" to be joined as parties plaintiff. *Gorrell v. Gates*, 79 Iowa 632, 44 N. W. 905.

Separate Creditor Without Lien Not a Common Creditor.—Under a statute "to justify more than one separate creditor in uniting as complainants in one and the same suit, they must be judgment creditors with executions returned 'No property found,'" the statute not allowing separate creditors without judgment liens to come in on the same footing with judgment creditors. *Montgomery & F. R. Co. v. McKenzie*, 85 Ala. 546, 5 So. 322.

Whenever there are creditors or other persons having demands, which are cognizable in equity and of equal claim upon a common fund or estate out of which they claim to be paid, the

proper course is for them to unite in one bill, or for one or more to file a bill in behalf of all. *Lentilhon v. Mofat*, 1 Edw. Ch. (N. Y.) 451.

Converting Equitable Into Legal Action.—In equity different judgment creditors are entitled in one bill to reach the equitable property of their common judgment debtor, or remove a fraudulent incumbrance in the way of the collection of their judgments, but they cannot thus unite in an action at law, and where, as a creditor's bill at the time of the trial it had entirely failed of its object, it could not then be converted into a legal action for the purpose of recovering a judgment for damages against the defendants, or either of them. *Sage v. Mosher*, 28 Barb. (N. Y.) 237.

Averment of Interest Insufficient. When a bill is filed by several complainants "on behalf of themselves and all other bondholders" and all that is averred in it as to the interest of the complainant is that they are "subscribers to and holders of bonds of various denominations," the averments are insufficient, as the bonds are of other classes and the averments do not show the classes. *Union I. Investment Assn. v. Lutz*, 50 Ill. App. 176.

If a complainant by his judgment and execution at law, and by his diligence in prosecuting his claim, has obtained a position which entitles him to priority over the other creditors of the debtor, he does not stand in the attitude of a complainant in an ordinary creditor's bill, and since it does not appear that there are any other creditors of equal degree with the complainant, it is not necessary that his bill should be brought for the benefit of all the creditors jointly with him. *Way v. Bragaw*, 16 N. J. Eq. 213, 84 Am. Dec. 147.

There are two sorts of creditor's bills, the one is a statutory bill in aid of a judgment creditor who has exhausted his remedy at law, to enable him to discover the debtor's property and to reach his equitable interest, and

against an individual and others have judgments against the same individual and others, they may unite in a bill against him and join the others.⁷⁸

Nor is it error to join as parties plaintiff two partnerships united in seeking satisfaction from subjects which, as creditors of the defendant, they can properly claim;⁷⁹ or complainants who are interested collectively and ratably in the levy where they represent all of such interests.⁸⁰ Nor are an assignor and an assignee of the judgment,⁸¹ or the person who holds the legal title to the judgment and the one who claims the equitable ownership, improperly joined.⁸²

D. PARTIES DEFENDANT. — 1. Against Whom Relief May Be Obtained. — Under certain statutes, a creditor's bill may be maintained against a corporation, not municipal, if insolvent, without its being a trader.⁸³ A creditor's lien will lie at the instance of a non-resident against a non-resident where the land sought to be subjected lies within the state jurisdiction.⁸⁴ And a non-resident debtor of a resident judgment debtor may be made liable for the payment of the judgment debt by a creditor's suit, and he may be brought in by publication and without personal service, and a judgment against him may be satisfied out of any property upon which a *fieri facias*

under such a bill several creditors, by judgment, of the same debtor, may unite in an action though they had no other common interest than in the relief sought, and all the judgment creditors are proper parties though not necessary parties; the other class are suits brought for the administration of assets to reach property fraudulently disposed of or held in trust, and in such cases the bill is filed in behalf of the plaintiff and all others standing in a similar relation, and it may be filed by simple contract creditors and does not require a judgment to have been obtained, and in this case the bill must be specifically filed by the complainants in behalf of themselves and the rest having like interest. *Conro v. Port Henry Iron Co.*, 12 Barb. (N. Y.) 27.

The creditors of the debtor may bring a suit against an attachment creditor to have the property seized under the attachment subjected to the payment of all the creditors after the priorities and liens thereon have been established, and they are properly joined as plaintiffs and the attachment creditor properly made defendant. *Skinner v. Stuart*, 13 Abb. Pr. (N. Y.) 442.

Failure To Show Other Lienors. When it does not appear from the

record in any way either by evidence, pleading, or by suggestion to the court in any manner, that there were others who claimed liens on the land, and the liens of the plaintiffs are fully ascertained, it is not necessary for anyone else to be made parties before the land should be sold. *Howard v. Stephenson*, 33 W. Va. 116, 10 S. E. 66.

Suit by Judgment Lienor for Himself.—Although a suit is brought by one judgment lienor for the benefit of himself only, under the statute it may be treated as for all, by allowing all lienors to prove their judgments and the court ordering a reference to convene all liens for this makes it a suit for all. *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102.

78. *Blackett v. Laimbeer*, 1 Sandf. Ch. (N. Y.) 366.

79. *Nelson v. Hill*, 5 How. (U. S.) 127, 12 L. ed. 81.

80. *First Nat. Bank v. Tyler*, 55 Mich. 297, 21 N. W. 353.

81. *Neely v. Jones*, 16 W. Va. 625, 37 Am. Rep. 794.

82. *Eaton v. Eaton*, 68 Mich. 158, 36 N. W. 50.

83. *National Bank v. Richmond Factory*, 91 Ga. 284, 18 S. E. 160.

84. *Zecharie & Kerr v. Bowers*, 3 Smed. & M. (Miss.) 641.

can be levied.⁸⁵ But such a suit will not avail a creditor against a debtor of his debtor where the debtor himself would not be able to benefit himself thereby.⁸⁶

Municipal Corporations.—While the courts have jurisdiction to entertain a creditor's bill against a municipal corporation by a creditor thereof,⁸⁷ they will not entertain a bill to subject money owing by a town or county to a debtor, either upon contract or otherwise, to the claims of its creditor.⁸⁸ Exceptions to this general rule have been recognized where the bill seeks to subject money due an absconding city official already in the treasury of the city,⁸⁹ and where the salary sought to be subjected is already due and unpaid.⁹⁰

2. Proper Parties.—The following cases will serve to illustrate who are proper parties defendant in a creditor's suit: a judgment debtor;⁹¹ the maker of a note in a suit to subject the property of the

85. *McCrae v. Bank of West Tennessee*, 6 Coldw. (Tenn.) 474.

86. *Bonte v. Cooper*, 99 Ill. 449.

Where the creditor summons the debtor of his debtor to an excessive amount, the debtor so summoned should apply to the court to compel the complainant to select whom he would hold and in default of such selection the court would assign who should be holden, and if no application was made all should be bound. *Gilmore v. Miami Bank*, 3 Ohio 503.

87. *Hinsdale-Doyle Granite Co. v. Tilley*, 19 Fed. 799.

88. *Ga.*—*Morgan v. Rust*, 100 Ga. 346, 28 S. E. 419. *Ill.*—*Addyston Pipe Co. v. City of Chicago*, 170 Ill. 539, 48 N. E. 967, 44 L. R. A. 405; *Addyston Pipe Co. v. City of Chicago*, 58 Ill. App. 273. *Mo.*—*Grist v. St. Louis*, 156 Mo. 643, 57 S. W. 766, 79 Am. St. Rep. 545.

A creditor's bill to subject the equity and chose in action of counties to the payment of judgments against said counties cannot be entertained either by statute or otherwise. *Boalt v. Com. of William Defance Paulding Counties*, 18 Ohio 13.

But a creditor who has furnished his debtor material for building a courthouse, may reach the amount still due such debtor, as contractor, from the county. *Riggin v. Hillard*, 56 Ark. 476, 20 S. W. 402, 35 Am. St. Rep. 113.

89. *Pendleton v. Perkins*, 49 Mo. 565.

90. *City of Newark v. Funk & Bro.*, 15 Ohio St. 432.

A creditor unable by execution at law, to recover his debt, may subject

to that debt the money actually due and owing from the city to its officers for services at the time of the commencement of the suit, fully rendered or when the money has been set apart for his use, and subject immediately to his demand, but to extend the rule further and permit a creditor to file his bill in anticipation of future salary to become due for services to be rendered in the future would be detrimental to the public weal and is not permitted. *Speed v. Brown*, 3 B. Mon. (Ky.) 108.

91. *Ferguson v. Ann Arbor R. Co.*, 17 App. Div. 336, 45 N. Y. Supp. 172; *Jackson v. Hull*, 21 W. Va. 661; *Shenandoah Nat. Bank v. Bates*, 20 W. Va. 210; *Norris Caldwell & Co. v. Bean*, 17 W. Va. 655. See also *supra*, III, A.

Where a wife voluntarily files an answer to a bill in which she denies all charges of fraud or that the debtor had any property right in the land to which her husband has title and she appear by counsel to support the proof of the statement of her answer, it was not an abuse of judicial discretion to treat her as liable with the other defendants for the payment of costs, her interest in the land being at most only an inchoate right of dower. *Scott v. Aultman Co.*, 211 Ill. 612, 71 N. E. 1112, 103 Am. St. Rep. 215.

Objection That Judgment Debtor Is Not a Party.—Where a judgment debtor transfers his stock of goods to a third party and a bill is brought against the third party to subject said goods in his hands to the payment of the judgment, the objection that the

endorser thereof to the payment of a judgment thereon;⁹² the bank wherein the fund sought to be reached is deposited;⁹³ and the assignor of the obligations upon which one of the judgments sought to be enforced by the plaintiff creditor is founded.⁹⁴

Action by Trustee. — When the debtor has assigned property to a trustee for the benefit of others, these others must be made parties,⁹⁵ and where a wife has *bona fide* claims against her husband she must be made a party to a suit to subject his property to the payment of his debts.⁹⁶ But a person is not a proper party defendant merely because he is a medium of transfer of the property sought to be reached,⁹⁷ or because he is a foreign executor of an estate when there is a resident executor.⁹⁸ Nor is a wife a proper party defendant in

judgment debtor is not made a party does not lie in the defendant but the court will permit the judgment debtor to be notified of the tendency thereof and let him voluntarily come in as a defendant if he desires to do so. *Phillips v. Weston*, 16 Ga. 137.

92. *Fidelity, L. & T. Co. v. Engleby*, 99 Va. 168, 37 S. E. 957.

93. *Nourse v. Weitz*, 120 Iowa 708, 95 N. W. 251.

94. *Preston v. Astor's Admrs.*, 85 Va. 104, 7 S. E. 344.

A demurrer for improper parties defendant is not well founded when the assignor of the obligations, upon which one of the judgments sought to be enforced by the plaintiff's bill is founded, and the alienees of certain real estate of the defendant are joined. *Preston v. Astor's Admrs.*, 85 Va. 104, 7 S. E. 344.

95. *Helm v. Hardin*, 2 B. Mon. (Ky.) 231.

When a bill is brought to subject property in the hands of a trustee for the benefit of the wife and children of the deceased for debts made by said wife, the children must be made parties thereto. *Prewett v. Land*, 36 Miss. 495.

See *Cronin v. Gray*, 20 Tex. 460, holding that in an equitable proceeding to make discovery of and subject the trust fund to the payment of debts, the bill is defective in not making the *cestui qui trust* a party and in not stating the facts of the transaction in such a manner as to enable the court to determine that the fund is liable for the debt.

96. *Smith v. Shaffer*, 29 Neb. 656, 45 N. W. 936.

When a creditor of a husband attempts to subject property conveyed

by him to his wife to a creditor's bill, her children should be permitted to be made parties. *Sayers v. Wall*, 26 Gratt. (Va.) 354, 21 Am. Rep. 303.

97. *Keiby v. Steele*, 65 W. Va. 719, 64 S. E. 919.

If it is not sought in the creditor's suit to set aside the respective transfers of the property from the first assignee and then that of the second and that of the third assignee but the plaintiff merely claims an equitable lien upon the assets of the property of the first assignee now in the possession of the third assignee, it is not necessary to make the intervening assignee a party. *McNeal v. Hayes Mach. Co.*, 118 App. Div. 130, 103 N. Y. Supp. 312.

If it does not appear that a conveyance was made after the settlement upon his wife by the debtor, which is sought to be set aside, and the property subjected to the creditors suit, the grantor in such conveyance is not a necessary party to the creditor's suit. *Sively v. Campbell*, 23 Gratt. (Va.) 893.

If the creditors of a municipal corporation which had conveyed certain property to the defendant and paid the purchase price thereof out of the city treasury, bring a suit against the defendant to subject said party to the payment of its debts, the property having been owned and held by the town for other than governmental purposes, they need not join the grantor or city in the creditor's suit, the conveyance being deemed fraudulent. *Southern R. Co. v. Hartshorne*, 150 Ala. 217, 43 So. 583, 124 Am. St. Rep. 68.

98. *Plume, etc. Co. v. Baldwin*, 87 Fed. 785.

a suit against her husband because he happens to be a lunatic,⁹⁹ or because she has securities deposited with those of her debtor husband when the suit is to reach only those deposited by her husband.¹

And the custody of the court of certain property in possession of the court having vested in its appointee, such appointee is not a proper party defendant in order to reach such property by a creditor's suit.²

When a person holding a fiduciary position has entire charge of the matters and the disposition thereof, it is unnecessary to make the beneficiaries, who are interested but have no control of the property, parties;³ nor is it necessary to join the personal representatives of a father when the bill seeks to reach any interest that his son had in the property.⁴ And when a judgment creditor has assigned his whole interest in the judgment, he need not be made a party to a suit brought by his assignee.⁵

A grantor from whom the debtor has purchased land and at whose request the grantor transferred it to a third person need not be made a party in a suit by a creditor of such debtor to subject said land to the payment of his judgment.⁶

As to Persons Having or Claiming Interest in Property. — All persons having an interest in a fund in which the debtor has an undivided interest which is sought to be reached are proper parties defendant,⁷

99. *Copous v. Kauffman*, 8 Paige (N. Y.) 583, sustaining demurrer by wife.

1. *McMullen v. Ritchie*, 57 Fed. 104.

2. *Tuck v. Manning*, 150 Mass. 211, 22 N. E. 1001, 5 L. R. A. 666.

3. **U. S.**—*Chicago, R. I. & P. R. Co. v. Howard*, 7 Wall. 392, 19 L. ed. 117. **Ky.**—*Dana v. Brown*, 1 J. J. Marsh. 304. **Minn.**—*Winslow v. Minn. & P. R. Co.*, 4 Minn. 230. **Tenn.**—*Harrison v. Hollum*, 5 Coldw. 525. **Va.**—*Hale v. Horne*, 21 Gratt. 112.

The accommodation acceptor of a bill of exchange given to secure the purchase price of land of the complainant's principal debtor, is not a necessary party in a creditor's suit to subject the land after the payment of the purchase money to the satisfaction of the complainant's judgment. *Nix v. Winter*, 35 Ala. 309.

4. *McArthur v. Hoysratt*, 11 Paige (N. Y.) 495.

5. *Morey v. Forsyth*, 1 Walk. (Mich.) 465; *Scott v. Ludington*, 14 W. Va. 387.

But in *Cooper v. Gunn*, 4 B. Mon. (Ky.) 594, it was held that where a complainant in a creditor's suit makes title through an assignment thereof by

the plaintiff to a trustee and by such trustee to him, it is necessary to the maintenance of such suit that the original plaintiff and the trustees be made parties to the suit.

When Debtor Has Claim Against Assignor.—Where the assignee brings a creditor's suit and the judgment debtors set up a claim they had against the assignor as a set-off, the court will not permit testimony to be received of such set-off when the assignor has not been made a party. *Gildersleeve v. Burrow*, 24 Ohio St. 204.

6. *Ballentine v. Beall*, 4 Ill. 203.

7. See *Bergmann v. Leavitt*, 113 App. Div. 899, 99 N. Y. Supp. 748, holding that where a creditor's suit is brought to subject the debtor's interest in a certain trust fund to the payment of a judgment and it appears that a certain fund had been left to a widow to her use for life and at her death to be divided between her two children, one of which was the defendant, and by agreement between the widow and the children the fund had been set apart and that the fund had increased as invested, the other child was a proper party to the suit.

If one of the distributees of an es-

and so are the trustees and beneficiaries of a trust fund sought to be reached,⁸ and the person holding title to a moiety of the land sought to be sold.⁹ But one who has an interest in an estate together with the debtor is not a proper party when his interest will not in any way be affected by the suit.¹⁰

All persons who have liens upon the property sought to be subjected, who appear upon the records as being lienors, are proper parties defendant,¹¹ as are also the children of the debtor who have a lien upon the property conveyed to their father and sought to be

tate is made a party defendant the other distributees are necessary parties therein where the debtor's interest is an individual interest in a large estate consisting of land, chattels and credits. *Carlton v. Felder*, 6 Rich. Eq. (S. C.) 58.

The holder of the legal title to land, attempted to be subjected to the payment of a judgment, must be made a party to the proceedings. *Ogle v. Clough*, 2 Duv. (Ky.) 145.

When a supplemental bill was filed in 1867 setting up that since the original bill was filed, an execution had been levied on the land and been purchased by the complainant and the bill seeks to have complainant's title under the bill established as paramount, it is necessary for the person who appears to have been a *bona fide* purchaser of the land from the person to whom the debtor had conveyed to be made a party thereto. *Low v. Pratt*, 53 Ill. 438.

8. *Carnahan v. Ashworth* (Va.), 31 S. E. 65; *Marshall's Exr. v. Hall*, 42 W. Va. 641, 26 S. E. 300; *Jackson v. Hull*, 21 W. Va. 601; *Shenandoah Nat. Bank v. Bates*, 20 W. Va. 210; *Norris Caldwell & Co. v. Bean*, 17 W. Va. 655.

Making Curator Party Not Sufficient.

Where a creditor's bill is brought to subject to the plaintiff's debts the proceeds of three insurance policies on the life of the deceased debtor, which were originally taken out by him for the benefit of himself, his executors or assignees, and two of them were afterwards assigned by him to his wife and children, and the third exchanged for a policy in favor of his wife, it is not sufficient merely to make the curator of the minor children a party thereto for the title to the property is in the infants alone and not in the curator, and the pro-

ceeding must be brought with the children as parties. *Judson v. Walker*, 155 Mo. 166, 55 S. W. 1083.

Legal title in Trustee.—Where the debtor owns an undivided equitable interest in property the legal title to which is in the hands of a trustee, it is not necessary under the statute to make the trustees parties in order to subject this interest to the payment of a creditor's judgment. *Russell v. Burke*, 180 Mass. 543, 62 N. E. 963.

9. *Horton v. Bond*, 28 Gratt. (Va.) 815.

10. *Burke v. Morris*, 121 Ala. 126, 25 So. 759; *Cassady v. Grimmelman*, 108 Iowa 695, 77 N. W. 1067.

If it is attempted to reach the defendant's interest in certain devises and legacies, it is not necessary to make all the devisees and legatees parties, where the others have no common interest in the bill and it is not shown how under the facts alleged their interest can be affected in any material way by granting the relief prayed against the defendant. *Bryan v. May*, 9 App. Cas. (D. C.) 383.

11. All the several plaintiffs as well as all the several defendants in all the judgments in the court of records in the counties in which the land sought to be subjected lie, which have been rendered against the judgment debtor alone or the judgment debtor and other defendants jointly, and also all the plaintiffs and all the defendants in any such judgments whether rendered by court of records or by justice in any part of the state, which have been docketed on the judgment lien docket of said county or counties, are necessary parties defendant. *Jackson v. Hull*, 21 W. Va. 601; *Shenandoah Nat. Bank v. Bates*, 20 W. Va. 210; *Norris Caldwell & Co. v. Bean*, 17 W. Va. 655.

reached,¹² and a third person whose title to the property under a levy is sought to be declared null and void.¹³

3. Necessary Parties.—When a creditor's suit is brought to assail a deed, either for the purpose of having it ratified or vacated, all parties to the deed are necessary parties to the suit.¹⁴

In Case of Vendor's Death.—When a judgment debtor has purchased property and a portion of the purchase money remains unpaid, and the vendor dies, a judgment creditor bringing a suit to subject the debtor's payments to his judgment must make the heirs of the vendor parties.¹⁵

Property in Hands of Third Person.—When a creditor's suit is brought to reach a debt owed to the judgment debtor, the judgment debtor is a necessary party.¹⁶ And when property of the judgment debtor in the hands of third persons is sought to be reached, such third persons are necessary parties,¹⁷ though in a bill of discovery the complainant has a right to bring the action against the debtor alone.¹⁸

Lien Creditors.—When it is sought to reach property upon which creditors have already attached the lien, such creditors are necessary parties to the suit.¹⁹

12. *Hutton v. Lockridge*, 22 W. Va. 159.

13. *Gavezzi v. Dryfoos*, 110 App. Div. 90, 97 N. Y. Supp. 59.

14. *Ward v. Hollins*, 14 Md. 158.

15. *McNab v. Heald*, 41 Ill. 326.

16. **U. S.**—*United States v. Howland*, 4 Wheat. 108, 4 L. ed. 526. **Ark.** *Boone County v. Keck*, 31 Ark. 387. **Ga.**—*Stephens v. Whitehead*, 75 Ga. 294. **N. Y.**—*Miller v. Hall*, 70 N. Y. 250.

Judgment Debtor's Property in Hands of Attaching Creditors.—In an action to subject the judgment debtor's property in the hands of attaching creditors to a creditor's suit the judgment debtors are not necessary parties as to the plaintiff's rights against them and the property is established by the final judgment of the court, and because they have since the attachment assigned and transferred their interest and have no claim nor interest in the property. *Skinner v. Stuart*, 13 Abb. Pr. (N. Y.) 442.

17. *Stoeckle v. Ehlers*, 37 Mich. 261; *Gavazzi v. Dryfoos*, 47 Misc. 15, 95 N. Y. Supp. 199; *Robeson v. Ford*, 3 Edw. Ch. (N. Y.) 441.

But in *Brightwell v. Mallory*, 10 Yerg. (Tenn.) 196, it was held that when the judgment debtor owns shares of stock in a bank and a creditor

brings suit to subject same to the payment of his judgment the bank is not a necessary party thereto.

18. *Bay State Iron Co. v. Goodall*, 39 N. H. 223, 75 Am. Dec. 219; *Cresswell v. Smith*, 8 Lea (Tenn.) 688.

19. *Rountree v. McKay*, 59 N. C. 87; *Bilmyer v. Sherman*, 23 W. Va. 656; *Dickinson v. R. Co.*, 7 W. Va. 390; *Hoffman v. Shields*, 4 W. Va. 490.

A creditor who brings a bill against a debtor to enforce the lien of his judgment against his debtor's land should sue on behalf of himself and all other judgment creditors excepting those made defendants, and he should make formal defendants in his suit all other creditors who have obtained judgment in the court of record in which the debtor owns lands which are sought to be subjected to the payment of the judgments and also all creditors who have obtained judgments in any part of the state which have been recorded in the judgment lien docket of said county. *Pappenheimer v. Roberts*, 24 W. Va. 702; *Grove v. Judy*, 24 W. Va. 294; *Livesay v. Feamster*, 21 W. Va. 83; *Neely v. Jones*, 16 W. Va. 625.

If a bill is brought to enforce liens for the benefit of lien holders, and the claims cannot be equitably settled

Mortgagee.—In an action by a creditor to reach money due upon a mortgage, on the ground that the assignment of the mortgage was fraudulent, the mortgagee, though a non-resident is a necessary party.²⁰

As to Life Tenant and Remaindermen.—Where the deceased debtor had devised his land, which the bill sought to reach, to one person for life and the remainder to others, the holder for life and the remaindermen are necessary parties;²¹ though it is not necessary to make remaindermen parties when the suit is merely to subject the life estate of the debtor.²²

Assignee of Complainant.—When the sole complainant is discharged under the insolvent act and makes an assignment for the benefit of creditors, his assignee must be made a party,²³ and when one of the defendants has become a bankrupt his trustee must be made a party to the suit.²⁴

without taking evidence as to the claim of one of the lien holders, this lien holder should be made a party and his rights adjusted. *Smith v. Parsons*, 33 W. Va. 644, 11 S. E. 68.

All the lien creditors who have filed their claims and have had them reported by the commissioners thereby become parties to the suit, and being such parties the court has the right and authority, after the debt of the formal plaintiff had been paid and satisfied, to dismiss the suit as to him and direct that the cause shall thereafter be prosecuted in the names and at the cost of any and all of the unsatisfied creditors who had filed their claims and thus became parties to the suits. *Bilmyer v. Sherman*, 23 W. Va. 656.

If there was a formal order directing a convention of lien holders after publication, for a failure to make lienors formal parties, the court will not reverse a decree; the liens being ascertained and definite. *Norris, Coldwell & Co. v. Bean*, 17 W. Va. 655.

A decree of sale in equity does not affect junior lienors, not parties thereto, for junior lienors, when not made parties to a bill for foreclosure or sale, are not bound by the decree, nor is that rule violated when it is held that another has the title, as that consequence flows from the fact that the lien of the judgment under which another claim is prior to that under which the junior lienors claim, and whatever rights the junior had prior to the sale in equity which gives such

other the paramount title they still have, wholly unimpeached, by that sale or by any other cause, unless they are barred by lapse of time or laches, and the lien of the junior creditor's judgment still remains in full force. *Howard v. Milwaukee, etc. R. Co.*, 101 U. S. 837, 25 L. ed. 1081.

20. *Gray v. Schenck*, 4 N. Y. 460.

When no relief is asked against a mortgage of the defendant, and his mortgage is not assailed and his title under it is conceded to be valid there is no ground on which the mortgagee can be regarded as a necessary party to the suit. *Trego v. Skinner*, 42 Md. 426.

21. *Bowen v. Gent*, 54 Md. 555.

Where, under a creditor's bill, a decree for the sale of certain real estate of the deceased is made, the decree will be set aside until certain remaindermen who are minors are made parties to the proceedings and have an opportunity of submitting an exception to the sale which they may make available to prevent it. *Whaley in E. Fraser & Dill v. Charleston*, 8 S. C. 344, 30 Am. Rep. 26.

22. *Moore v. Bruce*, 85 Va. 139, 7 S. E. 195.

23. *Sedgwick v. Cleveland*, 7 Paige (N. Y.) 287.

24. *Lowry v. Morrison*, 11 Paige (N. Y.) 327.

No Objection Made as to Parties. When one of the defendants has become a bankrupt and the necessity for the addition of the assignee as a party becomes apparent, and no objection is

In Case of Joint Interests in Property.—When it is sought to subject a debtor's interest in certain notes where such interest is inseparable from the interest of other joint owners of the notes, these others are necessary parties,²⁵ and when a distributive share is sought to be subjected, all the distributees are necessary parties.²⁶

As to Joint Debtors.—But in order to bring a creditor's suit against one joint judgment debtor, it is not necessary to make the other joint debtor a party when he has obtained an order from the supreme court staying the proceedings as to him,²⁷ or when an execution has been returned unsatisfied as to him and the answer admits his insolvency,²⁸ or when upon a return of an execution unsatisfied against him, the complainant's claim is shown to be a lien upon certain real estate belonging to the other joint debtor and that the other alone has an interest in the suit.²⁹

4. Joinder of Parties Defendant.—A distinct right of property of each of two or more defendants may be pursued by a single action against both or all in behalf of creditors to whom they are jointly liable.³⁰ And so it is proper to join as defendants the judgment debtor and all others through whom the title to the property has passed in conveying said property.³¹ And where separate judgments have been obtained against the maker and drawer of a note and executions have been returned upon both unsatisfied, they may be joined.³²

taken to the bill that proper parties are not made, there is no sound reason why the case should not stand over in order to make the necessary parties. *Rugely & Harrison v. Robinson*, 10 Ala. 702.

Where Assignee Is Counsel in the Cause.—If defendant in a creditor's suit has become a bankrupt *pendente lite* but the record disclosed that his assignee in bankruptcy was counsel in the cause, and was cognizant of all the proceedings, was one of the commissioners of sale and an assignee in the bankruptcy, the assignment of error that the cause was not revived in the name of the assignee is not well taken. *Merchants Bank v. Campbell*, 75 Va. 455.

25. *Martin v. Carter*, 90 Ala. 96, 7 So. 510.

26. *Hartley v. Bloodgood*, 16 Ala. 233.

When land is conveyed to one son for himself and his three brothers, a creditor's bill in which they have not been made parties cannot have the effect of subjecting the land to the payment of a judgment against their grantor. *Gudgel v. Kitterman*, 108 Ill. 50.

27. *Commercial Bank v. Meach*, 7 Paige (N. Y.) 448.

28. *Rankin v. Rothschild*, 78 Mich. 10, 43 N. W. 1077; *Williams v. Hubbard*, 1 Mich. 446.

29. *Fox v. Moyer*, 54 N. Y. 125.

30. *Braduer v. Holland*, 33 Hun (N. Y.) 288.

“A demurring defendant is not in position to complain that complainant has found it necessary to join other defendants in the effort to secure a lien upon sufficient property of the judgment debtor to satisfy her claim.” *Wilson v. Addison*, 127 Mich. 680, 87 N. W. 109.

31. **U. S.**—*Prevost v. Gorrell*, 19 Fed. Cas. No. 11,405. **Ala.**—*Lehman v. Meyer*, 67 Ala. 396. **Fla.**—*Hayden v. Thasher*, 18 Fla. 795. **Ill.**—*Hurd v. Ascherman*, 117 Ill. 501, 6 N. E. 160. **Mich.**—*Hulbart v. Detroit Cycle Co.*, 107 Mich. 81, 64 N. W. 950. **N. H.**—*Chase v. Searles*, 45 N. H. 511. **S. C.**—*South Carolina v. Foot*, 27 S. E. 340. **Wis.**—*Winslow v. Donsman*, 18 Wis. 456.

32. *Austin v. Figuera*, 7 Paige (N. Y.) 56.

It is also proper to join as defendants the representatives of the deceased member of two firms with the surviving partner of one of the firms when the creditors were common creditors of both firms,³³ and for an assignee of a judgment in a creditor's suit against the judgment debtor to join the co-plaintiff of his assignor, who claimed to be the owner of the entire judgment.³⁴

Where a debtor, in order to secure his sureties, gave them a mortgage, and one of them took charge of the property to administer it until the notes for which they were sureties were paid, it is proper for the other sureties in bringing a suit for an accounting, to join such surety with the debtor as defendants in the action.³⁵

In a creditor's suit in the federal court, upon a judgment obtained in the state court for the benefit of creditors, it is proper to bring in as parties defendant the parties to the suit in the state court and the representatives of the estates.³⁶

E. INTERVENTION. — 1. Right To Intervene. — Where a creditor's suit is brought for the complainant and for all others who may be made parties, to subject the property of the debtor to the payment of his debts, any creditor presenting his claim cannot be refused participation as a party therein.³⁷ And when the matter has been re-

33. *Nelson v. Hill*, 5 How. (U. S.) 127, 12 L. ed. 81.

34. *Beagg v. Gaynor*, 85 Wis. 468, 55 N. W. 919.

35. *Anthony v. Ray & Somerville*, 28 Mo. 109.

36. *Howards v. Selden*, 5 Fed. 465.

37. **Ga.**—*Branan v. Baxter & Co.*, 122 Ga. 222, 50 S. E. 45. **Ind.**—*Doherty v. Holliday*, 137 Ind. 282, 32 N. E. 315, 36 N. E. 907. **Mo.**—*Williams v. Jones*, 23 Mo. App. 132. **N. J.** *Jones v. Fayerweather*, 46 N. J. Eq. 237, 19 Atl. 22.

As qualifying or amplifying the principles here stated, see *supra*, III.

Necessity To Exhaust Legal Remedies.—In order to entitle a creditor to intervene to reach property in the hands of the court, apparently belonging to another creditor of their common debtor, he must show that he has exhausted his remedy at law or he must show a specific lien upon property; and when his petition alleged "that the petitioner was induced not to take steps to intervene . . . and have his rights determined in that proceeding upon the strength of a promise made by the respondents that the balance of the fund should be applied on his judgment if the intervening creditors succeeded is a sufficient reason to justify the court in dismissing

the petition." *Meissner v. Meissner*, 68 Wis. 336, 32 N. W. 51.

But in *Carp v. Chipley*, 73 Mo. App. 22, it was held that when it has been demonstrated by one judgment creditor that a legal remedy is unavailing, other creditors may then intervene and they should not be turned away and required to sue at law and obtain a judgment, etc., in order to make proof of a fact already in existence.

Asserting Judgment Lien in a Second Creditor's Suit.—Where a creditor fails to prove his judgment in a creditor's suit brought first when his judgment is a lien upon property not involved therein, he is not barred thereby from coming and proving his claim in a subsequent creditor's suit in which the land upon which his judgment is a lien is involved. *Gilbert v. Lawrence*, 56 W. Va. 281, 49 S. E. 155.

Where all the creditors are to be paid in proportion, when any creditor institutes a suit to obtain the benefit of the trust the decree must be such that all other creditors may come in under it. *Long v. Yanceyville Bank*, 85 N. C. 355.

When under a bill a receiver has been appointed and has come into the possession of the fund, a claimant upon such fund can be heard before the master upon a proper application, *pro in-*

ferred to a commissioner, any creditor, though not a party to the suit, has a right to appear before the commissioner and file his claim.³⁸

Where the design of the bill is to declare property subject to the lien of any attaching or judgment creditors, all creditors having

teresse suo, and the master should protect the rights of such party by such order as will comport with the rights of all parties subject to the review of the chancellor. *Field v. Jones*, 11 Ga. 413.

In Debtor's Application Under Insolvent Debtor's Act.—The creditors of a debtor, who is an applicant for the benefit of the insolvent debtor's act, may join therein in order to enlarge the fund for the payment of creditors and to exclude fraudulent creditors. *Brandon & Nethers v. Gowing*, 6 Rich. Eq. (S. C.) 5.

Since the property of a bankrupt is subject to the claims of creditors of the bankrupt and the money is held in trust for his creditors, a creditor has the right to file a bill and detain the fund for the benefit of creditors, and having done so, another creditor has the right to intervene and make himself a party. *Clark v. Clark*, 17 How. (U. S.) 315, 15 L. ed. 77.

A suit in chancery, although filed on behalf of one creditor only, may, by decree covering all creditors, be converted into a general creditor's bill and will allow all consequences attending such. *Williams' Admr. v. Newman*, 93 Va. 719, 26 S. E. 19; *Hurn v. Keller*, 79 Va. 415; *Piedmont & A. Ins. Co. v. Maury*, 75 Va. 508; *Arnold v. Casner*, 22 W. Va. 444.

Sufficient if Opportunity To Intervene Is Given.—It is sufficient in the beginning of a creditor's suit if an opportunity be given to other creditors to present and establish their demands, and the title need not be amended so as to make it in behalf of all other creditors. *Brenan v. Burke*, 6 Rich. Eq. (S. C.) 200.

Where Formal Request To Be Intervenor Unnecessary.—When an insolvent corporation mortgaged its property to two of its creditors, and another creditor brought suit for himself and all intervening creditors to set aside mortgages and have the mortgagees declared trustees for the creditors, the mortgagees did not have to

put on record a formal request to be admitted "under the invitation of the bill" in order to share the benefits of the suit on an equality with the other intervenors, since the mortgages were not set aside for fraud. *Lippincott v. Shaw Carriage Co.*, 34 Fed. 570.

When the original bill was not good as a creditor's bill, the proceeding was one in which the creditors who sought to intervene had no interest and it was not error to deny their prayer to become parties by intervention. *Braman v. Baxter & Co.*, 122 Ga. 222, 50 S. E. 45.

Presentation of an Assigned Claim. When a master is appointed to take proof of claims and a claim is presented which seems to have been assigned, the proper course would be for the claim to be presented in the way of a petition to the court making the assignee a party so that he may have opportunity of asserting whatever interest he may claim. *Burnham v. Lamar Ins. Co.*, 79 Ill. 160.

After the filing of the master's report, a purchaser of the rights of one of the creditors, pending the litigation, cannot come in without a supplemental bill. *Wilder v. Keeler*, 3 Paige (N. Y.) 164.

A judgment debtor may be permitted to intervene in a suit brought to subject his interest in property and assets to the payment of the judgment, when, after the cause has been heard on further directions, he submitted to be bound by the previous proceedings, as it places him, as to further proceedings, in the same situation as if he had been a party from the first. *Cowing v. Greene*, 45 Barb. (N. Y.) 585.

38. *Wilson v. Carrico*, 50 W. Va. 336, 40 S. E. 439.

When a creditor proves his claim before a commissioner in a creditor's suit, he becomes a substantial party to the cause and is in a position to appeal from any adverse decree. *Carnahan v. Ashworth* (Va.), 31 S. E. 65.

liens are entitled to be heard and have their liens protected.³⁹ And when a receiver has sold property without an order of court, he being appointed such in a creditor's suit, other judgment creditors may intervene and have such sale declared illegal.⁴⁰ But where the action is based upon a personal privilege, like usury, intervenors are not allowed to come in.⁴¹

Any person claiming an interest in the property which it is attempted to subject to the claims of creditors, may be permitted to come in as a party to the suit.⁴²

Persons failing to come in, after an opportunity to do so in a suit in behalf of complainant and all other creditors, will be excluded from the benefit of the decree made, and yet being, in an essential sense, parties to the action, they will be bound by it.⁴³

2. Time To Intervene.—A creditor may intervene at any time after the creditor's bill has been filed if his claim is filed within the time specified in the proceedings for presenting claims,⁴⁴ and may

39. Kuhl v. Martin, 26 N. J. Eq. 60; Voorhees v. Reford, 14 N. J. Eq. 153.

When it appears by record that the parties attempting to intervene tendered and offered by proper petitions liens older than any of those reported by the commissioner and prayed to be made defendants, it was error to reject their petitions and prayers. Pappenheimer v. Roberts, 24 W. Va. 702.

40. Campan v. Detroit Driving Club, 130 Mich. 417, 90 N. W. 49.

41. Boughton v. Smith, 26 Barb. (N. Y.) 635.

42. Taylor v. Mills, 2 Edw. Ch. (N. Y.) 318; Kanawha Val. Bank v. Wilson, 29 W. Va. 645, 2 S. E. 768 (as to heirs).

Interest in Property Conveyed Pendente Lite.—When, after a creditor's suit was brought, and a short time before the decree was rendered, a portion of the land sought to be subjected was conveyed to certain parties, since their interest was acquired *pendente lite*, it was not necessary that they be made parties to the suit. Price v. Thrash, 30 Gratt. (Va.) 515.

43. Dobson v. Simonton, 93 N. C. 268. See also, *infra*, VII, E.

When certain plaintiffs are indorsers of notes of the deceased, the creditors to whom they are bound as sureties are under an obligation to bring in their claims and offer them for a dividend in the case, and if they fail to do so after having notice of this suit they can obtain no satisfaction from the estate after the whole of it

has been distributed and the plaintiff as sureties would be discharged; or, after coming in, if they fail to establish their claims and obtain a dividend, then those plaintiffs can only be bound for the balance; and to enable the plaintiffs to avail themselves of either of these defenses against the claims it should be shown to the auditor and clearly set forth by him in his statement of their claims, that they are those very liabilities specified in the bill against which the plaintiffs ask an indemnity or a discharge. Simmons v. Tongue, 3 Bland (Md.) 341.

44. In Tabor v. Royal Ins. Co., 124 Ala. 681, 26 So. 252, it was held that when a private business corporation becomes insolvent and the debts must be determined in order to discover to whom *pro rata* payments are to be made, the court is required to fix a day for the bringing in of such claims, and the court will not thereafter permit a creditor to proceed on his own account but he must come in under the former bill.

Opportunity should be given to all the other creditors of the testator coming in and agreeing to bear their proportion of the cost, to prove their debts before the commissioner within a reasonable time prescribed by the chancellor, and to participate equally in the equitable assets. Kinney v. Harvey, 2 Leigh (Va.) 70, 21 Am. Dec. 597.

"If, from the delay which has taken place, it is manifest that no correct account can be rendered, that any conclusion to which the court can arrive

be permitted to file his claim up to the time of the actual distribution of the assets,⁴⁵ if he has not been guilty of laches in filing it,⁴⁶ and if the rights of others are not thereby prejudiced.⁴⁷

3. Rights After Intervention.—In some jurisdictions where the suit is such, that, as a matter of right, creditors may come in and be made parties and they have done so, it is not competent for the plaintiff to effect any compromise or do anything that will curtail

must at best be conjectural, and that the original transactions have become so obscured by time, and the loss of evidence and the death of parties as to render it difficult to do justice, the court will not relieve the plaintiff." *Kavanaugh v. Kavanaugh*, 98 Va. 649, 37 S. E. 275.

Where several creditors have been admitted as plaintiffs upon the filing of their bills and have agreed to contribute to the expenses of the suit they may go at once before the commissioners and have their claims stated subject to exceptions as in other cases. *Anderson v. Anderson*, 4 Hen. & M. (Va.) 475.

When Creditor Does Not See Notice To Come in.—Where a general creditor's bill is filed and six months' notice is given creditors to come in, this is a reasonable time; and a complainant who did not see the notice is unfortunate and cannot intervene; but when a creditor is not in a position to intervene, he may, on petition to the court, be allowed to prosecute his action at law to judgment and then file his claim. *Barnett v. East Tenn. V. & G. R. Co. (Tenn.)*, 48 S. W. 817.

45. *Bank v. Dugan*, 2 Bland (Md.) 254; *Jones v. Fayerweather*, 46 N. J. Eq. 237, 19 Atl. 22.

In *Ex parte Naylor & Smith*, 11 Rich. Eq. (S. C.) 259, 78 Am. Dec. 457, it was held that when a creditor has failed to present and prove his claim before the day appointed in the order for actual distribution, the court will not afford any protection from laches and the petitioners are not entitled to be saved from the consequence of the lapse of time before the filing of the petition.

After Decree.—The joining of parties plaintiff is so much a matter of form that new parties may come in at almost any stage of the proceedings on a proper application and under special circumstances, even after decree, if

they can show an interest in the common fund. *Seaver v. Bigelow*, 5 Wall. (U. S.) 211, 18 L. ed. 595.

46. *Continental Trust Co. v. Toledo St. L. & K. C. R. Co.*, 82 Fed. 642; *United States F. O. G. Co. v. Rainey (Tenn.)*, 113 S. W. 397.

Upon Conditions.—In creditor's suits it is not the practice of the court to hold creditors to very strict terms as to the time when they shall come in and prove their debts so long as it can be done without injustice to other parties, and those who have neglected to prove their claims within the time prescribed by the master may make their proof upon payment of the extra cost. *Pratt v. Rathbun*, 7 Paige (N. Y.) 269.

After the cause has been finally heard, a creditor cannot be admitted unless his admission is by consent, on condition that those who have expended labor and incurred risks be first paid. *Jones v. Davenport*, 45 N. J. Eq. 77, 17 Atl. 570.

47. *Brooks v. Gibbons*, 4 Paige (N. Y.) 374; *Marling v. Robrecht*, 13 W. Va. 440.

A creditor applying for leave to prove his debts after the filing of the master's report must give notice of the application to the solicitors of the creditors who have established their claims before the master as well as to the original parties to the suit, and must file his application within a reasonable time after he is informed that his debts had not been proved before the master. *Wilder v. Keeler*, 3 Paige (N. Y.) 164.

Statute of Limitations Runs Until Claim Is Filed.—There is no objection to letting certain other parties come in as complainants when an amended bill is filed, but the statute of limitations will run against their claims until they do come in. *McDowell v. Goldsmith*, 2 Md. Ch. 370.

the rights of the intervenors in the disposition of the suit;⁴⁸ while in other jurisdictions, until a decree is made, the plaintiff may discontinue the suit, or prosecute it with dispatch at his election.⁴⁹

4. Misjoinder of Intervenor.—a. *How Taken Advantage of.* A defect of or a misjoinder of parties must be taken advantage of

48. *Mix & Storey v. Dukes*, 58 Tex. 96; *Honesdale Shoe Co. v. Montgomery*, 56 W. Va. 397, 49 S. E. 434.

Although the debt of the plaintiff was paid, the suit was for all lienors, and when others had appeared and become parties, the payment to the plaintiff could not defeat the decree for "the decree belonged to all and not one of the creditors, and any creditor yet unpaid had a right to enforce it." *Shumates Exrs. v. Crockett*, 43 W. Va. 491, 27 S. E. 240.

After an order of reference, the plaintiff in a creditor's suit ceases to have absolute control over it, and it cannot be dismissed by him without the consent of the other creditors who have filed claims. *Lewis v. Laidey*, 39 W. Va. 422, 19 S. E. 378; *Billmeter v. Sherman*, 23 W. Va. 662.

Under Delay by Original Complainant.—If before decree a creditor makes application for and is made a complainant, he should be permitted to proceed with the prosecution of the suit, if the original complainant unduly delays. *Thompson v. Fisler*, 33 N. J. Eq. 480.

Where the plaintiff had sold or assigned his claim before any of the creditors had come in or had served a notice of motion to be brought in as parties, and the person to whom he had sold his claim had stipulated a discontinuance of the action, and had executed a release to many of the defendants, the complaint was properly dismissed. *Hirschfield v. Fitzgerald*, 157 N. Y. 166, 51 N. E. 997, 46 L. R. A. 899.

When the defendant paid the original complainant's claim and tendered his costs to the solicitor, and afterwards new parties applied, without notice to defendant, to be admitted as complainants, the defendant is entitled to have the case dismissed. *Schlagenhaf v. Craven*, 61 N. J. Eq. 232, 47 Atl. 804.

49. *Salisbury v. Binghamton Pub. Co.*, 85 Hun 99, 32 N. Y. Supp. 652;

Freman v. Guardian Mut. Ins. Co., 11 Hun (N. Y.) 286; *Innes v. Lansing*, 7 Paige (N. Y.) 583; *Mattison v. Demarest*, 19 Abb. Pr. (N. Y.) 356.

Until Decree for an Account.—Although a creditor's bill is in behalf of all the creditors, it is yet under the control of the party bringing it, at least until there is a decree for an account. *Duerson's Admr. v. Alsop*, 27 Gratt. (Va.) 229.

It makes no difference that when the decree for sale was entered the plaintiff by whom the suit was brought had parted with his claims against the defendant company and was no longer interested in the creditor's suit, for when a decree for a general accounting is entered for the benefit of all the creditors, the case thereon ceases to be under the control of the party who instituted it. *Karn v. Rorer Iron Co.*, 86 Va. 754, 11 S. E. 431; *Piedmont & Arlington Ins. Co. v. Maury*, 75 Va. 508.

When in a creditor's suit a part of the funds has been decreed to be paid, and the other creditors have come in, the plaintiff, against the wish of his co-plaintiff and the other creditors, cannot dismiss. *Muldron & Bruce v. DuBose*, 2 Hill. (S. C.) 375.

Upon Appointment of Receiver.—When a bill is brought to subject the property of the defendant for the benefit of all its creditors and a receiver is appointed, any other creditor may thereafter intervene by petition and the original plaintiff cannot then withdraw the suit without the consent of such co-plaintiff. *Belmont Nail Co. v. Columbia I. & S. Co.*, 46 Fed. 336.

Correlative Right of Defendant To Settle.—Up to the time of the decree in a creditor's suit it is only a suit between party and party, and the plaintiff is master of his own case and may make any disposition of it he sees fit, and as a correlative right to this, the defendant may tender satisfaction and compel him to accept it. *McDougald v. Dougherty*, 11 Ga. 570.

by special demurrer, when it appears upon the face of the complaint.⁵⁰

b. *Timeliness of Objection.*—An objection that certain petitioning creditors were made complainants on imperfect petitions comes too late when made after an answer and submission for trial upon its merits.⁵¹ And where the defect appears by answer, the existence of such persons and the necessity of their being made parties should be pointed out by the plea or answer.⁵²

IV. SERVICE OF PROCESS.—It is necessary that service of process be made upon the party whose property is to be affected, or the judgment as to him will be a nullity and void,⁵³ and the service

50. *Tatum v. Rosenthal*, 95 Cal. 129, 30 Pac. 136, 29 Am. St. Rep. 97.

By Answer or Demurrer.—Where the trust created in favor of creditors of the party paying the consideration money of real estate conveyed to another under a statute inures to the benefit of all such creditors, the creditor's suit having been instituted not only on the plaintiff's own behalf, but also on behalf of all other creditors, and the case being one of actual and not constructive fraud, the defense of the absence of any other creditors as necessary parties plaintiff must be presented by answer or demurrer, and when not so presented it will be deemed to have been waived under the statute. *Hiler v. Hetterick*, 5 Daly (N. Y.) 33.

As to Receiver Being Necessary Party.—When the defendants in a creditor's suit desire to raise the question as to the receiver being a necessary party to the bill, they should do so by demurrer. *King v. Goodwin*, 130 Ill. 102, 22 N. E. 533, 17 Am. St. Rep. 277.

51. *Gibson v. Trowbridge Furniture Co.*, 96 Ala. 357, 11 So. 365.

Unless a misjoinder of complainants will affect the propriety of the decree, an objection thereto will not be allowed when taken for the first time at the hearing. *Colgin v. Redman*, 20 Ala. 650.

When a judgment creditor filed a petition in a creditor's suit and all the subsequent proceedings were carried on as if an order had been made permitting the joinder and no objections to the want of an order was made, the fact that there was no order is not ground for a reversal. *Myers v. Fenn*, 5 Wall. (U. S.) 205, 18 L. ed. 604.

52. *McCandless & Co. v. Hadden*, 48 Ky. 186.

53. *Monroe v. Galveston Co.*, 19 Abb. Pr. (N. Y.) 90; *Gray v. Palmer & Stuart*, 33 Gratt. (Va.) 357.

When a Debt Due Debtor Is Attempted To Be Reached.—If the debt due the debtor by a third party is attempted to be reached in a creditor's suit and the debtor is out of the state and no process has been served upon him, the court cannot make the decree sought for, for the decree would not bind the debtor and would afford no protection to the third party if sued abroad by the debtor. *Love v. Bowen*, 55 N. C. 49.

Where a debtor is out of the state and his distributive share in an estate in the hands of an administrator is sought to be reached by a creditor's suit, it will not avail, for no decree could be made that would protect the administration for making the payment in case the debtor sued the administrator for the amount of his distributive share in the estate in a foreign court. *Yarbrough v. Arlington*, 40 N. C. 291.

A non-resident debtor of a resident judgment debtor may be subjected to the payment of the judgment debt, and such non-resident debtor may be brought without personal service by publication, and upon default, a decree may go against him and an execution of *fiery facias* may issue, which may be made out of any property of such defendant, that may be found. *McCrae v. Tenn.*, etc. Bank, 6 Coldw. (Tenn.) 474.

Service of Process Upon Some of Joint Debtors.—Where a judgment is recovered against joint debtors upon the service of process upon only some of them, a creditor's bill can only be issued against the joint property of all or against the separate property of those who have been served, and can-

must fulfil every requirement of a statute or of a rule of court or it will not be effective.⁵⁴ A party may, however, by appearing and making defense, waive objection to such service.⁵⁵

V. FORM AND REQUISITES OF PLEADINGS.—A. BILL, COMPLAINT OR PETITION.—1. **Allegations Must Follow Statute.**—It is essential that the bill, complaint or petition in a creditor's suit allege all matters required by the statute,⁵⁶ or by the rules and practice of the courts.⁵⁷ And when such requirements have been fol-

not interfere with any disposition of the separate property of those who have not been served. *Billhofer v. Heuback*, 15 Abb. Pr. (N. Y.) 143.

Judgment creditors are necessary parties in proceedings to subject lands, upon which they have liens, to the payment of such other judgment liens, and it is necessary to serve them with process. *Hoffman v. Shields*, 4 W. Va. 490.

Copy of Process Served Upon President.—Where a copy of the process, on which was endorsed the object of the action, was duly served upon the president of the company, he not being a party, it was but service upon the company and no lien is created against him by mere service of process on the defendant company alone. *Newport Bridge Co. v. Dougless Trust Co.*, 12 Bush (Ky.) 673.

The failure of the court to make an order that the bill should stand as a general creditor's bill, and to direct publication for all creditors to appear, is merely a defect in the proceedings, inasmuch as creditors generally appeared to have accepted it as such and come in under it without such order or publication. *Bank of Rome v. Haselton*, 15 Lea (Tenn.) 216.

54. *Bryant v. Bryant*, 14 Ky. L. Rep. 358, 20 S. W. 270; *Nesmeth v. Halsted*, 11 Paige (N. Y.) 647; *King v. Ray*, 11 Paige (N. Y.) 235.

55. *Barger v. Buckland*, 28 Gratt. (Va.) 850.

56. *Simmons v. Eldridge*, 19 Abb. Pr. (N. Y.) 296.

57. *Clark v. Davis*, Harr. (Mich.) 227.

It is sufficient if, in making the allegations, the plaintiff comply with the code, since that supersedes the rules of the court requiring certain allegations to be made in a creditor's bill, and the want of an allegation that defendant has an equitable interest or property to the value of \$100.00 or

more, having been required by the rules of the court and not by the code, does not invalidate the bill. *Quick v. Keeler*, 2 Sandf. (N. Y.) 231.

Allegations of Residence.—In a judgment creditor's bill it must be alleged that the defendant resides in the county to which the *fi. fa.* issued out of the supreme court, at the time it was so issued. *Hope v. Brinckerhoff*, 3 Edw. Ch. (N. Y.) 445. See also, *Sherman v. Tucker*, 69 N. Y. Supp. 850; *Howe v. Harvey*, 8 Paige (N. Y.) 73.

When the bill shows an existing debt against a partnership before dissolution and judgment therefor, and the bankruptcy court is about to seize the property or the land of one of the partners, sufficient facts are alleged to entitle plaintiff to bill. See *v. Rogers*, 31 W. Va. 473, 7 S. E. 436.

Admitting Persons as Parties as an Admission of Their Claims.—When the complaint alleges as a reason for making them parties that certain defendants claim some interest in the subject, it does not admit their claims, but they must be proven. *Ames v. Hurlbut*, 17 How. Pr. (N. Y.) 185.

Allegations Sufficient to Enable a Defense.—When the allegations in the bill are of such certainty and consistency as would enable the defendant to make defense, they are sufficient. *Hutchinson v. Maxwell*, 100 Va. 169, 40 S. E. 655, 93 Am. St. Rep. 944, 57 L. R. A. 384.

A failure to aver absence of collusion is not ground for demurrer, although it might be ground for staying the action or taking the complaint off the files. *Faber v. Matz*, 86 Wis. 370, 57 N. W. 39.

Stating Cause of Action for Several Creditors.—The general rule, that "if a complaint assumes to state a cause of action in favor of two or more parties, and states a cause of action in

lowed, the fact that it contains matters which are irrelevant or redundant, or that the allegations are indefinite or uncertain, will not invalidate it.⁵⁸

It is not necessary to set up matters which constitute an affirmative defense.⁵⁹

2. That Action Is for All Creditors.—Where a creditor's suit is brought for the benefit of all creditors, it must appear in the bill by proper allegations,⁶⁰ although in one jurisdiction such an allegation is not necessary where no receiver was asked for or appointed.⁶¹

It has also been held that this requirement has been satisfied when the bill asks for a sale of property for the benefit of the creditors of the defendant,⁶² when it appears from the whole proceedings, bill, answer, order and decree, that it was a suit in which other creditors may come in,⁶³ and when it is "in behalf of all creditors who may be entitled to become parties to the suit."⁶⁴

Where a creditor may bring a suit for himself alone and recover judgment for himself, the bill need not make an allegation to that effect.⁶⁵ But where he may bring suit either for himself alone or in behalf of himself and others, he should, by express averment in his bill, make his election to sue in the one way or the other.⁶⁶

3. Alleging Existence of Relationship of Creditor.—It is essential that the bill, petition or complaint in a creditor's suit contain an allegation that the complainants are judgment creditors, either direct or by assignment, or otherwise, of the debtor.⁶⁷ But

favor of a part only of the parties, thus joined, it is bad on demurrer" does not apply when "parties are designated as plaintiffs in the title of a complaint in the nature of a creditor's bill, and there is a statement of the respective claims of creditors showing that each claim is several and distinct, and there is no attempt to state a joint cause of action in favor of those who are named in the title." *Doherty v. Holliday*, 137 Ind. 282, 32 N. E. 315, 36 N. E. 907.

58. *Simmons v. Eldridge*, 19 Abb. Pr. (N. Y.) 296.

59. *Kedey v. Petty*, 153 Ind. 179, 54 N. E. 798.

60. *Me.*—*Crocker v. Craig*, 46 Me. 326; *Fletcher v. Holmes*, 40 Me. 364. *N. J.*—*Hunt v. Field*, 9 N. J. Eq. 36. *N. Y.*—*Egberts v. Wood*, 3 Paige 517, 24 Am. Dec. 236; *Louis v. Belgard*, 17 N. Y. Supp. 882.

See, *supra*, III, C. 2.

Must Allege That There Are Other Creditors.—Where a suit is brought by plaintiffs in behalf of themselves and all other creditors of the estate of the deceased debtor, the court held the com-

plaint defective in that so far as the plaintiff sued in behalf of other creditors it did not allege that there were other creditors. *Elwell v. Johnson*, 3 Hun (N. Y.) 558.

61. *Nebraska Nat. Bank v. Hallowell*, 63 Neb. 309, 63 N. W. 556.

62. *Birely & Holtz v. Staley*, 5 Gill & J. (Md.) 432, 25 Am. Dec. 303.

63. *Stike's Case*, 1 Bland (Md.) 57.

64. *Hutchinson v. Maxwell*, 100 Va. 169, 40 S. E. 655, 93 Am. St. Rep. 944, 57 L. R. A. 384.

65. *Green v. Griswold*, 4 N. Y. Supp. 8; *Morrison v. Blue Star Nav. Co.*, 26 Wash. 541, 67 Pac. 244.

66. *Hammond v. Hammond*, 2 Bland (Md.) 306.

67. *Ala.*—*Walthatt v. Rives*, B. & Co., 34 Ala. 91. *Miss.*—*Scott v. McFarland*, 34 Miss. 363. *N. Y.*—*Elwell v. Johnson*, 3 Hun 558.

"When a bill alleges that the judgment is the property of the complainant (Smith), and the only interest therein besides his own has been transferred to him, it was not necessary to make the partnership of Daniels & Smith, or Joseph Daniel parties to the

where in a creditor's bill the existence of a judgment is alleged, it is not necessary to show that it was founded upon a valid and subsisting debt.⁶⁸ And when the bill is not to set aside a sale as a fraud on creditors, but to bring forward an indebtedness fraudulently covered up and concealed, it is immaterial that the bill fails to state that the complainants were creditors.⁶⁹

4. Alleging Exhaustion of Legal Remedies.—The allegations must be such as to show that relationship existent which would result from the fact that all legal remedies have been exhausted,⁷⁰ and

suit." *Jones v. Smith*, 92 Ala. 455, 9 So. 179.

A creditor's action cannot be maintained unless the plaintiffs were, or unless some one of them was, a creditor of the limited partnership and the allegation employed to show they were such should be sufficiently definite and specific to inform the defendant when, in what manner, or by what contract of said firm, it is claimed that they became indebted to the plaintiff severally, and in what amount. *Gray v. Kendall*, 10 Abb. Pr. (N. Y.) 66.

Allegation of Ownership of Execution Issued Merely.—A bill brought by one not a party to the judgment must allege the complainant's ownership of the judgment in a proper manner, and an allegation of ownership of an execution issued thereon and return unsatisfied is not sufficient. *Richardson v. Gilbert*, 21 Fla. 544.

When the complainants brought a judgment from the plaintiff in the original action upon which execution had issued and return made, the complainant may have a creditor's bill without another execution and without stating therein the consideration for the assignment. *Gleason v. Gage*, 7 Paige (N. Y.) 121.

Bill Only Against Solvent Judgment Debtors.—Where the judgment is against several parties the bill need not be against the insolvents among them. *Van Cleef v. Sickel*, 2 Edw. Ch. (N. Y.) 392.

68. *Tatum v. Rosenthal*, 95 Cal. 129, 30 Pac. 136, 29 Am. St. Rep. 97.

69. *Deimel v. Brown*, 136 Ill. 586, 27 N. E. 44.

70. *Reed v. Wheaton*, 7 Paige (N. Y.) 663, 34 Am. Dec. 366; *Williams v. Sexton*, 19 Wis. 51. See also cases cited under note below.

In *State v. Foot*, 27 S. C. 340, 3

S. E. 546, it was held that it is not necessary for the complaint in a creditor's suit to set out the fact that execution has issued and been returned "*nulla bona*."

If a creditor's bill charges in substance that the defendant was indebted to the complainant on a judgment and that certain property of the defendant was in the hands of a third person with a lien thereon in favor of the third person, and that the plaintiff was seeking to subject the surplus to his judgment after payment of such third person and there was no charge of a judgment execution and return *nulla bona* against defendant, it is immaterial that an order *pro confesso* was then taken against the defendant, and the decree thereon is invalid, for the court never had jurisdiction. *Isham v. Sienknecht* (Tenn.), 59 S. W. 779.

An averment of want of personal assets must be made. *Scott v. Ware*, 64 Ala. 174.

That the defendant has no other property liable to satisfy the complainant's judgment need not be alleged, if the bill shows that the complainant has exhausted his legal remedy. *Bayley v. Bayley*, 66 N. J. Eq. 84, 57 Atl. 271.

If the bill is not a judgment creditor's bill but a bill in aid of execution, an averment that a lien was made upon the property, and perfected, so far as the situation of the property permitted, is sufficient. *Campbell v. Western Elec. Co.*, 113 Mich. 333, 71 N. W. 644.

A bill to enforce a judgment lien, as a remedy provided for by statute, must, under the statutory provisions, show a return to a *fiery facias* of "no property found" or that no execution issued on the judgment within two years from its date." *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102.

it must appear, by proper averments, that a judgment at law has been obtained against the defendant, that execution has been duly issued thereon, and that the execution has been returned unsatisfied,⁷¹ unless it affirmatively appears in the bill that the defendant

Necessity of a Lien Upon Property.

While it is necessary under the decision of this court, that creditors should have a lien upon the property sought to be subjected before they come into a court of equity, it is not necessary that they should have alleged a return of no property found upon the execution as a condition precedent to the filing of the bill. *Hutchinson v. Maxwell*, 100 Va. 169, 40 S. E. 655, 93 Am. St. Rep. 944, 57 L. R. A. 384.

71. **U. S.**—*Cleveland Rolling Mill Co. v. Joliet Enterprise Co.*, 53 Fed. 683. **Ill.**—*Durand v. Gray*, 129 Ill. 9, 21 N. E. 610. **Kan.**—*Moyer v. Riggs*, 8 Kan. App. 234, 55 Pac. 494. **Me.**—*Baxter v. Moses*, 77 Me. 465; *Griffin v. Nitcher*, 57 Me. 270; *Webster v. Clark*, 25 Me. 313, 52 Am. Rep. 783. **Mich.**—*Preston v. Wilcox*, 38 Mich. 578. **Mont.**—*Whiteside v. Hoskins*, 20 Mont. 361, 51 Pac. 739. **N. J.**—*Manning v. Jagels*, 71 N. J. Eq. 41, 63 Atl. 492. **N. Y.**—*Cassidy v. Meacham*, 3 Paige 311; *Beardsley Seythe Co. v. Foster*, 34 How. Pr. 97. **Pa.**—*Suydam v. Northwestern Ins. Co.*, 51 Pa. 394. **E. I.**—*Ginn v. Brown*, 14 R. I. 524. **Tenn.**—*Stahlman v. Watson*, 39 S. W. 1055. **Wis.**—*Lehr v. Murphy*, 136 Wis. 92, 116 N. W. 893; *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909; *Piertoff v. Jorge*, 86 Wis. 128, 56 N. W. 735, 39 Am. St. Rep. 881; *Daskam v. Neff*, 79 Wis. 161, 47 N. W. 1132.

When it is sought by equitable process to reach equitable interests of a debtor, the bill, unless otherwise provided by statute, must set forth a judgment in the jurisdiction in which the suit is brought, the issuing of an execution thereon and its return unsatisfied, or must make allegation showing that it was impossible to obtain such a judgment in any court within such jurisdiction. *Albright v. Texas*, S. F. N. R. Co., 8 N. M. 422, 46 Pac. 448.

Alleging Time Execution Issued.—It has been held that a bill cannot be regarded as a creditor's bill when it does

not set forth the time when the execution was issued, when it was returnable, etc., in such a manner as to show the court that the plaintiff's remedy at law has been exhausted. *Albright v. Herzog*, 12 Ill. App. 557.

But in *Cary v. Clark*, 3 Edw. Ch. (N. Y.) 274, it was held that the court will intend the execution was regularly issued, although more than two years have elapsed from the time of recovering the judgment, for if the issuances of the execution was not authorized or regular the defendant should have it set aside, and while it is suffered to remain as one duly issued and returned, the court will presume it regular.

Residence When Execution Issued.

A bill does not show that the complainant's remedy at law has been exhausted when it shows that the defendant resides in the county where the bill was filed but does not show that he resided there when the execution was issued. *Wheeler v. Heermans*, 3 Sandf. Ch. (N. Y.) 597; *Payne v. Sheldon*, 43 How. Pr. (N. Y.) 1.

Showing Where the Execution Issued.

When the petition in a creditor's suit fails to show that the county where the execution issued was the county of the defendant's residence and that none issued from the county when the judgment had been rendered it is insufficient. *Crabb v. Hill*, 17 Ky. L. Rep. 44, 30 S. W. 415.

A creditor's bill is insufficient which does not allege that an execution issued to the sheriff of the county in which the debtor lives, or if he does not reside in the state, to the sheriff of the county where the bill is filed. *Campbell v. Foster*, 16 How. Pr. (N. Y.) 275; *Millard v. Shaw*, 4 How. Pr. (N. Y.) 137.

Where Execution Issued Matter of Defense.—It is not indispensable for the creditor's bill to show that the execution was issued to the county of the debtor's residence, and returned "*nulla bona*," but if there was not an execution to that county, it was a

has no property, real or personal, which is subject to execution.⁷²

matter of defense to be made by the defendant. *Nix v. Winter*, 35 Ala. 309; *Brown & Dimmock v. Bates*, 10 Ala. 432.

That Execution Duly Levied.—Where the bill alleges that the execution was levied in due form of law it is sufficient. *Bostford v. Beers*, 11 Conn. 369.

In order to maintain a judgment creditor's action, the complaint must show that the execution is not still outstanding, for that will defeat the action. *Marks v. Equitable Life Assur. Soc.*, 109 App. Div. 675, 96 N. Y. Supp. 551.

Sufficiency of a Return.—Where there is an allegation in the bill that the sheriff "returned said writ of execution to this court, the said return stating in effect, that the said sheriff had been unable to satisfy said writ of execution and was unable to find any property in Cook County on which to lay the writ, and he, said sheriff, therefore, returned the same no property found and no part satisfied, as by said writ of execution and return of the said sheriff indorsed thereon as aforesaid now on file in the office of the said superior court will more fully appear, and to which, or to a copy thereof your orator prays leave to refer," the allegation of a return *nulla bona* is sufficient to give the court jurisdiction, if any such allegation were necessary. *French v. Commercial Nat. Bank*, 79 Ill. App. 110.

Under the code authorizing an action for the enforcement of a judgment upon the return of "no property found," either in the county in which the judgment is rendered or in the county in which the defendant resides or is summoned, an allegation that such return was made from the county in which the defendant then resided and also from the county when the judgment was rendered, is sufficient. *Martin v. Byrd*, 19 Ky. L. Rep. 1030, 42 S. W. 1112.

Return of Execution Unsatisfied Best Evidence.—A court of equity entertains jurisdiction in a creditor's suit when the remedy at law has failed or proved ineffectual and the sheriff's return of execution unsatisfied is the best evidence of such failure of the

remedy at law. *Wyatt v. Wyatt*, 31 Ore. 531, 49 Pac. 855.

"Unsatisfied in Whole or in Part."

Where the statute authorizes the plaintiff in execution to file a creditor's bill, when his execution against the property of the defendant has been returned "unsatisfied, in whole or part," an allegation in the bill that the execution was returned "wholly unsatisfied" is sufficient. *Alexander v. Tams*, 13 Ill. 221.

Return After Commencement of Creditor's Suit.—Where the execution shows that it was returned and filed after the commencement of the creditor's suit, the bill is insufficient, but the objection may be obviated by amendment. *Pardee v. De Cala*, 7 Paige (N. Y.) 132.

72. N. Y.—*Conant v. Sparks*, 3 Edw. Ch. 104. **Ohio.**—*Clark v. Strong*, 16 Ohio 317; *State Bank of Ohio v. Oliver*, 1 Disney 159. **Wis.**—*Daskam v. Neff*, 79 Wis. 161, 47 N. W. 1132.

Where the bill expressly alleges that the defendant had not the legal title to any property whatever and the only interest which he owned which could be made liable to the satisfaction of the plaintiff's debts was one which could be reached only in a court of equity, a demurrer to the bill because the bill did not contain the fact that execution had issued against the defendant and had been returned "*nulla bona*" cannot be sustained. *Rounters v. McKay*, 59 N. C. 87.

The bill with respect to property purely equitable should stand and relief ought to be had in the court, whether by execution against the estate and return *nulla bona* or otherwise, if it appears that there is nothing out of which satisfaction at law by execution can be had, and so the bill is sufficient which alleges that no satisfaction of the debt could be obtained by an execution at law. *Tabb & Co. v. Williams*, 57 N. C. 352.

When an attachment is issued by the plaintiffs and contains a lien upon the real estate, or when the debtor is known to be insolvent, it is not necessary for the bill to allege and prove the issuance of execution and return *nulla bona*. *Ziska v. Ziska*, 20 Okla. 634, 95 Pac. 254, 23 L. E. A. (N. S.) 1.

5. Existence and Description of Debtor's Property.—A creditor must allege in his pleading the existence of equitable assets or the ownership of property by the defendant or of some one else for him, or that he has made some disposition of assets for the avoidance of his debts, to give his bill standing in court.⁷³ In describing

If the creditor's bill alleges the issuing and returning of an execution unsatisfied upon the part of two of the plaintiffs, who were partners and a judgment merely by the third plaintiff and the further allegation that the plaintiffs knew of no property upon which an execution can be levied, the court held there was a sufficient allegation of insolvency. *Enright v. Grant*, 5 Utah 334, 15 Pac. 334.

Where a Trust Is Quoted for Benefit of a Creditor.—A creditor's bill will not be refused a creditor having a trust created for his benefit, on the ground that he has omitted to proceed at law, as where the holder of bill desires that a fund especially appointed by the debtor, for the purpose of paying these bills be applied, for the averment that the legal remedy has been exhausted is essential only when a creditor seeks to have satisfaction out of equitable estate of his debtor. *Toulmin v. Hamilton*, 7 Ala. 362.

To Set Aside a Deed Given To Defraud, etc.—While a judgment creditor bringing a bill to reach equitable assets must aver insolvency or an execution returned "*nulla bona*" this need not be averred when the suit is one to set aside and annul a deed of land given before the recovery of the judgment by the judgment debtor without consideration and to defraud the judgment creditor, who purchased said land at the sheriff sale. *Hager v. Shindler*, 29 Cal. 47.

To Subject a Husband's Interest.—In an action by a creditor to subject the husband's interest in real estate to a judgment, title to the property being in the wife, the husband's insolvency need not be averred although, if it were a suit to set aside a conveyance on the grounds of fraud in the interest of creditors, such an allegation would be necessary. *O'Connell v. Taney*, 16 Colo. 353, 27 Pac. 888, 25 Am. St. Rep. 275.

A creditor's bill may be had to force an accounting from time to time to show the solvency or insolvency of the

debtor, for the complainant may desire to establish debtor's insolvency when certain mortgages or conveyances were made, and has a right to call upon the debtor for an answer in order that he may be spared the necessity of adducing proof. *Importers' & Traders' Bank v. Littell*, 41 N. J. Eq. 29, 2 Atl. 785.

More Judgments Than Defendant Can Pay.—When the substance and sum of the amount in a creditor's bill to have a receiver appointed, states the insolvency of the debtor, it is sufficient, that is when it states that the plaintiff has more judgments already rendered against the defendant than it can pay. *Whitehouse v. Point Defiance*, etc. R. Co., 9 Wash. 558, 38 Pac. 152.

Insolvency need not be alleged when there is allegation that the legal remedy has been exhausted by the issuing of an execution and its return unsatisfied. *Page Co. v. Peter Grant*, 9 Ore. 116.

A creditor's bill must allege, when the suit is on a legal demand, and assets other than equitable are sought to be subjected why it is that execution at law cannot give to complainant the relief he is entitled to and it must show, as a fact or upon information and belief, that defendant is without outside visible means, subject to legal process, of value sufficient to pay the demand sued for. *Lawson v. Warren*, 89 Ala. 584, 8 So. 141.

"An allegation that no transcript of the judgment had been lodged with the clerk of the circuit court, and no execution sued out thereon, for the reason that the debtor had no other real estate than that sought to be sold in the equitable proceeding, does not meet the requirements of the law." *Mansfield v. Wilkinson*, 16 Ky. L. Rep. 276, 27 S. W. 808.

73. Ala.—*Balch v. Klein Furnishing Co.*, 121 Ala. 435, 25 So. 764. **Ind.** *Reid v. Wilson*, 2 Ind. 181. **N. Y.** *Van Cleef v. Sickels*, 2 Edw. Ch. 392; *Bradt v. Kirkpatrick & Wilson*, 7 Paige

62. **S. C.**—*Verdier v. Foster*, 4 Rich. Eq. 227.

Alleging Interest in Property.—When a bill contains an allegation that one of the defendants was the owner of or in some way or manner beneficially interested in some real estate it was sufficiently broad to embrace the defendant's interest in the land whether legal or equitable and a sale thereof by a receiver transferred to the purchaser all the defendant's interest therein. *Watson v. Le Row*, 6 Barb. (N. Y.) 481.

Defendant an Equitable Owner.—In an action to subject land to payment of a judgment, when the petition alleges that the partners of the defendant held the land as security for an indebtedness, the amount of which was unknown, but that defendant was the equitable owner, it is sufficient. *Nichols S. Co. v. Ringler*, 135 Iowa 181, 112 N. W. 543.

Since the interest of the debtor in trust property from a third person is only subject to the claims of a creditor in the surplus over and above an amount necessary and proper for his maintenance and support, it must be set out by proper averments in the complaint that such a surplus exists. *Graff v. Bomett*, 31 N. Y. 9, 88 Am. Dec. 236.

As of Time Debtor's Interest Vests. When the complaint in a creditor's bill alleged that a testator who died in New York and whose will was probated there, gave a specific sum to a trustee to invest and use for his wife for life and then divided the fund among his children, one of whom was the judgment debtor, it is sufficient to give the court jurisdiction when the debtor had the right to claim the property, but not until then. *Berymann v. Leavitt*, 99 N. Y. Supp. 748.

Purchase Money Furnished by Debtor.—When the creditor's bill alleges that the judgment debtor purchased the property, paid for it with his own money, but had title made in some one else, who had no interest whatever in the property, the allegations are sufficient. *Hageman v. Brown* (N. J.), 72 Atl. 438.

A mortgagor's equitable interest in land may be subjected to a creditor's bill without paying the mortgage claim. *Mattocks v. Humphrey's Admr.*, 17 Ohio 336.

Allegation of Judgment When Confessed Being Unpaid.—When there is no direct allegation in the complaint that at the time judgment by confession was entered against defendant in favor of plaintiff, the money for which judgment was confessed was due and unpaid, the allegation is insufficient to secure a priority of lien over one who subsequently obtained the proceeds of sale of defendant's property under his own judgment, as such an allegation is material. *St. Clair Denver v. Burton*, 28 Cal. 549.

General Allegations in Alternative. It would seem to be quite enough to allege in the bill the supposed interests of the defendant, in property, etc., in the general terms of the act, for if greater particularity were required in the frame of the bill, the statute would often fail to afford an adequate remedy, and if it were not permissible to make general allegations in the alternative, then it would not have introduced or extended the remedy in favor of judgment creditors. It is not necessary to allege fraud or concealment of property on the part of the defendant in order to delay, hinder or defraud creditors. *Brown & Dimmock v. Bates*, 10 Ala. 432.

Alleging Debts Due and Property Held for Debtor.—In a bill to reach and apply sums of money alleged to be due defendant, it is essential not only to allege the nature of the debt due defendant but the person who owes the debt should be described. *Amy v. Manning*, 149 Mass. 487, 21 N. E. 943.

A bill in equity to reach and apply in payment of a debt due by plaintiff for board and lodging certain sums of money due by one of the defendants to the other, being on a legal cause of action, should set out the cause of action as specifically as is required in the action at law, and is bad upon demurrer when no specifications are made as to the sums due or of how much board or what lodging were furnished and when furnished. *Sandford v. Wright*, 164 Mass. 85, 41 N. E. 120.

When the bill alleges that a certain person is indebted to the debtor and has in his hands or possession property belonging to the debtor but that the amount of his indebtedness is not known nor in what way, nor what kind of property it is or how much, the bill is bad for being uncertain and in-

such property, if it be real estate, the description must be so definite as that anyone reading it can learn thereby what property is in-

definite. *Talbott v. Tarlton*, 5 J. J. Marsh. (Ky.) 641.

When the object of the bill is to set aside a mortgage deed on the ground that it was not recorded in proper time, an allegation to that effect must be set out in the bill, in order that the defendant may reply the fact of notice, as it is only to creditors without notice that the statute avoids an unrecorded deed of trust. *Allen v. Montgomery R. Co.*, 11 Ala. 437.

The allegations in a bill merely expressing complainant's fears that the money collected will be paid to other creditors having no priority of lien over them is not sufficient for the allegations must show the grounds of the fears, or charge issuable facts, in order to be controverted and have their sufficiency determined. *McGough & Crews v. Insurance Bank, etc.*, 2 Ga. 15.

When a bill alleges that the defendant claimed an interest in the land sold and that he had notice when he acquired it of complainant's superior equity, he was informed that the bill sought not only to have the lands sold but also to have his interest in them sold, unless he should show, by his answer, that he had such an interest as would make the sale unjust, the allegations of the bill were thus sufficient to bring before the court the subject-matter upon which it decreed, to-wit: The sale of land in payment of the complainant's judgment. *Thomson v. Morris*, 57 Ill. 333.

In order to obtain a personal judgment against a defendant for money in his hands belonging to the debtor, the bill must allege that a personal judgment is sought, otherwise such a judgment will not be allowed. *Kervan v. Hellman*, 110 App. Div. 655, 97 N. Y. Supp. 55.

Allegations Which Show Fraud.—When a creditor's bill alleges facts that showed fraud if true, and that the defendant had property subject to execution which they concealed, it is sufficient, for a general charge or statement of the matter of fact is sufficient, and it is not necessary to charge mi-

nutely all the circumstances which may conduce to prove the general charge, for these circumstances are properly matters of evidence which need not be charged in order to let them in as proof. *Mitchell & Parrish v. Byrns*, 67 Ill. 522.

The allegations in a creditor's bill are sufficient when they state that the assets were paid to one creditor to defraud others and neglects to state that such creditor aided in such fraud or had any notice of the intended fraud. *Lyons v. Murray*, 95 Mo. 23, 8 S. W. 170, 6 Am. St. Rep. 17.

When a bill supplementary to execution in the nature of a creditor's bill is filed for the purpose of setting aside a fraudulent conveyance of property by the judgment debtor, or of removing such conveyance out of the way of the execution, the court of chancery obtained jurisdiction on the grounds of fraud; but where as to a particular defendant, no fraud is charged and no other grounds of equitable jurisdiction is set up beyond mere allegation of possession of assets of the judgment debtor or indebtedness to him, and the answer traverses such allegations, there is no ground upon which the bill may be maintained. *Philadelphia Fire Ins. Co. v. Central Nat. Bank*, 1 Ill. App. 344.

It will not be inferred from a general statement in an action in equity to reach property fraudulently transferred, that one of two joint judgment debtors was security for another in order to bring the case within the exception to the rule that an execution must be issued and returned against all judgment debtors. *Egan v. Hagan*, 104 N. Y. Supp. 247.

Order of Sale To Comply With Ownership.—An averment of the bill of complaint to reach equitable assets reciting that at least half of the consideration paid for the real estate was paid by defendant, and he is half owner, is not broad enough to warrant a claim for the sale of all of the property and it must be modified to provide for the sale of any undivided one-half of the property. *St. Louis Hoop & Stave Co. v. Danforth*, 160 Mich. 226, 125 N. W. 5.

tended to be made the subject of litigation,⁷⁴ and if it be personal property the description should be sufficiently definite to enable the defendant to know what property is meant.⁷⁵ Such definiteness is not necessary, however, as to either kind of property, where the bill is one only for discovery of assets.⁷⁶

74. *Miller v. Sherry*, 2 Wall. (U. S.) 237, 17 L. ed. 827; *Coquillard v. Suydam*, 8 Blackf. (Ind.) 24.

When the allegations of the description of the real property are such that no one could have any doubt about it, it is all that is necessary. *Bryant v. Pryant*, 14 Ky L. Rep. 358, 20 S. W. 270.

Description of an Equitable Estate. The description in a creditor's bill of the equitable estate of the debtor should have been such as would have been necessary had the bill been filed by the debtor to enforce his rights against the person having the legal estate. The complainant cannot get a decree without showing that the debtor is entitled to some particular interest in the premises, which interest is enforceable in equity and the bill must describe that particular interest. *Reid v. Wilson*, 2 Ind. 181.

Interest in an Estate.—When the description states that the defendant is entitled to an interest in the estate of his mother and that she died possessed of certain real estate in a county named, it is sufficient. *Taylor v. Badoux* (Tenn.), 58 S. W. 919.

Description in Petition Curing Error in Judgment.—A bill to subject land to a judgment will not be set aside on the ground that the range where it was situated was wrongfully set out in a copy of the judgment, when the land was certainly described in the petition. *Citizens' Bank v. Johnson*, 107 Iowa 365, 77 N. W. 1046.

75. *Muir v. Hodges*, 116 Fed. 912.

To Fix a Lien.—The allegations in a creditor's bill are too general and indefinite to fix a lien when there is no attempt at a specific description of the property, as by giving the names of the debtors, and it is stated merely "the notes, accounts and bills receivable of defendants." *Boorum & Pease Co. v. Armstrong* (Tenn.), 37 S. W. 1095.

Existence of Vendor's Lien.—Where there is an averment of all the facts

essential to the existence of a vendor's lien and there was a prayer for general relief, the bill is sufficient. *Edwards v. Edwards*, 24 Ohio St. 402.

Garnishee Indebted in Larger Amount Than That Due Plaintiff.—When the allegation is that the garnishee is indebted to the judgment debtor in a certain sum, judgment may be taken by the plaintiff in a creditor's suit by default but when it is alleged that the garnishee is indebted in an amount largely more than enough to pay plaintiff's claims the allegation is not sufficiently specific to authorize a judgment by default. *Crabb v. Hill*, 17 Ky. L. Rep. 44, 30 S. W. 415.

76. *Ala.*—*Moore v. Alabama Nat. Bank*, 120 Ala. 89, 23 So. 831; *McKissack v. Voorhees*, 119 Ala. 101, 24 So. 523; *Drenner v. Alabama Nat. Bank*, 117 Ala. 320, 23 So. 71; *Sweetzer v. Buchanan*, 94 Ala. 574, 10 So. 552; *Brown v. Dimmock*, 10 Ala. 432. *Ill.* *Dimond v. Rogers*, 203 Ill. 464, 67 N. E. 968. *Mich.*—*Saginaw Sav. Bank v. Duffield*, 157 Mich. 522, 122 N. W. 186, 133 Am. St. Rep. 354. *N. H.*—*Bay State Iron Co. v. Goodall*, 39 N. H. 223, 75 Am. Dec. 219. *Ohio.*—*Cadwallader v. Alexandrian Soc.*, 11 Ohio 292; *Miers v. Zanesville*, etc. Turnpike Co., 11 Ohio 273.

Insufficiency of Visible Assets.—"It is not necessary that the bill (by a creditor for the discovery of assets) should show any fraudulent conveyance or attempt to fraudulently transfer property. It is sufficient if it avers the insufficiency of visible assets subject to legal process and the existence of assets which are concealed and hidden out." *Pollak v. Billing*, 131 Ala. 519, 32 So. 639. See also, *Floyd v. Floyd*, 77 Ala. 353.

A bill of discovery is not bad for insufficient allegations of fraud, since fraud is not necessary to uphold the equity of obtaining the bill and need not be alleged. *Burke v. Morris & Co.*, 121 Ala. 126, 25 So. 759.

Allegation Raising Presumption of a

6. Multifariousness.—a. General Rule.—It is impracticable to lay down any rule as to what constitutes multifariousness as an abstract proposition; each case depending on its own circumstances.⁷⁷

b. In Prayer for Relief.—Where the scope, purpose and proposed results of the prayer for relief in a creditor's bill is single, or where one transaction is the basis for the several set out and for which relief is prayed, the bill is not bad for multifariousness.⁷⁸ But the bill is bad in this respect when it seeks to have two separate, distinct and utterly unconnected kinds of relief granted.⁷⁹

Judgment.—Where the allegations in the petition to discover assets and have a certain conveyance set aside, merely raise a presumption of fact that a judgment had been recovered, this is not sufficient, for the petition should allege every fact necessary to show the right of a judgment creditor to institute the action. *Morrison v. Fletcher*, 32 Ky. L. Rep. 1162, 108 S. W. 267.

77. Oliver & Pratt, 3 How. (U.S.) 333, 11 L. ed. 622; Baltimore & Ohio Tel. Co. v. Interstate Tel. Co., 54 Fed. 50, 4 C. C. A. 184; Attorney Genl. v. Cradock, 3 Mylne & Cr. 85, 40 Eng. Reprint 857.

In *Beam v. Bennett*, 51 Mich. 148, 16 N. W. 316, it was held that a bill will lie for the double purpose of aiding an execution and to reach property not open to execution.

Accounting and Reaching Equitable Assets.—A creditor's suit by a receiver against the estate of the debtor to reach said estate in the hands of third parties and to call for an accounting may be maintained. *Palen v. Bushnell*, 18 Abb. Pr. (N. Y.) 301.

Payment of Judgment to Receiver. When a creditor's bill seeks to have moneys in the hands of a railroad company due a telegraph company paid to a receiver of the telegraph company, an allegation setting out the relationship of the companies, the judgment execution and return, and the insolvency of the telegraph company, is not bad for multifariousness. *Baltimore & O. Tel. Co. v. Interstate Tel. Co., 54 Fed. 50, 4 C. C. A. 184.*

Setting Aside Conveyances and Reaching Equitable Interests.—A bill is not bad for multifariousness because it seeks to set aside distinct and separate fraudulent conveyances and to bring within reach certain equitable interests because the grounds of the suit form parts of a series of transac-

tions. *Way v. Bragaw*, 16 N. J. Eq. 213.

For Discovery of Assets and Appointment of Receiver.—A bill may not only seek to have a discovery of assets, but in addition seek to have a receiver of the defendant appointed and certain payments made by the corporation to certain others of the defendants adjudged fraudulent as to complainants, without being multifarious. *Bouton v. Smith*, 113 Ill. 481.

In a creditor's bill, the joining of all the several plaintiffs as well as all the several defendants in all the judgments in courts of record in counties in which the land sought to be subjected lies, which have been rendered against the judgment debtor alone or the judgment debtor and other defendants jointly, should be made parties and is not, therefore, multifarious. *National Bank v. Bates*, 20 Wis. 210.

78. For an Accounting and Setting Aside of Encumbrances.—When a bill shows the issue and return of the executions unsatisfied, and further shows that a large part of the goods have been sold and disposed of, it may ask for an accounting and is not rendered bad for asking that certain encumbrance be set aside without first obtaining a lien upon the property. *Krolik v. Bulkley*, 58 Mich. 407, 29 N. W. 205.

Enforcement of a Trust and Benefit of Levy.—While a bill cannot contain two opposite and inconsistent rights, antagonistic to each other, such is not the case when the bill seeks first, the enforcement of the trust for the benefit of creditors and then for the benefit of advantages assumed by levies, and registration of judgment. *Mason v. Anderson*, 3 Baxt. (Tenn.) 290.

79. Thus, in Halbert v. Grant, 4 T. B. Mon. (Ky.) 580, it was held that a creditor's bill cannot be maintained

7. Verification.—Under the statutes in some jurisdictions a failure to verify the creditor's bill renders it insufficient;⁸⁰ though in at least one jurisdiction verification is only necessary in a bill of discovery,⁸¹ and in that case it is not necessary where such a bill is merely incidental to the relief sought.⁸²

By Agent or Attorney.—And where the complainant resides at a distance, or is absent, such verification may be made by his agent or attorney.⁸³

B. DEMURRER.—The failure to state the necessary jurisdictional facts may be taken advantage of by demurrer.⁸⁴

C. PLEA OR ANSWER.—**1. In General.**—The allegations in the plea or answer must be responsive to the prayer of the bill,⁸⁵ and

which contains a prayer for setting aside fraudulent deeds and also asks for damages for breach of warranty suffered by reason of having the land taken away by the possessors of the fraudulent deed.

And so, a creditor's bill cannot stand which prays that certain fraudulent deeds be set aside and also asks to reach certain property not open to execution. *Vanderpool v. Noley*, 71 Mich. 422, 39 N. W. 574.

80. *Calk v. Chiles*, 9 Dana (Ky.) 265.

The judgment and execution, being matters of record, the complainant need not swear positively to them in a creditor's suit, and a verification as to remainder of the bill is sufficient. *Hammersley v. Wyckoff*, 8 Paige (N. Y.) 72.

Under the code the verification must be made by every party who unites in such pleading whose interest is several. *Gray v. Kendall*, 10 Abb. Pr. (N. Y.) 66.

Required by Rules of Court.—A creditor's bill must be sworn to as required by the rules of court, or the bill cannot be sustained. *Clark v. Davis*, Harr. (Mich.) 227.

Verification Amounting to no More Than Belief.—Where the verification in the bill amounts to no more than a statement of belief that the contents of the bill are true, it is insufficient and the order appointing a receiver thereunder will be reversed on appeal. *Brabrook Tail. Co. v. Belding Bros. & Co.*, 40 Ill. App. 326; *Siegmund v. Archer*, 37 Ill. App. 122.

The fact that the bill waives answer under oath does not keep it from being a creditor's bill, nor take away the

right to the discovery of assets. *Hudson v. Wood*, 119 Fed. 764.

81. *Lawson v. Warren*, 89 Ala. 584, 8 So. 141; *Sweetzer v. Buchanan*, 94 Ala. 574, 10 So. 552.

When a Bill of Discovery.—When answer under oath is waived as to all of it except the interrogatories incorporated therein and the interrogatories are directed to the ascertainment of the character and location of assets, the bill is still a bill of discovery. *Pollak v. Billing*, 131 Ala. 519, 32 So. 639.

82. *Henderson v. Farley Nat. Bank*, 123 Ala. 547, 26 So. 226, 82 Am. St. Rep. 140; *Plaster v. Thorne-Franklin Shoe Co.*, 123 Ala. 360, 26 So. 225; *Burke v. Morris*, 121 Ala. 126, 25 So. 759.

83. *Bergh v. Poupard*, Walk. Ch. (Mich.) 5; *Sizer v. Miller*, 9 Paige (N. Y.) 605.

84. See the title "**Demurrer.**" See also the cases cited under II, C.

Failure to state in the bill that the complainant nor any of the creditors whose claims were embraced in it were judgment creditors is ground for demurrer. *Scott v. McFarland*, 34 Miss. 363.

85. See cases generally throughout this subdivision.

An answer making the objection that the suit is one against a living man cannot be maintained. *Preston v. Astor's Admr.*, 85 Va. 104, 7 S. E. 344.

A petition by a stranger cannot be treated as an answer where it makes no parties and asks no prayer of relief. *Sturm v. McGuffin*, 48 W. Va. 595, 37 S. E. 561.

The defendant need answer only as

when they are, and no testimony is offered, the answer must be taken as true.⁸⁶ The court may give judgment upon the facts as stated

to the inquiries which tend to show that he has delivered all his property to the receiver, and whether there is property in the hands of other persons which might be subjected. *Fitzburgh v. Erringham*, 6 Paige (N. Y.) 29.

Where the heirs to the estate come in and answer, they are proper parties and may have their rights adjusted. *Sayers v. Wall*, 26 Gratt. (Va.) 354.

The complainants are entitled to an answer to interrogatories as to how matters stand upon the company's books with reference to ownership of stock and price thereof. *Hipple v. Five Mile Beach Imp. Co.* (N. J.), 3 Atl. 682.

Alleging Existence of Leivable Property.—An answer which is used in opposition to a motion for the appointment of a receiver before the time of answering has expired, should be treated only as an affidavit, and where an answer sets up the existence of property owned by defendant which might have been levied upon by the sheriff, a general assertion is not sufficient but the answer must state where and what the property was. *Rankin v. Rothschild*, 78 Mich. 10, 43 N. W. 1077.

Objections To Be Taken Advantage of by Answer.—An objection to a creditor's bill to set aside a sale of real property on the ground that no judgment lien, or levy lien was set up in the bill, must be taken advantage of in the answer or it will be held to be waived. *Wells v. Dalrymple*, 29 Fed. Cas. No. 17,392.

Where a statute requires such answers as the court may direct, the remedy for failure to make them is not by motion to strike, but to require full and explicit discoveries by process of contempt; if the answer be informal, redundant, or otherwise, so long as it tenders an issue, the remedy is not by motion to strike, but for more specific statement or by demurrer. *W. A. Jordan Co. v. Sperry Bros.*, 141 Iowa 225, 119 N. W. 692.

Cross-Bill.—A judgment debtor cannot file a cross-bill against the men who held certain stock for him, alleging their mismanagement of the com-

pany, so as to depreciate the stock in a suit by a judgment creditor against him to subject such stock to payment of his judgment. *McMullen v. Ritchie*, 57 Fed. 104.

Where a creditor's bill seeks to subject property of the defendant to the payment of the judgment in which the defendants are vendees and the purchase price for the property has not all been paid, the only way for the vendor, who has been made a defendant to take precedence in the payment is for him to file a bill, either a cross-bill to the present suit, or an original, to subject the estate sold for the balance of the purchase money. *Cloud v. Hamilton*, 3 Yerg. (Tenn.) 81.

Before a final decree of adjudication, any lien creditor may file a separate answer to the creditor's bill in the nature of a cross-bill attacking any other lien as void as a preference. *Lawyer v. Barker*, 45 W. Va. 468, 31 S. E. 964; *Casto v. Greer*, 44 W. Va. 332, 30 S. E. 100.

86. Edwards v. Edwards, 24 Ohio St. 402.

Defendant Personally Examined. A defendant who consents to be examined personally pursuant to a rule of court, cannot be compelled to put in an answer. *Merritt v. Blackwell*, 1 Edw. Ch. (N. Y.) 466.

When Answer Must Be Overcome by Two Witnesses.—It is only where the defendant states facts within his knowledge that his answer must be overcome by evidence equivalent to the testimony of two witnesses; a sworn answer in so far as it sets up new matters by way of defence, is not evidence. *Atkinson v. Foster*, 134 Ill. 472, 25 N. E. 538.

Where an answer to a bill of discovery fails to discover, and denies the possession of assets, the allegations in the answer cannot be traversed and the court can proceed no further. *United States Ins. Co. v. Cent. Nat. Bank*, 7 Ill. 426; *Philadelphia Fire Ins. Co. v. Cent. Nat. Bank*, 1 Ill. App. 384.

When Responsive It Is Evidence Against Complainants.—Where the allegations in the bill are that the de-

in the bill upon a failure to answer,⁸⁷ or where the bill is confessed by the defendants.⁸⁸ And when the defendant admits the return of "*nulla bona*," he cannot afterwards be heard to object that the complainants have not exhausted their legal remedy.⁸⁹

2. Plea of Non-existence of Property of Debtor.—In answering a creditor's bill, as to his possession of property, the defendant must answer as to his possession at the time of filing the bill.⁹⁰

defendant had a mortgage or lien under which they sold the lot, that it was pretended, not real, that the debts secured thereby were not bona fide, that they were discharged by the proceeds of the sale, and that there remained an excess in their hands, an answer exhibiting the mortgage asserting the bona fides of the debt secured and of the mortgage, and showing that a balance remained due, is responsive and would be evidence against the complainants. *England Lee v. Reynolds*, 38 Ala. 370.

87. *Scott v. Ludington*, 14 W. Va. 387.

When the bill alleged that the defendant owned certain interests in the lands and seeks to subject same to plaintiff's judgment, and the defendant fails to file an answer, a decree for the sale of his interest is correct and is not void because the allegations as to the defendant's title were not positive or specific. *Thomson v. Morris*, 57 Ill. 333.

One co-tenant cannot be brought into court to answer the judgment creditor of the other for improvements made by the latter in advance of a suit for partition, and where the bill asks for a removal of fraudulent conveyances and this fraud is successfully answered it is sufficient. *Beam v. Scroggin*, 12 Ill. App. 321.

Demurring to Bill Because Answer Would Incriminate.—A creditor's bill cannot be demurred to because an answer will incriminate the defendant, but the defendant need not make any discovery that will subject him to a forfeiture. *Bay State Iron Co. v. Goodall*, 39 N. H. 223, 75 Am. Dec. 219.

88. *Hendrickson v. Winn*, 3 How. Pr. (N. Y.) 127.

Where a bill was demurred to by the defendants and was overruled, and they declined answering over, they admit all the allegations of the bill to

be true and cannot question the correctness of the decree by denying the truth of the statements of the bill. *Miller v. Davidson*, 8 Ill. 518, 44 Am. Dec. 715.

When Demurrer Overruled.—When the defendant appeared and demurred to a bill in a creditor's suit setting out a judgment the return of an execution unsatisfied and upon information and relief, the existence of property of value of more than one hundred dollars, and the demurrer was overruled and the defendant refused to answer further, a decree *pro confesso* was proper. *Gage v. Smith*, 79 Ill. 219.

A decree *pro confesso* is too broad which directs that receivers sue for assets and apply same to plaintiff's judgment; it should have directed the proceeds of such money as might be collected by the receiver to be brought into court that the court might distribute it. *Bennerson v. Bill*, 62 Ill. 408.

Under a judgment creditor's bill taken as confessed, the decree should embrace the appointment of a receiver and the examination of the defendant and witnesses as to matters charged in the bill and not admitted by the defendant, but not that the receiver pay the amount found to be due complainant and costs out of the first moneys, for any further directions should be reserved until the coming in of the master report. *Stephenson v. Parkins*, 2 Edw. Ch. (N. Y.) 218.

89. *Rugely & Harrison v. Robinson*, 19 Ala. 404.

90. *Trotter v. Bunce*, 1 Edw. Ch. (N. Y.) 573.

Insolvency Averred in Answer. Where the defendant avers that he continued to be insolvent from the time of making the last assignment to the time of putting in the plea, it is no denial of the charge, that at the time of filing the bill he had property,

An answer denying the possession of property will not successfully resist a motion for the appointment of a receiver.⁹¹ And when the possession of certain property is admitted, the order delivering the property to a receiver should not be restricted to that property.⁹²

D. REPLICATION.—When a replication is filed to a traverse, a bill for discovery and relief should not be dismissed without giving the complainants an opportunity to adduce testimony contradicting the answer and maintaining the allegations of the bill.⁹³

E. SUPPLEMENTAL PLEADINGS.—Supplemental bills may be filed upon the discovery of new matter and new events, facts and testimony.⁹⁴ They are necessary to discover and reach property acquired by the debtor subsequent to the filing of the original bill.⁹⁵

Where the original complainant becomes insolvent, the defendant, if he wishes to have the suit carried on, may apply for an order that the assignee file a supplemental bill in the nature of a revivor,⁹⁶

for an averment that he is insolvent is not equivalent to a denial that he had any property. *Brownell v. Curtis*, 10 Paige (N. Y.) 210.

91. *Fuller v. Taylor*, 6 N. J. Eq. 301; *Bloodgood v. Clark*, 4 Paige (N. Y.) 574.

The affidavit of the defendant that he has not \$100 in property is no defense to the suit nor to the application for a receiver. *Fitzburgh v. Everingham*, 6 Paige (N. Y.) 29.

Must Give Particular Account of Property.—It is not sufficient that defendant denies any property excepting "his necessary wearing apparel," but he must give a particular account of his wearing apparel, in order that the court and not the defendant may judge whether it is only such as is exempt from execution. *Brown v. Morgan*, 3 Edw. Ch. (N. Y.) 278.

Subject To Be Examined by Master. Notwithstanding the defendant has answered the bill and denied that he has property, he may still be examined by the master touching property to be delivered to a receiver. *Austin v. Dickey*, 3 Edw. Ch. (N. Y.) 378.

92. *Browning v. Bettis*, 8 Paige (N. Y.) 568.

93. *Heisler v. Dickinson*, 17 Ill. App. 193.

94. *Baughner v. Eichelberger*, 11 W. Va. 217.

New matters and new events which do not change the parties before nor

the right and interests of the parties, but merely refer to and support the rights and interests already in the bill, may be brought before the court by a supplemental bill proper. *Riddle v. Motley*, 1 Lea (Tenn.) 468.

Original Parties Competent To Bring Suit.—Where in the supplemental complaint it did not appear that any plaintiff, as the parties appeared upon the record at the trial, was so circumstanced as to be competent to commence such an action, it is immaterial so long as originally the parties were so arranged as to give the court jurisdiction. *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909.

95. *Newlove v. Pennock*, 123 Mich. 260, 82 N. W. 54; *Hope v. Brinckerhoff*, 4 Edw. Ch. (N. Y.) 348; *Gregory v. Valentine*, 4 Edw. Ch. (N. Y.) 282.

After the filing of the first bill an execution was issued upon another judgment for the benefit of the complainant, and the court held that the complainant had a right to file a supplemental bill, the defendant having, in the meantime, acquired additional property. *Thomas v. McEwen*, 11 Paige (N. Y.) 131.

If the complainants were right in filing the original bill, a supplemental bill seems to be the proper mode of reaching subsequently acquired property of the defendant. *Eager v. Price*, 2 Paige (N. Y.) 333.

96. *Sedgwick v. Cleveland*, 7 Paige (N. Y.) 287.

and a creditor may make persons, when discovered by a bill, parties defendant by a supplemental bill.⁹⁷

A supplemental answer may be filed in order to submit a defense arising after the issue was joined upon the original papers.⁹⁸

F. CROSS-BILL.—It has been held that a cross-bill is the proper mode of procedure by an assignee in bankruptcy in order to make all parties to the original creditor's bill parties defendant.⁹⁹

G. AMENDMENTS.—While the pleadings in a creditor's suit may be amended in matters of form,¹ an amendment will not be allowed after a decision has been reached and a decree has been entered thereon and the rights and claims of the parties have been adjudicated,² nor to set up an entirely new plea.³

97. *Morris v. Husson*, 4 Sandf. (N. Y.) 89.

When the subject-matter of a creditor's suit was in the hands of a receiver, so that no independent suit could be instituted in regard to it, except by leave of court, and when a person not a party to the pending suit, between whom and the plaintiff there is no priority, but who has a claim or lien on the property or is interested in the subject-matter of the suit, desires, for his own protection, to present his new claim, to assert his independent rights and raises new issues, he must do so by a formal bill, containing appropriate allegations, that is, by an original bill in the nature of a cross-bill or of a supplemental bill, as the case may be. *Talladega Merc. Co. v. Jenifer Iron Co.*, 102 Ala. 259, 14 So. 743.

98. In *Stewart v. Isidor*, 5 Abb. Pr. N. S. (N. Y.) 68, it was held that where the plaintiff began a creditor's suit to set aside an assignment made by the defendant and after issue was joined the defendant obtained his discharge in bankruptcy, and where the plaintiff appeared in the bankruptcy proceedings and proved his claim, the court held that the defendant had a right to file a supplemental answer setting up the discharge in bankruptcy, the plaintiff lost his lien acquired by the filing of the creditor's suit by proving his claim in full in the bankruptcy court.

99. *Bouton v. Dement*, 22 Ill. App. 619.

1. See cases generally throughout this article.

Amendment To Cure Variance.—Where there is a variance between

the dates of the judgments as set forth in the bill and according to the proofs adduced the bill may be amended at any time during the proceedings in the case. *First Nat. Bank of Horshall v. Hosmer*, 48 Mich. 200, 12 N. W. 212.

Where the affidavit before the chancellor tends to show that an averment in the bill that the defendant resided in the county of Rensselaer at the time the execution was issued there, was not true, the plaintiff must amend or his bill must fail. *Merchants & Mechanics Bank v. Griffith*, 10 Paige (N. Y.) 519.

Amendment To Include Claims Subsisting at Filing of Bill.—If the plaintiff had other claims than those mentioned in the pleadings, subsisting at time of filing his bill, which might have been included therein he must amend in order to have such claims considered. *Strike v. McDonald*, 2 Har. & G. (Md.) 191.

It is not sufficient evidence of the proper filing of a transcript of a judgment that it appears as an amendment to the original bill by the plaintiff. *Peterson v. Gittings*, 107 Iowa 306, 77 N. W. 1056.

2. Where the plaintiffs are parties to a bill upon which a decree had already been entered, adjudicating the right and claims of the parties as creditors, directing the property to be sold and the sale had taken place, it was then too late, without reasons, to permit them such amendment on the original bill as that the court would have opened the case and set aside the claim. *Clewis & Co. v. Brunswick & A. R. R. Co.*, 50 Ga. 522.

3. In *Brendel v. Strobel*, 25 Md. 395, it was held that a plea of limita-

When equity jurisdiction has attached, the jurisdiction will not be interfered with by a subsequent amendment setting out that defendant has since the filing of the original bill accumulated property,⁴ and when an amendment is made after the expiration of the period of limitation, it will relate back to the commencement of the action if it does not set up a new cause of action or bring in new parties.⁵

Bringing in New Parties. — The courts are very liberal in allowing amendments in order to bring in parties, who are necessary, before the rights of all can be ascertained.⁶

VI. TRIAL AND PROCEEDINGS GENERALLY. — **A. TRIAL.** It is error to try a creditor's suit as an action at law upon the idea that a verdict is conclusive, but it should be tried by the modes of proceeding known to the courts of equity, and the chancellor or judge is responsible for the decree therein, and must be satisfied in his own conscience that the findings made by the jury are correct.⁷

A complainant is not concluded by the sworn answers of the defendant, for when he has a right to file a bill, he is entitled to support the same by proof and to have a hearing thereon.⁸

The mere fact that a witness is a party to the suit is not sufficient reason to exclude or suppress his testimony if he has no interest in that part of the litigation about which he is called to testify, or if, being interested, he is examined as to matters which militate against that interest,⁹ and exceptions must be taken and relied upon in the court below and that court must pass upon the competency of the evidence whenever such objections are insisted upon.¹⁰

B. REFERENCE. — **1. The Order.** — A decree or order of reference in a creditor's suit operates as a suspension of all other pending suits for the administration of the assets of the debtor, and the decree may be made in the cause first ready for a hearing, although it may not be the suit first instituted.¹¹

It is error for a court to decree a sale of land before referring the matter to one of its commissioners to summon the parties and in-

tion, not having been set up in the answer, cannot be put in an answer by amendment.

See the title "Amendments and Joinders."

4. *Newlove v. Pennock*, 123 Mich. 260, 82 N. W. 54.

5. *Bryan v. Zarecor Co.*, 112 Tenn. 503, 81 S. W. 1252.

6. *McDougald v. Dougherty*, 14 Ga. 674.

7. *Dunphy v. Kleinsmith*, 11 Wall. (U. S.) 610, 20 L. ed. 223.

8. *Edwards v. Rodgers*, 41 Ill. App. 405.

9. *Colquin v. Reduman*, 20 Ala. 650.

10. *Pauloc v. Roger's Admr.*, 5 T. B. Mon. (Ky.) 164.

Upon a petition in error the court held that nearly all the questions argued in the briefs upon the petition in error may be disposed of by the suggestion that no bill of exception nor any pleadings appear in the record. *Cochran v. Cochran*, 62 Neb. 450, 87 N. W. 152.

11. *Bilmyer v. Sherman*, 23 W. Va. 656.

quire and report the amount of indebtedness properly chargeable on the land, after affording the defendant an opportunity of showing any payments made or set-offs to which he may have been entitled,¹² except where it does not appear in the record that there were any liens existing against the lands sought to be charged except such as were ascertained and their priorities fixed.¹³

The reference should be directed to the master in the county in which the defendant resides, or as near the residence of the defendant as possible.¹⁴

2. Notice of Hearing.—While notice of the hearing of claims before a master must be given,¹⁵ yet when advertisement is made of the same for a reasonable time and according to the order made in the case, it is sufficient, and personal notice is not required.¹⁶

The notice to appear before a master in chancery or auditor should specify how and when it was served in order to enable the court to judge whether it was properly done.¹⁷

3. The Hearing.—*a. Generally.*—The examination before a master is not limited to the defendant's property or effects, but extends to any matter the defendant would be required to disclose by answering to the bill, and authorizes the examination of witnesses on any matter charged in the bill and not admitted by the defendant on his examination.¹⁸ And a defendant who has answered and denied that he has any property may still be examined before the master touching property to be delivered to a receiver.¹⁹ And it is

12. *Kendrick v. Whitney*, 28 Gratt. (Va.) 646; *Marling v. Robrecht*, 13 W. Va. 440.

13. *Bock v. Bock*, 24 W. Va. 586; *Anderson v. Nagle*, 12 W. Va. 98.

14. *Bank of Monroe v. Keeler*, 9 Paige (N. Y.) 249.

15. *Clark v. Shelton*, 16 Ark. 474.

16. *Md.*—*Williamson v. Wilson*, 1 Bland 418. *N. Y.*—*Kerr v. Blodgett*, 48 N. Y. 62. *Tenn.*—*Barnett v. East Tennessee V. G. R. Co.* (Tenn.), 48 S. W. 877.

An order requiring the master in the creditor's suit to advertise the hearing of the claims against the debtor and fixing the time of their presentation in his office and the time for objections to same, should be granted and ought to be made at an early time in the proceedings. *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.*, 82 Fed. 642.

Where a creditor has no information of the notice as published in the advertisement thereof limiting the time for proof of claim, and he is not chargeable with negligence in bringing forward his claim, the judge should

inquire into the facts before rejecting the application to share in assets. *Glenn v. Farmers Bank*, 80 N. C. 97.

In the absence of proof the legal presumption would be that the commissioner had done his duty and had given due notice requiring creditors to come in and prove their claims, such notice being absolutely required. *Chestnut v. Fire & Marine Ins. Co.*, 2 Hill Eq. (S. C.) 72.

17. *Whipple v. Brown*, Har. (Mich.) 436.

18. *Howard v. Palmer*, Walk. Ch. (Mich.) 391.

Where the judgment debtor is a lunatic and a guardian has been appointed for him and has answered, and there have been no directions to the defendant to deliver over his property, the complainant has no right, under an order of reference, to force the wife to testify, and is not authorized to examine witnesses to hunt up testimony previous to the appointment of a receiver. *Copous v. Kauffman*, 8 Paige (N. Y.) 583.

19. *Austin v. Dickey*, 3 Edw. Ch. (N. Y.) 378.

competent for the creditors of the debtor to appear before the master and contest the claims of each other.²⁰

When the defendant has been sworn once generally upon the reference, the master has no right to require him to be sworn a second time, and where the examination of the defendant has been once closed, the master has no authority, under this order of reference, to issue a new summons to compel defendant to submit to a new examination.²¹

b. *Presentation and Allowance of Claims.*—A creditor should present the particulars of his claim to the master or receiver, accompanied by an affidavit in support thereof averring that the amount claimed is justly due.²²

Upon a reference to a master to ascertain the actual cash value of the property, the answer by the defendants as to the price stated is not conclusive as to the value upon the master but may be treated by him as evidence merely, and other evidence upon the subject is admissible. *Morse v. Slason*, 16 Vt. 319.

20. *Woodyard v. Polsley*, 14 W. Va. 211. See *supra*, III, E.

Where certain claims against the debtor are contested and the evidence to support such contest is within the knowledge of the parties whose claims are contested, these parties may be made to answer the objections to claims on oath. *Williamson v. Wilson*, 1 Bland (Md.) 418.

21. *Hudson v. Plets*, 11 Paige (N. Y.) 180.

Propounding Special Questions.

When a party had once gone through with an examination of the judgment debtor, it was not right to oblige him to undergo another general examination and the best course would be for the party who might require an additional examination to satisfy the master that the questions were material, necessary, and proper by propounding the questions in writing and laying them before the master, and upon the master finding them material he should issue an examination and restrict the further examination to matter of such written interrogatories. *Star v. Morange*, 3 Edw. Ch. (N. Y.) 345.

22. *Morris v. Mowatt*, 4 Paige (N. Y.) 142.

There can be but two modes under which other creditors may be permitted

to come in and participate and they are either by petition or by filing the vouchers of their claims and the filing of the schedule of an insolvent debtor cannot be considered as filing the claim of any creditor appearing therein. *Strike's Case*, 1 Bland (Md.) 57.

When the creditor asks to be permitted to come in with new proof of his claim in the interval between the final report of the auditor made under the direction of the court, and its ratification, within which period, though it is not a matter of course to let the party in to offer further proof in support of his claim, he will be allowed to do so, under circumstances which would not entitle him to the privilege after the report has been ratified. *White v. The Okisko Co.*, 3 Md. Ch. 214.

An exception to an allowance should be taken and disallowed by the master, and until such an exception is there taken and disallowed, the parties cannot be heard on exception in the circuit court. *Pennell v. Lamar Ins. Co.*, 73 Ill. 303.

Where Adjudication Becomes Final.
When a claim was passed upon and sustained and the auditor's report allowing the same was finally ratified and confirmed, and the receivers were ordered to pay over accordingly, it was a final adjudication which an order at a subsequent term could not set aside except upon a showing of fraud, surprise or mistake, but it could only be reached by appeal or bill of review. *Trayhern v. National Mech. Bank*, 57 Md. 590.

And any party interested may deny and oppose the allowance of any claim and then it must be legally and regularly established.²³

4. Report of Referee or Other Officer. — Where the report of the master, commissioner, or auditor of reference fulfils the requirements, as set out in the reference, it is sufficient,²⁴ and errors in the report must be taken advantage of and excepted to in the lower court or the decree will not be reversed.²⁵

A report of reference should be re-committed where it fails, upon its face, to show the lien debts upon the property and the amount of each and the time from which each should bear interest together with their respective priorities;²⁶ or when the report states the debts approximately only and the debts are described as about the sums stated and no dates are given to show when they were contracted or where payable;²⁷ or where it appears that the report should be corrected and revised;²⁸ or where it shows that certain claims have not been proved and no final disposition had thereof.²⁹ But the report of an auditor after ratification should not be interfered with by subsequently remanding a part of the report in order to hear further testimony and decide as to the relative merits between two disputing trustees.³⁰

C. DISCOVERY. — Where a creditor has exhausted his legal remedies he is entitled, under a general prayer for discovery, to a discovery of all property held in trust for the debtor and of all the property the debtor then owns, both without and within the jurisdiction of the court,³¹ but all the requirements of the statute must be com-

23. *Welch v. Stewart*, 2 Bland (Md.) 37; *Dorsey v. Hammond*, 1 Bland (Md.) 463.

Original complainants may make objections to other claims being admitted as well as the defendant in a creditor's suit, and may contest the validity of such intervenors' claims. *Strike v. McDonald & Son*, 1 Har. & G. (Md.) 191.

Upon the dissolution of a corporation it places the assets of the corporation in process of equitable administration, and every creditor whose claim has been presented or established in any of the modes appointed, becomes a quasi party and may resist before the master the allowance of any claim of dignity equal to or greater than his own. *Fagan Osgood v. Boyle Ice Mach. Co.*, 65 Tex. 324.

24. *Sively v. Campbell*, 23 Gratt. (Va.) 893.

25. *Hutton v. Loekbridge*, 22 W. Va. 159.

Where the commissioners file a supplemental report showing judgment that

had been recovered since the filing of the original report exceptions must be made thereon in the court below. Where no error appears upon the face thereof, and no exceptions taken the supreme court will not entertain the same: *Scott v. Ludington*, 14 W. Va. 387.

26. *Dillard v. Krise*, 86 Va. 410, 10 S. E. 430; *Speidel & Co. v. Schlosser*, 13 W. Va. 686.

27. *Shultz v. Hansbrough*, 33 Gratt. (Va.) 567.

28. *Kane v. Mann*, 93 Va. 239, 24 S. E. 938.

29. *Dixon v. Dixon*, 1 Md. Ch. 271.

30. *Barroll v. Foreman* (Md.) 40 Atl. 883.

31. *Bay State Iron Co. v. Goodall*, 39 N. H. 223; *Le Roy v. Rogers*, 3 Paige (N. Y.) 234.

See generally the title "**Discovery.**"

When the allegation of the indebtedness of the defendant in the bill is not denied, and there is an acknowledgment of a large indebtedness, by the defendant, which did not exist, to a

plied with,³² though a defendant cannot object to an examination concerning his property and effects on the ground of the irregularity of the appointment of a receiver.³³

D. INJUNCTION.—1. When Granted.—It is proper to grant an injunction forbidding the removal or transfer of property where, pending the litigation, it is liable to be removed out of the jurisdiction of the court,³⁴ or where the defendant unless restrained will do some act during the pendency of the action which will produce injury to the plaintiff or threatens to do some act in violation of plaintiff's rights incident to or connected with the subject-matter of the action.³⁵ An injunction may be granted where the bill alleges

third party, the plaintiff was entitled to have an inquiry directed as to the true amount due to said third party. *Smoot v. Newberry*, 8 W. Va. 400.

Discovery of Particular Property and How Enforced.—After the complainant has exhausted his remedy at law he may, by a creditor's bill, compel the creditor to discover any particular property and the court may order that such property be delivered and applied to his judgment, which order may be enforced by the court by process of attachment for contempt. *Creswell v. Smith*, 8 Lea (Tenn.) 688.

When the debtor holds an equitable interest in lands, the creditor through a creditor's bill, under the statute, may compel a discovery of any property or thing in action due to or held in trust for him. *McNab v. Heald*, 41 Ill. 326.

Discovery by Interrogatories.—By proceedings supplemental to execution, the plaintiff may in all cases obtain a discovery by interrogatories filed with the complaint, and upon the filing of answers to them, he may on leave, which would always be given, so amend his complaint as to meet the facts, or he may take the defendant's deposition, and these provisions take the place of the former bill for discovery in a creditor's suit. *Mason v. Weston*, 29 Ind. 561.

32. In *Barr v. Voorhees*, 55 N. J. Eq. 561, 37 Atl. 134, it was held that the direction in an order to appear and make discovery must specify the place appointed for that purpose.

It is irregular to serve a subpoena upon the defendant in a creditor's suit without at the same time serving a copy of the 191st rule of the court, the object thereof being to apprise the de-

fendant of his rights and duties and to save him the expense of employing a solicitor, when he is willing to make a voluntary disclosure of his property; and when the order appointing a receiver directs the defendant to make a much more extensive discovery than the complainants were entitled to, when the defendant had not given a written consent to allow the bill to be taken as confessed, the order appealed from must be reversed or modified. *Nesmeth v. Halsted*, 11 Paige (N. Y.) 647.

33. *Thomss v. Circuit Judges*, 97 Mich. 608, 57 N. W. 188.

34. *Aetna Nat. Bank v. Manhattan L. Ins. Co.*, 24 Fed. 769; *Holladay v. Hodge*, 84 S. C. 109, 65 S. E. 1019. See generally the title "Injunctions."

35. *Clark v. Herbert, etc. Pub. Co.*, 57 N. Y. Supp. 975.

Where a creditor has a claim against a limited partnership, and it is attempted to make a special partner a general partner and liable thereon, the power of granting an injunction should only be exercised when the claim is undisputed and when the property will, as speedily as possible, be applied to the use of creditors. *La Chaise & Fauche v. Lord, Brown & Marks*, 10 How. Pr. (N. Y.) 461.

Injunction Pendente Lite and Ex Parte.—When money belonging to the complainant had been fraudulently converted by the principal debtor and he had bought land in his wife's name and the bill seeks to enjoin them from conveying or incumbering same, an injunction *pendente lite* granted *ex parte* may be allowed, though looked upon unfavorably. *Anderson v. Hulther*, 117 Ill. App. 231.

the fraudulent making of a bill of sale by the debtor and the real retention of the same in himself in order to cheat his creditors,³⁶ or to prohibit the transfer of property when a supplemental bill has been filed to reach subsequently acquired property,³⁷ or when there is shown presumptively to be a surplus of rents and profits from trust funds beyond the sum necessary for the education and support of the person for whose benefit the trust is created,³⁸ or where a creditor desires to prevent other creditors from suing the administrator at law or proceeding in any way except under the direction and control of equity,³⁹ unless there is an adequate, certain, and direct remedy at law.⁴⁰

Staying Proceedings of Plaintiff. — The power exists in the court perpetually to stay the proceedings of the plaintiff in an equitable action at the suit of his adversary in another equitable action.⁴¹

2. Effect of Injunction. — When an injunction has been granted restraining the judgment debtor from disposing of, or parting with,

An injunction upon a creditor's bill taken *pro confesso* may properly issue against the judgment debtor restraining him from disposing of his property, but whether an injunction will issue, or a receiver be appointed upon a creditor's bill *pendente lite* is matter of discretion in the court. Schroetter v. Brown, 59 Ill. App. 24.

Directed to Specific Debt or Trust. A prohibition of transfer of property by the judgment debtor in a creditor's suit cannot be general under the statute but must be directed to a specific debt or trust. Barr v. Voorhees, 55 N. J. Eq. 561, 37 Atl. 134.

When the defendant has declined to make discovery, and it stands admitted that defendant has property and chuses in action in his possession, there is no objection to his being restrained from putting it out of his hands and being required to surrender it to the possession of a receiver. Runals v. Harding, 83 Ill. 75.

Lien of the Injunction.—When under a judgment creditor's bill a receiver has been appointed and an injunction ordered, it gives a lien upon the property prior to that of an administrator of one of the defendants who dies subsequently thereto. Saginaw County Bank v. Duffield, 157 Mich. 522, 122 N. W. 186, 133 Am. St. Rep. 354.

36. Connolly & McCarthy v. Riley, 25 Md. 402.

When it is sought to have a deed of trust set aside for fraud and the

evidence tends to prove the substance of the allegation of fraud, an order of injunction should be granted restraining the defendant from paying any part of the debt mentioned in the deed of trust pending the action. Roberts v. Lewald, 107 N. C. 305, 12 S. E. 279.

When it is alleged that the judgment debtor has fraudulently executed a bond to defraud creditors, the charge of fraud is sufficient to show jurisdiction in equity to grant an injunction staying the payment of the bond. Mahaney v. Lazier, 16 Md. 69.

When it is alleged that the judgment debtor had before the judgment assigned his interest in the profits of the business, but that he had received it from time to time, it was proper for an injunction to be issued restraining the assignee from transferring or disposing of the interest of the judgment debtor held by him in this manner until the determination of the action. Bank of Montreal v. Gleason, 1 N. Y. Supp. 658.

37. Eager v. Price, 2 Paige (N. Y.) 333.

38. Rider v. Mason, 4 Sandf. Ch. (N. Y.) 351.

39. Walton v. Pearson, 85 N. C. 34.

40. Green Trustee v. Spaulding, etc., 76 Va. 411.

41. Pond v. Harwood, 139 N. Y. 111, 34 N. E. 768.

his effects, a prior judgment creditor will be restrained from prosecuting a subsequent action.⁴² While an injunction cannot operate to prevent a defendant from receiving and applying the proceeds of his subsequent earnings to the support of himself and family and the payment of his debts,⁴³ nor to prevent him from proceeding to a hearing in a suit which he had commenced prior to the injunction,⁴⁴ any interference with money previously earned, or with any of his property then acquired, is a violation both of the letter as well as of the spirit of the injunction.⁴⁵

Effect of Injunction Against Creditors.—The fact that an injunction has been granted restraining the creditors of the deceased from prosecuting their demands, does not keep a creditor from establishing his claim by reducing it to a judgment.⁴⁶

3. Dissolution of Injunction.—The fact that an injunction was not endorsed on the back thereof is not ground for dissolving it, although this might be used to show that it ought to be set aside as irregularly issued,⁴⁷ nor is a mere denial by the defendant that he has any property sufficient ground for a dissolution.⁴⁸ But when no receiver has been appointed and no provision made for the keeping or disposal of property, an injunction should be dissolved to the extent of enabling the defendants to preserve it themselves,⁴⁹ and an injunction should be dissolved when it would jeopardize a reorganization of a company and no equity remains that would justify its continuance.⁵⁰ In considering a motion to dissolve an injunction, the bill must be looked to as it is, and not as it might be made by amendment.⁵¹

E. RECEIVERS.—1. When Appointed.—Where the execution upon a judgment has been returned unsatisfied, the court has jurisdiction to appoint a receiver.⁵² And a receiver should be appointed

42. *Rankin, Jr. v. Elliott*, 14 How. Pr. (N. Y.) 339.

43. *Taggard v. Talcott*, 2 Edw. Ch. (N. Y.) 628.

Upon motion for an attachment against the defendant for violation of an injunction enjoining the transfer of his salary, the court held that the injunction was not violated when, previous to the creditor's suit the defendant had assigned his salary by draft upon the paying officer, and, in pursuance thereof, the defendant after the injunction was served upon him, endorsed a check which had been previously left with the disbursing officer. *Ireland v. Smith*, 1 Barb. (N. Y.) 419.

44. *Parker & Parker v. Wakeman*, 10 Paige (N. Y.) 485.

45. *Taggard v. Talcott*, 2 Edw. Ch. (N. Y.) 628; *Lansing & Whitheck v. Easton & Robinson*, 7 Paige (N. Y.) 364.

46. *Van Wyck v. Norris*, 6 S. C. 305.

47. *Sizer v. Miller*, 9 Paige (N. Y.) 605.

48. *New v. Bame*, 10 Paige (N. Y.) 502.

49. *Osborn v. Heyer*, 2 Paige (N. Y.) 342.

50. *Wash, etc. R. Co. v. Southern, etc. R. Co.*, 55 Md. 153.

51. *Lehman Durr Co. v. Griel Bros. Co.*, 119 Ala. 262, 24 So. 49.

52. *Ill.*—*Gage v. Smith*, 79 Ill. 219. *Mich.*—*Rankin v. Rothschild*, 78 Mich. 10, 43 N. W. 1077. *N. D.*—*Minkler v. United States Sheep Co.*, 4 N. D. 507, 62 N. W. 594.

Court Cannot Go Behind the Judgment and Execution.—If the plaintiff shows a judgment perfected, and an execution issued thereon and returned unsatisfied in due form of law, it is a matter of course to appoint a re-

where the defendant has made disposition of a large proportion of his property without accounting therefor and has left his indebtedness unpaid,⁵³ or where the amount involved is large and the property sought to be reached is of a kind easily put out of reach and the disposition of which would be difficult to prove,⁵⁴ or where the property, owing to its peculiar character, is liable to waste or deterioration.⁵⁵ And where the bill is formally sufficient, although the debtor denies ownership of any property reachable by the bill, a receiver may be appointed,⁵⁶ as also where it is alleged that one of the defendants has in his possession certain property equitably subject to the control of the court,⁵⁷ where the plaintiff appealed

ceiver, and upon such application the court cannot go behind the judgment and execution. *Lent v. McQueen*, 15 How. Pr. (N. Y.) 313.

53. *Strong v. Goldman*, 8 Biss. 552, 23 Fed. Cas. No. 13,542.

It is the usual and better practice, when the evidence shows that the transactions between the defendants were fraudulent and void, to direct the appointment of a receiver and a sale by him, but it has been held proper to adjudge that the sale be made on execution by the sheriff. *Kennedy v. Barandon*, 67 Barb. (N. Y.) 209.

Where Facts Alleged Show Property. Where the complainant does not state in words that the debtor has no other property out of which plaintiff could satisfy his judgment, but does state facts sufficient to show this, the court will not reverse the appointment of a receiver. *Whitehouse v. Point Defiance*, etc., 9 Wash. 558, 38 Pac. 152.

54. *Moore Furniture Co. v. Prussing*, 71 Ill. App. 666.

55. *Kuhle v. Martin*, 26 N. J. Eq. 60.

Application for Receiver Must Be Without Unreasonable Delay.—It is the duty of a complainant who has obtained an injunction restraining the defendant from collecting his debts or disposing of his property which might be liable to waste or deterioration to apply to the court and have a receiver appointed without unreasonable delay. *Bloodgood v. Clark*, 4 Paige (N. Y.) 574.

Before Judgment at Law.—When the debt is not denied, circumstances may warrant the appointment of a receiver although the plaintiff is not a judgment creditor, as where he is a general creditor of a firm which has

dissolved and it is alleged that the effects of the firm are being wasted by one of the late partners. *Dillon v. Horn & Moring*, 5 How. Pr. (N. Y.) 35.

56. *Campau v. Detroit Driving Club*, 144 Mich. 80, 107 N. W. 1063.

Where Defendant Alleges That Assets Are of No Value.—When the defendant disclosed property which consists of notes, etc., of an insolvent firm, of which he had been a member and an interest in a firm now existing of which he is a member it is proper that a receiver be appointed to take charge of the property and to collect all that may be due the defendant although the defendant alleges that these assets are of no value. *Webb v. Overmann*, 6 Abb. Pr. (N. Y.) 92.

57. A receiver may be appointed and the court may find out how much such property amounts to and force the defendant to turn it over to the receiver. *French v. Commercial Nat. Bank*, 82 Ill. App. 254.

Property Beyond Jurisdiction of Court.—When the only property the judgment debtor has is situated beyond the jurisdiction of the state, the court will not appoint a receiver, where under the facts proven the court would not appoint if the property had been situated within the jurisdiction of the state. *Heyl v. Taylor*, 137 App. Div. 641, 122 N. Y. Supp. 279.

When the records show that only certain interest upon the bond was due the court holds that a receiver should be appointed with reference to the amount of interest due upon the bond which was not yet due. *Ryerson v. Menton*, 3 Edw. Ch. (N. Y.) 382.

Pending a suit to subject a debtor's real estate to the payment of liens

from an order allowing him a sale of land but shutting him off from the personalty,⁵⁸ and where it is desired to have dower assigned to the judgment debtor in order to ripen the dower rights.⁵⁹

2. Appointment Pendente Lite.—A receiver may be appointed *pendente lite*,⁶⁰ and the appointment may be made by a judge in vacation.⁶¹

3 When Receiver Will Not Be Appointed.—The appointment of a receiver is not necessary where the judgment debtor dies *pendente lite* and the property may be disposed of in due course of administration,⁶² and such an appointment will not be made where the record does not show the insolvency of the debtor or the need of the court's taking charge of the property.⁶³

4. Time for Appointment.—While it is the duty of the complainant, when an injunction has been obtained restraining the defendant from collecting his debts or disposing of his property, which might be liable to waste or deterioration, to apply to the court and have a receiver appointed without unreasonable delay,⁶⁴ an appointment of

upon it the court may sequester the rents and profits of such real estate and appoint a receiver for that purpose, wherever it appears that the debtor is insolvent. *Ogden v. Chalfant*, 32 W. Va. 559, 9 S. E. 879; *Grantham v. Lucas*, 15 W. Va. 425.

58. *Benedict v. T. L. V Land & Cattle Co. (Neb.)*, 94 N. W. 962.

59. *Tenbrook v. Jessup*, 60 N. J. Eq. 234, 46 Atl. 516.

60. *Railton v. People*, 83 Ill. App. 396; *New Jersey Lumb. Co. v. Ryan*, 57 N. J. Eq. 330, 41 Atl. 839.

Bond of Receiver.—When the receiver is first appointed temporary receiver and gives bond and is subsequently continued as a permanent receiver, a new bond is not required unless ordered by the court, and an objection to the power of the receiver to sue on the ground that a bond was not furnished, will not be sustained in the absence of such an order. *Jones v. Blun*, 145 N. Y. 333, 39 N. E. 954.

When the evidence shows that the question of whether the property belonged to the debtor or to his wife could be settled only by a suit and there is reasonable grounds to apprehend that before the suit can be determined the stock will be removed beyond the jurisdiction of the court the case is a proper one for the appointment of a receiver. *Syracuse State Bank v. Gill*, 23 Hun (N. Y.) 410.

61. *Smith v. Butcher*, 28 Gratt. (Va.) 144; *Penn v. Whitehead*, 17 Gratt. (Va.) 503, 94 Am. Dec. 478.

62. *Sylvester v. Reed*, 3 Edw. Ch. (N. Y.) 296.

63. *Banner v. Dingus (Va.)*, 33 S. E. 530.

Necessary Allegation.—When the bill alleges that large sums of money are due to defendant but fails to allege who are indebted to the defendant and fails to describe them in any way, and they are not made parties to the suit, a receiver was properly refused. *Amy v. Manning*, 149 Mass. 487, 21 N. E. 934.

In the absence of averments that either the debtors or the alleged preferred creditors are insolvent or when it does not appear that the transaction amounted to a general assignment of substantially all of the debtor's property, there is no showing as will justify the appointment of a receiver. *Lehman-Durr Co. v. Griel Bros. Co.*, 119 Ala. 262, 24 So. 49.

Where a bill of discovery is brought by creditors and the answer shows that the debtor owns interests in property but the prior liens and mortgages upon it are more than sufficient to absorb all his interests, the facts furnished no predicate for the appointment of a receiver. *McCullough v. Jones*, 91 Ala. 186, 8 So. 696.

64. *Bloodgood v. Clark*, 4 Paige (N. Y.) 574.

a receiver should not be made before service of process,⁶⁵ or before the time for the defendant to appear has expired, unless such defendant has fraudulently removed himself from the jurisdiction of the court.⁶⁶

5. Necessity for Notice.—An appointment of a receiver cannot be sustained when made without notice to the defendant,⁶⁷ but when a receiver dies leaving uncompleted the duties devolving upon him, a successor may be appointed without notice.⁶⁸

6. Attacking Appointment.—The appointment cannot be collaterally attacked, when there is enough upon the face of the record to show that the court had jurisdiction and had power to act in the premises,⁶⁹ nor can the judgment obtained at law and the execution returned unsatisfied be collaterally attacked upon an application for a receiver.⁷⁰

7. Title to Property Upon Appointment of Receiver.—a. *Vesting of Title.*—It has been held that the title to the personal property of the debtor, subject to the order, vests in the receiver at the time and by virtue of his appointment, but that the title to real estate vests in him only by virtue of a conveyance to him by the debtor, which the court has power to compel.⁷¹ After an assign-

Where the execution was returned unsatisfied nine years before a bill was filed and a motion for a receiver was made, the time elapsing is unreasonable and the motion will be denied. *Gould v. Tryon*, Walk. Ch. (Mich.) 353.

65. *Meridian News Pub. Co. v. Diem*, etc. Co., 70 Miss. 695, 12 So. 702.

66. *Sanford v. Sinclair*, 8 Paige (N. Y.) 373.

Appointment on Notice.—Application for the appointment of a receiver may be made, after due notice to the defendant, at any time between the time of service of the subpoena and the time limited by rule of court, for the defendant to appear, and after that time the application may be made ex parte and without notice. *Austin v. Figueira*, 7 Paige (N. Y.) 56.

An appointment of a receiver should not be made before answer or service of process as the rights of the complainant might be preserved by injunction. *Meridian News & Pub. Co. v. Diem & Wing P. Co.*, 70 Miss. 695, 12 So. 702.

But in *Dutton v. Thomas*, 97 Mich. 93, 56 N. W. 229, it was held that the assertion that a receiver cannot be appointed until after answer filed or until the proof shows that there is property to go into the hands of a

receiver could not be supported by authority.

67. *Meridian News & Pub. Co. v. Diem*, etc. Co., 70 Miss. 695, 12 So. 702.

68. *Nicoll v. Boyd*, 90 N. Y. 516.

69. *Marsh v. Irwin*, 168 Ill. 50, 47 N. E. 768; *Lutt v. Grimont*, 17 Ill. App. 308.

Application by Director of Defunct Bank.—The appointment of a receiver on an ex parte application of the director of a bank, although insolvency is alleged, is utterly void and can be assailed collaterally and disregarded with impunity, for an insolvent debtor cannot take refuge in a chancellor's decree on his own application and obtain protection from pursuing creditors who may have been enjoined from pursuing their ordinary remedies. *Whitney v. Bank*, 71 Miss. 1009, 15 So. 33, 23 L. R. A. 531.

70. *Lent v. McQueen*, 15 How. Pr. (N. Y.) 313.

71. *Chautauqua Bank v. Risley*, 19 N. Y. 369, 75 Am. Dec. 347; *Wilson v. Allen*, 6 Barb. (N. Y.) 542; *Bowe v. Arnold*, 31 Hun (N. Y.) 256.

When after the filing of the creditor's bill against them and the appointment of a receiver, the judgment debtors petition the United States court to be declared bankrupts, they must

still perform the order of this court and deliver their property to the receiver, unless their property has already been delivered to the assignee in bankruptcy. *Watkins v. Pinkey*, 3 Edw. Ch. (N. Y.) 533.

Title to an Income.—The appointment of a receiver will not per se, vest in the receiver a title to an income, though the income may have accrued in the hands of trustees prior to such appointment except so much thereof as the trustees concede to be unnecessary for the debtor's proper support. *Genet v. Foster*, 18 How. Pr. (N. Y.) 50.

Vests Title Only to Such property as Is Designated.—The receiver under a general direction to take possession of the defendant's property and effects cannot go and seize such as he, acting within the scope of his own judgment, should deem to fall within the scope of the order, but only such as the master from time to time on taking examination and proof shall specifically designate. *Dickerson v. Van Tine*, 1 Sandf. (N. Y.) 724.

Attempt To Issue Execution.—In a creditor's suit where the creditors have come in and obtained judgment, and a receiver has been appointed to collect and disburse the amount pro rata, a creditor cannot then have execution issued on the judgment debtor's property and collect the assets as the receiver has acquired title to all the property and he alone can enforce judgment. *Rigney v. Tallmadge*, 19 Abb. Pr. (N. Y.) 16.

Effect of Execution Prior to Appointment.—There is no question as to the equitable rights of the receiver to all the personal property of the judgment debtor in which he had any interest at the time of the commencement of these suits, and to the rents, profits and income of the real estate which accrued after that time, provided such property or rents and income had not been reached by the execution of other creditors before the court made an equitable sequestration thereof by its order for the appointment of a receiver. *Albany City Bank v. Schermerhorn*, 9 Paige (N. Y.) 372, 38 Am. Dec. 551.

Where one purchases a claim against a judgment debtor with notice of the suit, after the bill was filed, and efforts were being made to serve the

subpoena and injunction, he does not get a good title as against the receiver appointed in such suit. *Weed v. Smull*, 3 Sandf. Ch. (N. Y.) 273.

Possession of Receiver Possession of Court.—Garnishment.—The possession of a receiver is deemed the possession of the court and as the court will not permit itself to be a suitor in a court of law, the possession of the receiver is not to be subjected to a suit by garnishment. *Field v. Jones*, 11 Ga. 413.

Debts Due Foreign Corporation. Where a resident receiver is appointed for a foreign corporation, foreign debts due the corporation cannot be regarded as passing to the receiver. *Holbrook v. Ford*, 153 Ill. 633, 39 N. E. 1091, 46 Am. St. Rep. 917, 27 L. R. A. 324.

The assignment to a receiver vests in him all the title and interest which the defendant had, and an execution levied upon an issuance of an alias fieri facias by the plaintiff cannot have any effect, the title being in the receiver. *Gouverneur v. Warner*, 2 Sandf. (N. Y.) 624.

Title to Real Estate in Another State.—The court has power to compel a judgment debtor to execute a conveyance or transfer of title to real estate lying in another state so as to invest the legal title as well as the possession. *Bailey v. Ryder*, 10 N. Y. 363.

Claims of Third Persons.—Where a judgment creditor's bill is filed, generally it is the duty of the court to require the judgment debtor to deliver to a receiver all property in his possession, not exempt by statute, and if third persons claim it they may present their claims to the court, or apply for leave to sue the receiver. *Heise v. Starr*, 44 Ill. App. 406.

Possession of Third Party for Use of Debtor.—Where it is charged in the bill that the possession of insurance policies was upon a secret trust for the use of the judgment debtor and the court finds such allegations sustained by the proofs, the court has ample power to compel the assignment and delivery of the policies to the receiver and to clothe him with authority to bring suits thereon at law. *Phila. F. Ins. Co. v. Cent. Nat. Bank*, 1 Ill. App. 344.

Where the defendant had neglected

ment to the receiver by the judgment debtor, if the debtor becomes bankrupt, the receiver has a title superior to that of the assignee in bankruptcy and his release of certain of the defendant's debtors discharges them.⁷² And where a receiver removes a tenant's furniture before a landlord attempts to distrain the property, it becomes the property of the receiver.⁷³

As against persons not parties to the suit, the receiver's title to real estate of the judgment debtor does not relate back to the filing of the bill but passes by force of the assignment only, and as of the time when the assignment was delivered in fact,⁷⁴ and a receiver's title by assignment of the debtor's real estate only secures to him, pending the litigation, the rents and profits therefrom, and does not so divest the judgment debtor of the title as to prevent a judgment recovered against the debtor after the execution of the assignment, from becoming a lien thereon.⁷⁵

A mortgagee in possession, after condition broken, may hold the premises as against a receiver appointed upon a creditor's bill filed subsequent to the execution, delivery and recording of the mortgage.⁷⁶

b. *Assignment of Property to Receiver.*—Under an order appointing a receiver, the defendant should deliver his property to the receiver including the rents and profits thereof, which have accrued subsequent to the filing of the bill, and the tenants should be directed to attorn to the receiver and pay the rents to him.⁷⁷ And where the defendant in a creditor's suit fails to make an assignment, or if the tenants of the debtor refuse to attorn to the receiver, the court will protect his rights against the sheriff or others who have seized upon the crops of the debtor.⁷⁸ But a compensation to become due to the judgment debtor is not subject to a cred-

to execute an assignment of his property to the receiver, the master had no right to refuse to proceed in order to compel the defendant to comply with the order which directed the defendant to deliver over his property to the receiver, and to decide what property the defendant had in his possession or under his control. *Eldred v. Hall*, 9 Paige (N. Y.) 639.

An affidavit filed by a receiver in a foreclosure suit, that he has been appointed receiver does not make him a party to the suit without an order of the court nor does the mere order of appointment set up in the affidavit confer title to the property upon him. *Thomas v. Van Meter*, 164 Ill. 304, 45 N. E. 405.

72. *Roberts v. Albany, etc. R. Co.*, 25 Barb. (N. Y.) 662.

73. *Martin v. Black*, 9 Paige (N. Y.) 640.

74. *Watson v. New York Cent. R. Co.*, 6 Abb. Pr. N. S. (N. Y.) 91.

75. *Chautauqua Bank v. White*, 6 Barb. (N. Y.) 589.

Appointment Sufficient To Justify Receiver in Collecting Rents.—The appointment of a receiver of the estate, real and personal, things in action, debts, equitable interests and other effects of the defendant is amply sufficient to authorize the receiver to collect rents. *Rice v. Agnew*, 147 Ill. App. 468.

76. *Peterson v. Lindskoog*, 93 Ill. App. 276.

77. *Farnham v. Campbell*, 10 Paige (N. Y.) 598; *Chipman v. Sabbaton*, 7 Paige (N. Y.) 47; *Osborn v. Heyer*, 2 Paige (N. Y.) 342.

78. *Albany City Bank v. Schermerhorn*, 9 Paige (N. Y.) 372, 38 Am. Dec. 551.

itor's bill and need not be turned over to the receiver,⁷⁹ nor need the debtor assign a mere right of action for a personal tort, as for assault and battery, slander, etc.⁸⁰

8. Suits by Receiver.—A receiver of an estate may sue for all demands belonging to the debtor,⁸¹ and the receiver may maintain an action for the property of the debtor without showing an assignment by all the defendants in the creditor's suit.⁸²

Where the debtor failed to claim damages to his property within a year, as required by statute, and later with the debtor's consent, a purchaser from him was paid the damages prior to the appointment of a receiver, the purchaser's title thereto is good and the receiver is not entitled to recover.⁸³

It has been held that a foreign receiver acquires no interest in the property of a resident debtor and cannot bring a suit within the jurisdiction of the court to set aside a fraudulent conveyance of property by the debtor.⁸⁴

9. Discharge of Receiver.—Where a receiver has been appointed upon the allegations in the bill before an answer was filed, and the answer, when filed, specially denies every such allegation, the receiver, thus appointed, should be discharged,⁸⁵ and when a receiver has been appointed in a case, a bill should not be dismissed without requiring him to account.⁸⁶

F. CONTEMPT OF COURT.—A defendant who, knowing of the appointment of a receiver and the awarding of an injunction, although the order was not entered or the process served, is guilty of contempt for thereafter disposing of property subjected under the injunction,⁸⁷ and where a receiver is appointed for a resident corpora-

79. *Browning v. Bettis*, 8 Paige (N. Y.) 568.

80. *Hudson v. Plets*, 11 Paige (N. Y.) 180.

81. *Green v. Bostwick*, 1 Sandf. Ch. (N. Y.) 185.

A receiver of an estate may bring suit against a debtor thereof for the amount due thereon although the debtor had assigned all his property. *Iddings v. Bruen*, 4 Sandf. Ch. (N. Y.) 223.

Collection of Moneys Held in Trust for Debtor.—A receiver may file a bill in equity for the collection of certain moneys which he claims are held in trust for the debtor. *Terhune v. Bell* (N. J.), 9 Atl. 111.

Annulling Encumbrances on Debtor's Property.—Where a receiver is appointed by virtue of a statute providing a method for discovering the concealed property of a judgment debtor, he may exhibit a bill in chancery to annul sales of property of the debtor

or encumbrances upon it on the grounds that such were in fraud of creditors. *Miller v. Mackenzie*, 29 N. J. Eq. 291.

82. *Wilson v. Allen*, 6 Barb. (N. Y.) 542.

83. *Danforth v. Suydam*, 4 N. Y. 66.

84. *Tilkins v. Nunnemacher*, 81 Wis. 91, 51 N. W. 79.

85. *Furlong & Miller v. Edwards*, 3 Md. 99.

86. *Simmons v. Shelton*, 112 Ala. 284, 21 So. 309.

87. *Hull v. Thomas*, 3 Edw. Ch. (N. Y.) 236.

The defendant cannot avail himself of any irregularity of serving a subpoena upon him without at the same time serving a copy of the 191st rule of the court as an answer to an application for the appointment of a receiver but he must resort to a cross motion, on his part founded upon an affidavit of the irregularity and due no-

tion, an attempt to garnishee a debt due the resident corporation in another state will subject the party attempting it to contempt.⁸⁸ A defendant may be adjudged guilty of contempt who fails to appear in accordance with an order appointing a receiver and notifying him to appear before a commissioner.⁸⁹

VII. JUDGMENT OR DECREE.—A. IN GENERAL.—A judgment or decree in a creditor's suit, being a means for the execution and enforcement of a judgment obtained at law, has no effect whatever upon the operative character of the judgment at law further than to satisfy it to the extent to which assets are realized through the judgment or decree.⁹⁰ And as such a suit is not an original suit but a continuation of the suit at law,—a proceeding in aid of execution upon the judgment at law,—the jurisdiction of a federal court to render a decree is not confined to the limitations of citizenship or residence as in an original suit.⁹¹

B. PERSONAL JUDGMENT.—A general judgment for the same cause of action as that obtained in the original suit is foreign to the nature and purpose of a creditor's bill.⁹² But where there is an absent defendant and a present defendant, and the present defendant denies indebtedness to the plaintiff, but it is shown that he has property of the absent defendant in his possession, the plaintiff is entitled to a personal judgment to the extent of the amount of the absent defendant's property that he has converted to his own use;⁹³ and a personal judgment against the defendant is also al-

tice of such motions to the complainant's solicitor and the application should be made at the first opportunity after the defendant's appearance has been entered. *Nesmeth v. Halsted*, 11 Paige (N. Y.) 647.

88. *Sercomb v. Catlin*, 30 Ill. App. 258.

89. *Central Nat. Bank v. Graham*, 118 Mich. 488, 76 N. W. 1042.

90. *Davis v. Sanders*, 25 App. Cas. (D. C.) 26.

Forms and Details of Judgment in Discretion of Court.—Where the issues and incomes of a certain amount are willed to the use of the wife during her life and the capital upon her death unto such of the testator's children as shall survive him, the remainder vests absolutely in the children and is subject to creditors judgment but the form and details of the judgment directing and providing for the satisfaction of the plaintiff's judgment was in the discretion of the lower court. *Bergmann v. Lord*, 194 N. Y. 70, 86 N. E. 828.

91. *Freeman v. Howe*, 24 How.

(U. S.) 450, 16 L. ed. 749; *Babcock v. Millard*, 2 Fed. Cas. No. 699.

92. *Barnes v. Beighly*, 9 Colo. 475, 12 Pac. 906.

93. *Gibson v. White & Co.*, 3 Munf. (Va.) 94.

In any action in the nature of a creditor's bill whereby creditors of the defendant Connor sought to subject a certain stock of merchandise which was in the possession of appellant Lemp to the payment of their judgment against Connor, when the trial court found that there was amply sufficient of said stock and book accounts (which were found by the court to belong to Connor) in Lemp's hands to pay the entire judgment of respondents against Connor and all the cost it was not error to render judgment against Lemp for the full amount of said judgment against Connor including costs. *Gordon v. Lemp*, 7 Idaho 677, 65 Pac. 444.

Where the defendant bought lands for the debtor with the understanding that he should transfer the title to him when he had repaid him the pur-

lowed where a mortgage was given to him by the debtor in order to defraud the plaintiff, and the defendant has converted said mortgaged property to his own use,⁹⁴ and against a purchaser of land upon which there is a mechanic's lien, who has purchased without removing said lien.⁹⁵

A personal judgment may also be given against a trustee under a deed of trust where it appears that he has money in the bank sufficient to pay the decree.⁹⁶

C. SCOPE OF DECREE.—1. Generally.—A complainant is not entitled to a decree which settles the rights between the judgment debtor and his debtor when those rights have not been litigated,⁹⁷ nor is a complainant entitled to a decree to turn over \$14,000 worth of property when only \$2,500 was due.⁹⁸

The following instances will serve to illustrate the form and scope of decrees which have been sustained: a decree that a deed of certain premises, though absolute upon its face, is in effect a mortgage;⁹⁹ that a mortgagee re-assign the property upon payment by

chase price and advancements made thereon, and upon the debtor's death, the defendant sold the property, a creditor of the debtor has the right to have same applied to his judgment and his recovery would be properly measured by the amount for which the defendant sold the lands and he need not pursue the securities which the defendant received on the sale thereof, and the creditor's right of recovery ought not to be defeated because securities were taken instead of money. *Bowery Nat. Bank v. Duncan*, 12 Hun (N. Y.) 405.

94. *Murtha v. Curley*, 90 N. Y. 372.

95. *Brown v. Story's Admr.*, 4 Metc. (Ky.) 316.

96. *Bobbitt v. Brownlow*, 62 N. C. 252.

97. *Seymour v. Browning*, 17 Ohio 362.

A decree settling the rights between co-defendants can be based only on the pleading and proofs between plaintiff and defendants and no decree should be made that are not so based. *Farmers Bank v. Woodford*, 34 W. Va. 480, 12 S. E. 544.

No decree should be pronounced against the holder of the property of a trust judgment debtor personally unless it appears that he had consumed or appropriated part of the property to his own use so that the same was not forthcoming or had derived profits from the use thereof, and

then only to the amount so used or appropriated and before the plaintiff is entitled to a decree against the holder of the absent defendant's property, he must bring a proceeding regularly against the absentee and establish his claim against him. *Gibson v. White Co.*, 3 Munf. (Va.) 94.

A Decree in Favor of Receiver Does Not Determine Rights of Parties.—A decree in favor of the receiver instead of in favor of the complainant is not ground for objection, as the receiver's possession is the possession of the court and determines no rights among the parties. *Harman v. McMullin*, 85 Va. 187, 7 S. E. 349.

The creditors of the debtor may pursue their remedy to set aside the fraudulent conveyance made by the judgment debtor and have a receiver appointed of their personal estate without waiving their legal liens on the premises. *Wilkinson v. Paddock*, 11 N. Y. Supp. 442.

98. *McKissack v. Voorhees*, 119 Ala. 101, 24 So. 523.

99. *Macaulay v. Smith*, 132 N. Y. 524, 30 N. E. 997.

Where a debtor had executed a deed of trust to secure certain notes and had permission to cut certain lumber and have the proceeds from the sale thereof credited on the notes a decree should be set aside which is based on the commissioner's report when the evidence shows that some of the money

the mortgagor of the principal and interest advanced, when it appears that, though there was some consideration, the mortgage was for a much larger amount than the consideration;¹ a decree which provided that the plaintiff shall be substituted for the judgment debtor and that the executor of an estate from which the judgment debtor is to receive money shall account to the plaintiff until his claim against the debtor is paid;² a decree which subjects the value of the homestead over \$2,000 to a valid lien against it which existed before the commencement of the suit, when it is in accord with the clear weight of the evidence;³ a decree holding the debtors of the debtor, who during the pendency of the creditor's suit, made payments to the principal debtor, liable to the complainant *sub modo*,⁴ or which secures the property from being moved out of the jurisdiction.⁵

A decree in the alternative allowing an executor to pay complainant's judgment out of the assets of the estate or to deliver the assets to that amount to the receiver, is permissible under a creditor's bill.⁶

When several creditors' suits are pending at the same time, a decree for an amount of outstanding claims may be made in the cause which is first ripe for a decree whether that cause was first commenced or not, and when the decree is made in the younger suit, the proceeding in the other should be stayed, as all must come in under the same decree,⁷ and when several such bills presented substantially the same issue, and by consent and agreement of parties they were heard together upon the same evidence, and without objection a single decree was entered, the appellant not being damnified thereby, the decree will stand.⁸

Effectiveness of Decree. — It is held that the judgment of a chancery court on a claim is effectually pronounced by confirming the auditor's report, and if no steps are taken to revoke or overrule such

was credited upon an old indebtedness and only about one-half of the remainder credited on the notes. *Farr v. Baldwin* (Va.) 14 S. E. 703.

1. *Jones v. Adams*, 23 N. J. Eq. 113.

Occupying Premises as Mortgagee. When, in a creditor's bill, a mortgagee is shown to have occupied the premises mortgaged as such mortgagee and not as a tenant holding over, a decree compelling him to account for rents and profits is valid. *Anderson v. Lanterman & Henry*, 27 Ohio St. 104.

2. *Ricketson v. Merrill*, 148 Mass. 76, 19 N. E. 11.

3. *Tingley v. Gregory*, 30 Neb. 196, 46 N. W. 419.

4. *Gilmore v. Miami Bank*, 3 Ohio St. 502.

5. *Trotter v. White*, 10 Smed. & M. (Miss.) 607.

6. The terms of the decree in the alternative, allowing the executor to pay complainant's judgment out of the assets of the estate or deliver the assets to that amount to the receiver, are admissible under a creditor's bill. *Saginaw Co. Sav. Bank v. Duffield*, 157 Mich. 522, 122 N. W. 186, 133 Am. St. Rep. 354.

7. *Stephenson v. Taverners*, 9 Gratt. (Va.) 398.

8. **Single Decree Upon Several Creditors' Bills.**—*Beidler v. Crane*, 135 Ill. 92, 25 N. E. 655, 25 Am. St. Rep. 349.

judgment, it is as conclusive as if it had been accompanied with an order on the trustee to pay the amount.⁹

2. Adjudging or Admitting Claims.—In a creditor's suit in behalf of the complainant and all other creditors that choose to come in, the decree should be such as to include the claims of all who come in;¹⁰ but where the suit is brought to enable a particular complain-

9. *Lee v. Admrs. of Boteler*, 12 G. & J. (Md.) 323.

10. *Johnson v. Waters*, 111 U. S. 640, 4 Sup. Ct. 619, 28 L. ed. 547; *Morgan v. New York & A. R. Co.*, 10 Paige (N. Y.) 290. See also, *infra*, VII, F.

In *Matterson v. Demarest*, 19 Abb. Pr. (N. Y.) 356, the court held that where a creditor files a bill in behalf of himself and all other creditors, who might choose to come in under the decree, it is necessary that such creditors should stand in the same right with the complainant and that they should have had executions upon their judgments returned unsatisfied and when at the commencement of the action executions upon the judgment in favor of the creditors who now apply to come in had not been returned even after judgment they should not be allowed to come in.

Under a general creditors' bill all creditors may, at any time before final decree, be allowed to come in and prove their claims but such bills are totally different from those instituted by an unsecured creditor (or several creditors if they choose to unite) against a living debtor for here the field is open to all, and he who first secures a priority reaps the reward. *Hancock v. Wooten*, 107 N. C. 9, 12 S. E. 199.

Intervention Unnecessary.—The holder of a legal demand not reduced to a judgment cannot intervene in a creditor's suit until his demands are reduced to a judgment but when a bill is brought not only for the complainants themselves but "in behalf of all and singular, the other judgment creditors of the respondent" and no order was made prior to the interlocutory decree requiring persons in whose behalf the bill was filed to intervene by a given day or be barred, then all judgment creditors whether they intervened before or after the interlocutory decree was entered are entitled to share ratably in the proceeds

of the sale if their judgments are found to be valid. *George v. St. Louis Cable & W. R. Co.*, 44 Fed. 117.

All Suits But One May Be Stayed. When bills were filed by different creditors of one of the defendants to set aside certain deeds of gift made by him at various times to the several defendants his children, on an objection that it should have been a creditor's bill the plaintiff may amend so that all the suits but one be stayed and require the several parties to come in under the decree in this one suit so that only one account of the estate may be necessary. *Williams v. Neel*, 10 Rich. Eq. (S. C.) 338.

When the decree rendered a deed and mortgage null and void it was not ground for error that they were made by a life tenant and the holder in reversion, and the life tenant having died her administrator or heirs were not made parties to the suit. *Johnson v. Huber*, 34 Ill. App. 527.

Infants.—When the petitioners to intervene were infants they may come in under a decree already made and the proceeds of a sale already made may be applied to the satisfaction of their claims ratably with other claims and the trustee should be ordered to make sale of so much more of real estate as would be sufficient to satisfy their claim. *Mackubin v. Brown*, 1 Bland (Md.) 410.

Before or After Decree.—Where conveyances made by the debtor were found to be in fraud of creditors and a suit was brought to set them aside and asking for a sale it is the kind of a suit in which all creditors who may obtain permission to come in may come in and participate at any time either before or after the decree and it is most usual and proper that the decree itself should command the trustee to give notice to all creditors to bring in their claims. *Strike's Case*, 1 Bland (Md.) 57.

Who Are Creditors.—No one is precluded from showing himself to be a

ant to assert his rights, the only creditors who may come in under the decree are those so circumstanced as that they could have filed a similar bill themselves.¹¹

3. Under Prayer for General Relief.—Under a prayer for general relief, a complainant is entitled to any relief not inconsistent with the bill,¹² although it may be inconsistent with the special relief prayed.¹³ And relief may be allowed in certain instances without a prayer therefor, when the evidence clearly shows the complainant entitled to it.¹⁴

creditor either because he does not distinctly state himself to be one by his answer or because he asked to be dismissed with costs and he may receive such proportion of the proceeds of the sales as he may be entitled to. *Gibbs v. Cunningham*, 4 Md. Ch. 323.

Proof and Decree Must Coincide. Where a decree was adjudged in favor of all the creditors and no proof was given in support of any of the claims save one it ought to be revised. *Ward v. Hollins*, 14 Md. 158.

11. *Parmelee v. Egan*, 7 Paige (N. Y.) 610; *North America Coal Co. v. Dyett*, 7 Paige (N. Y.) 9; *Cunningham v. Pell*, 6 Paige (N. Y.) 655.

12. *McNab v. Heald*, 41 Ill. 326; *Barkwell v. Swan*, 69 Miss. 907, 13 So. 809.

When the bill prayed that a certain deed of trust be set aside on the ground that it was fraudulent but failed to show fraud, yet the complainant had liens upon the land subject to the trust debts, the surplus of the trust fund was liable to plaintiff's judgment pursuant to the prayer. *Hale v. Horne*, 21 Gratt. (Va.) 412.

The court may allow specifically a sale of certain lands attached, and under a prayer for general relief, if the attached premises are insufficient, may decree a sale of other lands to which a right is pleaded and proved. *Columbia Nat. Bank v. Baldwin*, 64 Neb. 732, 90 N. W. 890.

13. *Bailey v. Burton*, 8 Wend. (N. Y.) 339.

Although the complainants cannot obtain the specific relief they seek, yet under the general prayer for relief they may be entitled to the money paid by the debtor as part of the consideration for the land with interest until the judgment was rendered, unless the exclusive appropria-

tion of the money of the claim of the complainant interferes with the just distribution of the effects of the debtor among all his creditors according to the provision of the statute of wills. *Alexander v. Tams*, 13 Ill. 221.

14. In *Durand v. Henderson*, 39 N. Y. 287, it was held that when in a creditor's bill a deed is asked to be set aside on the grounds that it was made to hinder and delay creditors and to apply any property in law or equity belonging to debtor to judgment and it was found that the deed was made but a mortgage was given back to the debtor and that this was kept hidden with fraudulent intent to keep it from the creditors, the mortgagee having been made a party, the court can decree that the mortgagee pay such mortgage to the receiver to be applied on the judgment, under the discovery part of the bill without any prayer.

And in *Webb v. Staves*, 1 App. Div. 145, 37 N. Y. Supp. 414, it was held that when the plaintiff had obtained a judgment and had execution issued thereon and a return unsatisfied, and the debtor subsequently made a chattel mortgage upon property to the intestate of the present defendant which was not filed, and upon his taking the mortgaged property the plaintiff brought a creditor's suit to have the mortgage set aside and the proceeds applied to his judgment because he asked only for a money judgment, he should not be turned out by the court and denied the relief that the evidence clearly showed him entitled to.

But in *Baughner v. Eichelberger*, 11 W. Va. 217, the court held that while it is true that "a rigid and technical construction of bills and proceedings in equity" is exploded in favor of

D. AMOUNT OF JUDGMENT. — 1. In General. — Where the statute forbids the bringing of a suit for less than a certain amount, and several creditors join, each individual claim must be for more than the statutory amount to give the court jurisdiction.¹⁵ But when the complainant has claimed more than the statutory amount, and jurisdiction has attached, judgment may be rendered for any amount less than the jurisdictional amount.¹⁶

2. Interest. — Judgment creditors should be allowed interest on the amount for which their judgment was returned,¹⁷ computed from the date and according to the amount of their respective judgments as a basis, and not upon the amount, as determined by the decree.¹⁸

E. PERSONS BOUND BY JUDGMENT OR DECREE. — Under a valid decree all persons who are parties, or who may come in and are made parties, are bound by the decree.¹⁹ And it has been held that

substance, a party will not be allowed, even in equity, to recover upon a case proved essentially differing from that alleged in the bill, and although the plaintiff should make out in evidence a good case which under other circumstances would secure the interposition of the court, yet if it be not the very case made by the bill it will not support the bill.

15. *Umbarger v. Watts*, 25 Gratt. (Va.) 167.

16. *Smets v. Williams*, 4 Paige (N. Y.) 364, holding further that it is just and proper that the plaintiff pay the costs.

17. *Nelson v. Felder*, 7 Rich. Eq. (S. C.) 395.

All illegal interest will be deducted in settling the amount of the defendant's debt, in order to determine his equitable interest in lands, but where it was the purpose of the parties, and generally carried into execution, to renew the note every year, annual interest has been secured according to their dealings, and such an arrangement will not be disturbed. *Mattocks v. Humphrey*, 17 Ohio 336.

The allowance of interest on the cost was error, but the error was so small that the court refused to reverse on that account but directed that the lower court, in enforcing the judgment, deduct it. *Cockrill v. Mize*, 11 Ky. L. Rep. 637, 12 S. W. 1040.

18. *Dilworth v. Curts*, 139 Ill. 508, 29 N. E. 861.

19. See cases generally in this subdivision, and *supra*, under IV, E.

When a creditor comes in and ac-

cepts of his pro rata share in the receiver's hands for distribution, his name not being mentioned either as plaintiff or defendant, he exercises his right under the first order of distribution and if he subsequently neglects his interest he must abide by the consequences, for by coming in he took the position of a complainant and he is presumed to have had notice of all steps taken in the case and therefore cannot be heard to set up ignorance of what occurred in it afterwards. *Tunsema v. Schuttler*, 114 Ill. 156, 28 N. E. 605.

When a creditor comes in after the institution of the suit by filing the voucher of his claim or otherwise, he and all who have interest in the claim either as trustees or *cestuis que trusts* do thereby, to the full extent of their claim as expressed by such voucher, become parties to the suit and are bound accordingly by the decree. *Post v. Mackall*, 3 Bland (Md.) 486.

A decree in a creditor's suit belongs to all and not to one of the creditors, and any creditor who remains unpaid has a right to enforce the decree, and such enforcement could go in the name of the original plaintiff, or if any body so asked the plaintiff's name could be stricken out and another creditor's name substituted. *Shumates v. Crockett*, 43 W. Va. 491, 27 S. E. 240.

Brought in by Publication. — Under a valid decree in a creditor's suit to settle a trust all creditors are parties if they are brought in by publication according to the laws of Georgia and the decree is binding upon them.

when all persons are authorized to come in and present their claims under an order or decree for an accounting, it operates as an interlocutory decree in favor of each and every creditor and each is bound thereby.²⁰

F. SALE OF PROPERTY.—1. Order of Sale.—When the facts in the case show the necessity and propriety of a sale of the property sought to be subjected, a sale should be decreed,²¹ subject, how-

Samples v. Bank, 1 Woods 523, 21 Fed. Cas. No. 12,278.

All parties who come in upon notice and establish their claims are parties to the cause and are bound by all the proceedings and it is not necessary for them to file cross-bills in order to establish their claim for they are already parties. *Chesnut v. Fire & Marine Ins. Co.*, 2 Hill Eq. (S. C.) 72.

20. *Kerr v. Blodgett*, 48 N. Y. 62. If the bill appears to be a creditor's bill, a decree directing the judgment creditors to be convened before a commissioner, by order of publication, and their debts to be audited, would make all judgment creditors quasi parties to the suit, but where the decree merely directs all liens to be audited it could not make a trustee who held the legal title to the land a party nor the existing *cestui que trust*, but only the independent class of judgment creditors holding liens similar to the plaintiffs can be made in such a case quasi parties to the cause and only such are bound by the decree. *McCoy v. Allen*, 16 W. Va. 724.

21. See the cases generally in this subdivision, and *supra*, VII, D.

When the debtor answers to a bill to subject his land to the payment of a creditor's judgment that the land was conveyed a part to one person and part to another and the remainder to his wife upon an antenuptial contract, and the interests conveyed to the two other parties is very small, the wife's land may be decreed for sale when the judgments were docketed before the contract was made. *Sively & Co. v. Campbell*, 23 Gratt. (Va.) 893.

Conditional Decree for Sale.—A decree is not erroneous which contains a clause that the defendant, the trustee, should pay the amount of the judgment interest and costs as thereinafore provided from the amount of rents in his hands accruing from the undivided interest and decreeing a sale

of said interest in the event such amount was not paid within a certain time. *May v. Bryan*, 16 App. Cas. (D. C.) 556.

Where purchase money was due by the judgment debtor upon the land sought by the creditor to be sold, the court will only decree a sale of land upon imposing a condition upon the complainant to see that the proceeds be first applied to the payment of the balance of the purchase money. *Cloud v. Hamilton*, 3 Yerg. (Tenn.) 81.

Of Real or Personal Property.—It is error for the court under a creditor's bill to decree a sale of land before the amount of the debts are ascertained and the assets found out from a sale of the defendant's personalty. *Strayer v. Long*, 86 Va. 557, 10 S. E. 574.

Must First Subject Personalty.—It is error for the court to render a judgment subjecting the real estate to a sale without first subjecting the personal property or ascertaining that there was none. *Davidson v. Simmons*, 74 Ky. 330.

Personal Estate of Debtor Immaterial. Under the statute, a court of equity jurisdiction has the power to enforce judgment liens against the land of the judgment debtor at any time without reference as to whether the judgment debtor has personal estate or not out of which the judgment might be made by process of execution. *Marling v. Robrecht*, 13 W. Va. 440; *Peck v. Chambers*, 8 W. Va. 210.

Decree To Set Aside Deed Including Transfer of Personalty.—A decree under a creditor's bill subjecting the land of the judgment creditor to be sold and applied to the payment of the judgment is correct but should be set aside when it decrees personalty that has been transferred under same deed to be sold, when the bill had been filed without suing out execution. *Mutual Assur. Soc. v. Stanard, etc.*, 4 Munf. (Va.) 539.

ever, to any liens or priorities that may be outstanding thereon.²²

What Lands To Be First Sold. Where a creditor is seeking in a court of equity to enforce a judgment lien against his debtor and the latter is then the owner of real estate upon which the lien attaches, the principles of equity would require that the lands of the debtor which ought to pay the debt, should first be applied to the discharge of such judgment before resorting to lands upon which the judgment is also a lien then in the hands of an alienee. *Handly v. Sydenstricker*, 4 W. Va. 605.

When the decree ordered a sale of the premises "as other lands on sale under execution" or so much thereof as should be necessary to satisfy the claims, the proceeds to be applied first to a certain claim, the court held that if the property were divisible the sheriff might sell under each execution a sufficient portion for its satisfaction, beginning with the oldest judgment and for the payment of the debt first to be satisfied. *Harmon v. Stiff*, 8 Blackf. (Ind.) 455.

Where a creditor's bill is brought to set aside a conveyance and sell the property conveyed subject to plaintiff's judgment, the court may order the property to be sold and applied to such part of the plaintiff's debt as may appear to be due. *Jones v. Slubey*, 5 Har. & J. (Md.) 372.

Where there are several decrees upon the same day each of which would take a moiety of the same land, the court properly directed the whole to be sold under a creditor's bill, when it was shown that the land had been conveyed in fraud of creditors and had not reached the hands of a bona fide purchaser. *Coleman v. Cocke*, 6 Rand (Va.), 618, 18 Am. Dec. 757.

Interest of Husband in Wife's Separate Property.—Where a wife has acquired property from her father and the husband has made a deed of trust to her use of his rights therein, this separate estate becomes subject to the rights of her creditor and the court should order an account to be taken of the separate estate, and when same has been established to proceed to subject said separate estate to the payment of the debts, but being under the disability of coverture she has no

power to make any contract binding upon her for the sale of the fee in land in which her husband has an interest. *Garland v. Pamplin*, 32 Gratt. (Va.) 305.

Value of Real Estate Immaterial. Under a suit to subject real estate of the defendant to the payment of his debts, it is not necessary to ascertain the value of the real estate before advertising its sale. *Grantham v. Lucas*, 24 W. Va. 231.

Decree of Sale a Final Decision.—A decree of a chancellor deciding the insufficiency of the personal estate and decreeing the sale of the real estate for the satisfaction of the debt, is a final decision in favor of the creditor and the statute of limitations is not a bar. *Griffith v. Reigart*, 6 Gill (Md.) 445.

Staying Sale for Further Order. Where the amount of property in the hands of the receiver was sworn to be large and much more than sufficient to satisfy the judgment, an order for him to forbear selling by public auction for the present and to stay such sale until further order from the court is correct. *Wardell & Co. v. Leavenworth*, 3 Edw. Ch. (N. Y.) 244.

Intermeddling in Sale.—Where, under a sale of personalty by order of the court, certain parties to the suit intermeddle and by their bidding cause loss to the trust fund for the payment of creditors, their claims will be reduced to the extent of the loss suffered by reason of their officiousness. *Jaffrey v. Brown*, 29 Fed. 476.

Any objection to a sale must be made in the lower court and it will not then be set aside except for fraud, mistake, surprise, or other cause for which equity would grant like relief. *Karn v. Rorer Iron Co.*, 86 Va. 754, 11 S. E. 431; *Bock v. Bock*, 24 W. Va. 586.

22. III.—*Gauler v. Wohlers*, 12 Ill. App. 594. Va.—*Carnahan v. Ashworth*, 31 S. E. 65; *Hasken, Wood, etc. Co. v. Cleveland, etc. Co.*, 94 Va. 439, 26 S. E. 878; *Buchanan v. Clark*, 10 Gratt. 164. W. Va.—*Kanawha Val. Bank v. Wilson*, 25 W. Va. 242; *Beaty v. Veon*, 18 W. Va. 291; *Murdock v. Wells*, 9 W. Va. 552.

Where a debtor conveyed land to a

The decree should specify the amount due thereon and all priorities

creditor to secure the payment of his debts, in an action by a junior judgment creditor to subject the land the court may decree that the land may be sold and the proceeds applied first to the balance due on the secured creditor's judgment, and the balance applied to the liquidation of the plaintiff's judgment. *Lewis v. Matlock*, 3 Ind. 120.

Lien Upon Only a Part.—When the effect of the decree for sale is not to give appellee a preferred lien upon all the property of appellant, but only upon that portion of it to which appellee's mechanic's lien rightfully attached and a lien together with the other creditors upon the property conveyed in the deed of trust, the decree is valid. *Haskin, Wood, etc. Co. v. Cleveland, etc. Co.*, 94 Va. 439, 26 S. E. 878.

Lienor Need Not Answer To Have His Claim Recognized.—It is error to decree a sale of land to pay the judgment of the plaintiff, without at the same time providing for the payment of another judgment lien appearing in the record, although the other lienor did not answer the bill and was not asking to have the land sold to pay his judgment. *Anderson v. Nagle*, 12 W. Va. 98.

One Lien Being Stricken Out—How Vacancy Filled.—Where a creditor has a lien against the debtor's estate stricken out because it was fraudulent, he does not take his place but the vacancy is filled up by closing up those in the rear in the order named, for he cannot thereby displace or impair any prior, valid subsisting lien. *Zell Guano Co. v. Heatherly*, 38 W. Va. 409, 18 S. E. 611.

Rights of Tenant in Possession Should Be Ascertained.—It is error to decree a sale before ascertaining the extent of the rights of a tenant in possession of the land ordered to be sold and not providing for his protection. *Moore v. Bruce*, 85 Va. 139, 7 S. E. 195.

Where the appellant purchased and improved the land in question having actual notice of the debts against the land and pendency of the suit to subject the same to their payment and pending this suit for sale and after

decree for sale bought and improved the land he must be held to have done so subject to the rights of creditors and must bear the burden thus self imposed. *Hurn v. Keller*, 79 Va. 415.

Court Must Decide Force of the Incumbrances.—A decree is erroneous when it directs the commissioners of sale to assign bonds to such creditors as had incumbrances upon the land by mortgages, and creditors by judgment, allowing prior satisfaction to prior demands and leaving to the said commissioners to judge what was the force of the different incumbrances and their operations upon the different funds as these things should have been decided by the court and specified sums decreed to each claimant to be paid out of his appropriate fund. *Tinsley v. Anderson*, 3 Call (Va.) 329.

Mortgagees Not Bound To Come in. Where there is a mortgage debt upon the property the mortgagees are not bound to come in and seek payment under the chancery proceedings but may cling to the property specially pledged for the payment of their debts and hold on until they are fully paid both interest and principal. *Ellicott v. Ellicott*, 6 Gill & J. (Md.) 35.

Subrogation.—When one creditor has a lien upon one piece of property and another creditor has a lien on the same property and also another tract, if the second creditor used up the first tract for the payment of his claims, a decree of court allowing the first creditor to be subrogated to the rights of the second upon the second tract and applying the rents toward the payment of such lien and ordering a sale thereof when the rents thereof are insufficient, is valid. *Hudson v. Dismukes*, 77 Va. 242.

Second Decree Suspends Former One. After a decree for a sale of land had been entered but before the lands were advertised it being suggested that there were other liens than those credited a second decree was entered referring the cause to a commissioner for a further account of liens, it suspends the former decree until the accounts were taken. *Harris v. Jones*, 96 Va. 658, 32 S. E. 455.

and liens attaching thereto,²³ and should specify the property²⁴ and the interest of the defendant therein to be sold.²⁵ The decree should also specify the date of sale or the interval to elapse before sale is made,²⁶ opportunity being given to redeem the property.²⁷

23. *Cohen v. Carroll*, 5 Smed. & M. (Miss.) 545, 45 Am. Dec. 267; *Scott v. Ludington*, 14 W. Va. 387.

The amount decreed to be sold should be limited to such as will evidently be sufficient to satisfy the claim or claims. *Jacob v. Howard*, 15 Ky. L. Rep. 133, 22 S. W. 332.

Effect of Mortgages.—Where the life estate of the debtor and the remainder is subject to a mortgage, the court should first adjudge a sale of the life estate of the debtor, where the life tenant had joined in the mortgage, and if it overpays the mortgage, the surplus should be paid to his assignee for the benefit of creditors. *Buckley v. Stevenson* (Ky.) 99 S. W. 961.

Where there were several liens upon several tracts respectively, and the only lien upon one certain tract was a certain judgment, a decree was improper which was so framed that in order to prevent the sale of that tract the purchaser was required to pay all the judgments against the defendant. *Shultz v. Hansbrough*, 76 Va. 817.

Effect of Consent of Lienor to Sale. It is error for the court to decree a sale of land before the amounts and priorities of the liens thereon were ascertained, and the fact that one of the creditors consented in the decree that the land might be sold before the amount of his lien was ascertained will not cure the defect. *Beard v. Arbuckle*, 19 W. Va. 135.

Sale Should Not Sacrifice Property. When a decree for sale is made where the deeds have not been proven fraudulent nor the debts due the plaintiff from the defendant ascertained it is not proper at that stage, since that has a tendency to sacrifice the property. *Cole's Admr. v. McRae*, 6 Rand. (Va.) 644.

24. Decree of Sale of Land in the Bills Mentioned.—When the court decrees a sale of land in the bills mentioned it is sufficiently definite as reference may be had to the bills. *Barger v. Buckland*, 28 Gratt. (Va.) 850.

Decree of Sale of Property To Be Discovered.—A decree in a creditor's

suit directing that the amount of the judgment shall be satisfied by a sale of property to be discovered before any property is in fact, discovered, is not ground for reversal, and the appellant cannot be heard to object unless the receiver shall attempt to satisfy the decree out of property exempt from seizure for that purpose or shall unnecessarily sacrifice or waste property liable to be so seized. *Gage v. Smith*, 79 Ill. 219.

25. *Mason v. Patterson*, 74 Ill. 191.

Where a bill avers that at least one half of the consideration paid for the real estate was paid by the defendant and that he is the owner of at least one half the premises, a decree *pro confesso* can only be given for a sale of one half as the admission by such a decree is only to the extent of the averments in the bill, and the prayers for relief, and is not broad enough to warrant a sale of the entire property. *St. Louis Hoop & Stave Co. v. Danforth*, 160 Mich. 226, 125 N. W. 5.

Since at common law a creditor upon the escape of the debtor had a right to proceed against the sheriff or to retake the defendant or to bring an action of debt and thereupon have an execution issued, the creditor here could subject lands, devised to the debtor after his escape and conveyed by him to another, to the payment of the *elegit* lien and the court should decree that a moiety thereof only be sold should it appear that the rents and profits will not discharge the debt. *Stuart v. Hamilton's Exrs.*, 8 Leigh (Va.) 503.

Changing Decree To Suit Changed Conditions.—When the judgment is first for a sale of an undivided interest of the debtor, and later the land is divided, the judgment of sale may be changed to a sale of the debtor's divided interest. *Bryant v. Bryant*, 14 Ky. 358, 20 S. W. 270.

26. *McClaskey & Crim v. O'Brien*, 16 W. Va. 791.

27. *Rose & Co. v. Broum*, 11 W. Va. 122.

The court erred in decreeing any

2. Lease Instead of Sale.—Where the debts of the debtor can be liquidated and the interests of the debtor be better preserved by leasing the property and paying the rents therefrom to the creditors, it is held in some jurisdictions that this should be done,²⁸ and the rule is followed that a sale will not be decreed until the court is satisfied that the rents and profits upon the land will not discharge the indebtedness within five years.²⁹

immediate sale of defendant's property for it should have decreed a time within which the defendant should pay the judgment and upon his failure to do so then sale be made. *Speidel & Co. v. Schlosser*, 13 W. Va. 686.

But in *Crawford v. Weller*, 23 Gratt. (Va.) 835, the court said that while a decree for the sale of property to enforce judgment liens without giving time to redeem ought not to be pursued in general, yet unless the debtor shows an unjust damage thereby a decree will not be set aside.

Time Given Within the Discretion of the Court.—It was error to decree a sale of land without giving a day before sale of the land to redeem and the time required for publication is not sufficient but additional time must be given and the time of indulgence given is within the sound discretion of the court. *King v. Burdett*, 44 W. Va. 561, 26 S. E. 1010.

28. Compton v. Tabor, 32 Gratt. (Va.) 121.

When an insolvent person, instead of paying his debts, expends a large sum in the erection of valuable buildings upon the lot or land of his infant son, the court may decree, under a creditor's suit, that such property be rented out and that complainant is entitled to a portion of the rent that is the value of such improvements in proportion of the value of the property. *Athey v. Knotts*, 6 B. Mon. (Ky.) 24.

As a Privilege of the Debtor.—To have real estate rented rather than sold under the law prior to the statute was a privilege and not an absolute right accorded to the debtor; and therefore to entitle him to this benefit he must exercise reasonable diligence in claiming it in the court below and when he has not done so and shows no sufficient reason why he has not done so, he cannot be permitted at the last moment to avail himself of such privilege and have the cause sent back to the commissioners or otherwise

delayed. *Arnold v. Casner*, 22 W. Va. 444. See also *Hollingsworth & Co. v. Brooks*, 7 W. Va. 559.

How Leasing Should Be Made of Railroad.—In a creditor's bill to subject the property of a railroad to their judgments, when the judgments amount to less than \$2000, and the annual rental of the railroad would far exceed that amount, the decree should direct the commissioner to offer to lease the railroad for three months, and if it could not be leased for that term then for six months, then if unavailing for nine months, and if this could not be done then for a year, for although the rental would far exceed the amount of judgment the plaintiffs are entitled to have it leased and if a shorter term cannot be handled then for a year. *Winch & Strasb. R. R. Co. v. Colfelt*, 27 Gratt. (Va.) 777.

29. Cooper v. Daughtery, 85 Va. 343, 7 S. E. 387; *Preston v. Aston's Admr.*, 85 Va. 104, 7 S. E. 344; *Brengle v. Richardson*, 78 Va. 406; *Muse v. Friedenwald*, 77 Va. 57; *Barr v. White*, 30 Gratt. (Va.) 531; *Price v. Thrash*, 30 Gratt. (Va.) 515; *Horton v. Bond*, 28 Gratt. (Va.) 815; *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102; *Newlon v. Wade*, 43 W. Va. 283, 27 S. E. 244; *Rose & Co. v. Brown*, 11 W. Va. 122.

Where from the report of the commissioners it appears that the lien resting on the lands could be paid off from the rents and profits of the land for five years, but that the land had been exposed for renting at a period in the years when it was almost impossible to rent land at all, and that the land was exposed for renting at a distance from the premises, a decree to sell the land is not proper but it should be referred to the commissioners. *Mustain v. Pannill's Exr.*, 86 Va. 33, 9 S. E. 419.

Reference To Ascertain Rents.—A decree should be made to subject the debtor's land to a sale for the payment first of a trust debt and the

3. What Officer To Make Sale.—It is the usual and proper practice in this class of cases to appoint a receiver, master or commissioner and to direct a sale to be made by him,³⁰ though a decree may authorize and direct a sale of the property by the sheriff as upon an execution.³¹

4. Order of Re-sale.—A sale will not be confirmed by the court, but an order of resale will be made when it clearly appears to the court that the sale was made at a greatly inadequate price,³² when the purchaser neglects to comply with the terms of the sale within a reasonable time,³³ or where the judgment debtor bought at the sale and fails to pay the purchase price.³⁴

A sale will not be set aside when the only party or parties objecting thereto have not been prejudiced,³⁵ or where only the party com-

judgment debt unless rents and profits would satisfy the debt in five years, and a reference ought to have been directed to ascertain how that matter is, when it does not otherwise appear in the record. *Laidley v. Hinchman*, 3 W. Va. 423.

When no inquiry as to rents is asked for, the court may decree a sale, as the parties may later ask for an inquiry. *Ewart v. Saunders*, 25 Gratt. (Va.) 203.

When the bill directly avers that the rents will not liquidate the debts in five years and there is no answer, and the bill is taken for confessed, a decree ordering a sale is proper. *Barr v. White*, 30 Gratt. (Va.) 531.

30. *Kennedy v. Barandon*, 67 Barb. (N. Y.) 207.

As to the Recommendations of Different Creditors.—Where certain petitioners come in at such a time as that the decree would not affect them, yet so as to affect appointing a trustee to make sale, the recommendation of such creditors may be allowed to have their due consideration, but when they state no reason for their recommendation and the original plaintiff shows the largest specified amount of claims, the court must allow the original plaintiff to have the greatest right. *Watkins v. Worthington*, 2 Bland (Md.) 509.

When the defendant is the owner of an undivided equitable interest in certain lands, the court may direct that a sale be made by a master appointed for the purpose, and upon such sale that the defendant should make the

conveyance. *Russell v. Burke*, 180 Mass. 543, 62 N. E. 963.

Under the statute, when the owner refuses to convey letters patent the court may order the master to transfer it for the benefit of a creditor under a creditor's bill, and such assignment by the master will be good in form under the statute of the United States. *Wilson v. Martin-Wilson Fire Alarm Co.*, 151 Mass. 515, 24 N. E. 784, 8 L. R. A. 309.

31. *Cochran v. Cochran*, 1 Neb. (Unof.) 508, 95 N. W. 778; *Schott v. Machamer*, 54 Neb. 514, 74 N. W. 854.

32. *Beaty v. Veon*, 18 W. Va. 291; *Hyman Moses & Co. v. Smith*, 13 W. Va. 744. See *supra*, III, E.

33. *Hyman Moses & Co. v. Smith*, 13 W. Va. 744.

34. *Dickinson v. Clement*, 87 Va. 41, 12 S. E. 105.

When a sale of land, consisting of three tracts, was made under order of the court and was bid in by the debtor but an up set bid was subsequently made upon one of the tracts, it was proper for the court to order a re-sale, regardless of whatever private agreement had been entered into by the debtor and one of bidders at the former sale in relation to the payment of the purchase money bid thereon. *Nat. Bank v. Jarvis*, 28 W. Va. 805.

35. *Thomas v. Farmers Nat. Bank*, 86 Va. 291, 9 S. E. 1122.

Where the defendant only complains, and not any of the creditors, and all the debtor's land is needed, he is not

plaining failed to make seasonable objection to the sale.³⁶

VIII. DISTRIBUTION UNDER JUDGMENT.—Where a creditor's bill was brought, not on behalf of the complainant only, but on behalf of all other creditors also, then all creditors who come in and present and establish their claims are entitled to share ratably in the proceeds of the property,³⁷ unless one or more of the creditors

prejudiced and a sale will not be set aside. *White v. Drew*, 9 W. Va. 695.

Where the amount due defendant as exempted from execution was not tendered to the defendant, the court will order the sale to be set aside. *Smith v. Vanscoten*, 20 Ind. 221.

36. *Hudgins v. Lanier Bro. & Co.*, 23 Gratt. (Va.) 494.

37. See the cases generally cited in this subdivision.

Among Judgment Creditors.—In *George v. St. Louis Cable & W. R. Co.*, 44 Fed. 117, it was held that when the complainants in a creditor's bill were acting not only for themselves but "in behalf of all and singular the other judgment creditors of the respondent," then all judgment creditors were entitled to share ratably in the proceeds of the sale.

Judgment Becoming Dormant Pending the Action.—In an action to subject mortgaged premises to sale and ascertain and marshal the liens thereon, a judgment creditor who was properly made a party, while his judgment was alive, will not lose his right to share in the distribution of the money arising from the sale by the fact that his judgment became dormant pending the action. *Lawrence v. Belger*, 31 Ohio St. 175; *Dempsey v. Bush*, 18 Ohio St. 376.

When the complainants have not complained but permitted the creditor to come in and share the expense of the creditor's suit they will not be permitted to absorb the entire proceeds of the suit, but all the creditors coming in and sharing the expense will be permitted to share pro rata. *Nebraska Nat. Bank v. Hollowell*, 63 Neb. 309, 88 N. W. 556.

Where a creditor had had a conveyance to him for his debt and had settled certain debts, and the conveyance is set aside, he has a right to share ratably with all the other creditors for his own debt and those he has liquidated. *Robinson v. Stewart*, 10 N. Y. 189.

Effect of Mortgage to Creditor.

Where property was conveyed by a person in order to evade the results of a suit at law, and the grantee mortgaged the property to a bona fide creditor of the grantor, the property may be sold in a creditor's suit, and if the proceeds are insufficient to pay the mortgagee and the plaintiff, the fund should be applied ratably. *Beam v. Bennett*, 51 Mich. 148, 16 N. W. 316.

Where the necessary parties were not before the court in a former suit, and a complete decree marshaling the liens and ordering the premises to be sold could not be made, a junior creditor who therein was given precedence over a senior creditor will not be allowed to enforce such priority where the fund is not sufficient to settle both claims. *Hemmenway v. Davis*, 24 Ohio St. 150.

Where two chattel mortgages had been given by the debtor to the defendants covering his entire property and there was no fraudulent intent involved, and the creditor's suit was brought to subject the amount received by the defendants from a foreclosure of said mortgages in the state courts to the payment of all the creditors, the defendants and intervenors in the foreclosure suit will be allowed to retain their proportionate shares of the assets and the complainants will be allowed to receive their proportionate shares. *Lippincott v. Shaw Carriage Co.*, 34 Fed. 570.

If a specific or general lien at law upon property can be obtained by a judgment creditor, he is entitled to the fruits of his superior vigilance, but if the property is such that it could not be reached by a judgment at law, and the fund is raised by a decree in equity and the creditors are obliged to resort to that court to avail themselves of it, they will be paid upon the footing of equality only. *Purdy v. Doyle*, 1 Paige (N. Y.) 558.

If the decree gives no preference in payment of the debts, and the fund

are adjudged to have preferences or priorities in payment of their claims.³⁸ This distribution, however, is to be made subject to the rights which any persons may innocently have acquired in the property of the debtor subjected.³⁹

is not sufficient to pay in full, the creditors must be paid ratably. *Burrell v. Leslie*, 6 Paige (N. Y.) 445.

If there is a distribution of a deceased debtor's real estate among his creditors, the court is directed by statute to pay away the proceeds of the realty in the same manner as is observed by an executor or administrator in making payments of personalty. *Dorsey v. Hammond*, 1 Bland (Md.) 463.

38. In *Wallace's Admr. v. Treackle*, 27 Gratt. (Va.) 479, the court held that the funds should be distributed first to pay the judgment creditors of the debtor their judgments obtained in his lifetime according to their priorities, second the creditors who in his lifetime filed their bill to set aside deeds to his sons and those who came into said suit by petition before his death, regarding their liens as subsisting from the date of the filing of said bill or petition respectively, and the balance, if any, to be distributed pro rata among his other creditors.

39. **Part of Purchase Price of Property.**—Where a debtor has purchased property, a certain amount of the purchase price being paid by another, his creditor will be allowed to reach only

that portion of the property for which the amount of money he furnished paid for. *Latham v. Henderson*, 47 Ill. 185.

When property was conveyed by a husband to his wife and the facts are not sufficient to convict him of fraud, but it is shown that the wife had a valid claim against her husband for advances and also for a sale of her separate property, her claim should be paid first and then the judgment creditors' claims. *Cicotte v. Stebbins*, 49 Mich. 631, 14 N. W. 666.

Where an executor has been forced to pay out money as executor for the deceased who was security for the debtor, in the sale of the debtor's property, he should be repaid for such payments as security. *Tuck v. Calvert*, 33 Md. 209.

Improvement Made Bona Fide by Mortgagee.—When a mortgagee under a bona fide impression, thinks he is the owner of property and he improves it and receives the rent therefrom, the court will order a sale for the money due him, but he must deduct therefrom any amount of rent he has received over and above the amount expended upon the place. *Uhler v. Adams*, 73 Miss. 332, 18 So. 654.

CRIMINAL CONVERSATION

By the Editorial Staff.

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CROSS-REFERENCES:

Adultery;

Alienating Affections.

For the admissibility, character and sufficiency of evidence in such an action, see 3 ENCYCLOPAEDIA OF EVIDENCE, 780 *et seq.*

I. THE RIGHT OF ACTION.—Since time immemorial the husband has been given by the common law a right of action for criminal conversation with his wife.¹ The common law gave no such right of action to the wife for criminal conversation with her husband.²

1. **N. H.**—Brown *v.* Spaulding, 63 N. H. 622, 4 Atl. 394. **Pa.**—Keath *v.* Shiffer, 37 Pa. Super. 573; Silvernail *v.* Westerman, 11 Luz. Leg. Reg. 5. **Vt.**—Lewis *v.* Roby, 79 Vt. 487, 65 Atl. 524. **Eng.**—Harvey *v.* Watson, 7 M. & G. 644, 49 E. C. L. 644; Weedon *v.* Timbrell, 5 T. R. 357, 101 Eng. Reprint 199; Birt *v.* Barlow, 1 Doug. 171, 99 Eng. Reprint 113; Rigaut *v.* Gallisard, 7 Mod. 78, 81, 87 Eng. Reprint 1106. **Can.**—Milloy *v.* Wellington, 4 Ont. W. R. 82.

In Doe *v.* Doe, 82 Me. 503, 20 Atl. 83, 17 Am. St. Rep. 499, 8 L. R. A. 633, the court questions the expediency of the action, saying that "they seem to be better calculated to inflict pain upon the innocent members of the families of the parties, than to secure redress to the persons injured."

The words "crim. con." are ju-

dicially understood as an abbreviation for criminal conversation. Gibson *v.* Cincinnati Enquirer, 2 Flipp. 121, 125, 10 Fed. Cas. No. 5,392.

2. Doe *v.* Roe, 82 Me. 503, 20 Atl. 83, 17 Am. St. Rep. 499, 8 L. R. A. 833; Kroessin *v.* Keller, 60 Minn. 372, 62 N. W. 438, 51 Am. St. Rep. 533, 27 L. R. A. 685.

In the case last cited the court commented on Seavers *v.* Adams, and Haynes *v.* Nowlin, *infra*, and pointed out that in those cases the courts relied on cases which sustained complaints for alienating affections.

The reason for this distinction is explained in 3 Black. Com., thus: "The inferior hath no kind of property in the company, care or assistance in the superior, as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or in-

And it is doubtful if, even now, she may maintain the action, notwithstanding statutes removing the disabilities of married women, though in nearly all the states of this country she may sue for alienation of her husband's affection, with an allegation of adultery.³ This action is not affected by statutes which merely enlarge the civil rights of married women.⁴

The action is based fundamentally upon the theory that the husband is lawfully entitled to the exclusive right to marital intercourse with his wife.⁵ The injury to the husband consists simply in the carnal

jury." Another reason is that the fact that the husband had to be joined as party plaintiff in action by the wife, and whatever damages might be recovered would be his property—to allow the action under these circumstances would be to allow a man to profit by his own wrong. But see *Dodge v. Rush*, 28 App. Cas. (D. C.) 149, holding that the wife's conjugal rights are in principle the same as the husband's, and that she has therefore a right of action for criminal conversation with her husband.

3. *Haynes v. Nowlin*, 129 Ind. 581, 29 N. E. 389; *Seaver v. Adams*, 66 N. H. 142, 19 Atl. 776, 42 Am. St. Rep. 597. See also *U. S.*—*Crocker v. Crocker*, 98 Fed. 702. *Conn.*—*Hart v. Knapp*, 76 Conn. 135, 55 Atl. 1021, 100 Am. St. Rep. 989; *Foot v. Card*, 58 Conn. 1, 18 Am. St. Rep. 258, 6 L. R. A. 829. *Mass.*—*Houghton v. Rice*, 174 Mass. 366, 54 N. E. 843, where the inference is that if the complaint had contained the essential allegation which would have given the husband the right to recover, the wife might have maintained her action. *Ohio.*—*Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397.

But see *Nolin v. Pearson*, 191 Mass. 283, 77 N. E. 890, 4 L. R. A. (N. S.) 643, a case of first impression in Massachusetts, for the effect of such statutes upon the action for alienating affections. See also the title "*Alienating Affections*." See also *Sims v. Sims*, 79 N. J. L. 577, 76 Atl. 842, and the cases cited therein and in the annotation thereto in 29 L. R. A. (N. S.) 842; *Messervy v. Messervy*, 82 S. C. 559, 64 S. E. 753.

4. Statutes regulating property rights of the wife do not lessen the injury to the husband arising from her adultery. *Cross v. Grant*, 62 N. H. 675, 13 Am. St. Rep. 607.

5. "This presumes the loss of the consortium with his wife, of comfort in her society in that respect in which his right is peculiar and exclusive." *Bigaouette v. Paulet*, 134 Mass. 123, 45 Am. Rep. 307.

In *Bedan v. Turney*, 99 Cal. 649, 34 Pac. 442, the court says: "The foundation of the husband's right of action is the wrong done him by the defendant in violating his personal rights. The husband has the right to the conjugal fellowship of his wife, to her society, her aid, and her fidelity in every conjugal relation. Any act of another by which he is deprived of this right constitutes a personal wrong, for which the law gives him a redress in damages. Her sexual intercourse with another is an invasion of his rights, and it is immaterial whether this invasion is accomplished by force or with the consent of the wife. As the right belongs to the husband, it is no defense to his action for redress that its violation was by the consent or with the procurement of the wife, for she is not competent to give such consent."

In *Bailey v. King*, 27 Ont. App. 703, 706, *Osler, J. A.*, said: "The old form of pleading in this action, whether it was treated as in trespass or on the case, furnishes as good a test as can be applied as to what is the real issue in such a case. The allegation was that the defendant, heretofore, to wit, on, etc., and on divers other days and times between that day and the commencement of this suit debauched and carnally knew the said E. F., then and there, and still being, the wife of the plaintiff."

And see *III.*—*Yundt v. Hartrunft*, 41 Ill. 9, holding this because the wrong relates to the injury which the plaintiff sustains by the dishonor of his bed, the alienation of the wife's affec-

intercourse with his wife by another. The action is for adultery.⁶ So he will recover in this action if he alleges and proves that he was married to the woman, and that the defendant had carnal intercourse with her without his consent or connivance.⁷ The action therefore lies against one who has intercourse with a married woman either with⁸ or without her consent.⁹

Differs From Action for Alienating Affections.—This action is closely related to the action for alienating the affections of either husband or wife, but differs therefrom in that the gist of the latter is loss of consortium, and that into it the question of adultery may not enter.¹⁰

The causes of action may be entirely separate and distinct, but frequently they are involved, and it is clear that there is loss of consortium when the adultery is committed with the consent of the plaintiff's wife.¹¹ And there are cases which seem to hold that the

tions, the destruction of his domestic comfort, and the suspicion cast upon the legitimacy of her offspring. **Ind.** Moore v. Hammons, 119 Ind. 510, 21 N. E. 1111 (consent of wife immaterial); Wales v. Miner, 89 Ind. 118 (holding the wife incapable of giving such consent as will bar husband's action). **Ore.**—Jacobsen v. Siddal, 12 Ore. 280, 7 Pac. 108, 53 Am. Rep. 360. **Pa.**—Sieber v. Pettit, 200 Pa. 58, 49 Atl. 763.

The right to this action is recognized at common law. **N. H.**—Brown v. Spaulding, 63 N. H. 622, 4 Atl. 394. **Pa.**—Silvernail v. Westerman, 11 Luz. Leg. Reg. 5. **Eng.**—Harvey v. Watson, 7 M. & C. 644, 49 E. C. L. 644; Wilton v. Webster, 7 Car. & P. 198, 32 E. C. L. 491; Chambers v. Caulfield, 6 East 244, 102 Eng. Reprint 1280; Weedon v. Timbrell, 5 T. R. 357, 101 Eng. Reprint 199.

6. Colo.—Stark v. Johnson, 43 Colo. 243, 95 Pac. 930, 127 Am. St. Rep. 114, 16 L. R. A. (N. S.) 674 (holding that alienation of affections is not necessary to right of action). **Ia.** Wood v. Matkens, 47 Iowa 409. **Mich.** Egbert v. Greenwalt, 44 Mich. 245, 6 N. W. 654, 38 Am. Rep. 260.

7. Sutherland on Damages, p. 744; 3 Black. Com. 139. Cal.—Bedan v. Turney, 99 Cal. 649, 34 Pac. 442. **Mass.** Bigaouette v. Paulet, 134 Mass. 123, 45 Am. Rep. 307. **N. H.**—Cross v. Grant, 62 N. H. 675, 13 Am. St. Rep. 611. **N. J.** Inderlied v. Bullen, 77 Atl. 469. **Wis.** Lee v. Hammond, 114 Wis. 550, 90 N. W. 1073.

8. Cal.—Bedan v. Turney, 99 Cal. 649, 34 Pac. 442. **Ill.**—Yundt v. Hart-runft, 41 Ill. 9. **Ind.**—Moore v. Hammons, 119 Ind. 510, 21 N. E. 1111; Wales v. Miner, 89 Ind. 118. **Mich.** Egbert v. Greenwalt, 44 Mich. 245, 6 N. W. 654, 38 Am. Rep. 260. **Ore.** Jacobsen v. Siddal, 12 Ore. 280, 7 Pac. 108, 53 Am. Rep. 360. **Pa.**—Sieber v. Pettit, 200 Pa. 58, 49 Atl. 763.

“The basis of this is trespass *vi et armis*, on the theory that the wife is not a free agent or separate person, and that therefore her consent is immaterial, so that the adulterer is pursued as a mere trespasser.” Putnam, C. J., in Crocker v. Crocker, 98 Fed. 702.

9. Bigaouette v. Paulet, 134 Mass. 123, 45 Am. Rep. 307 (holding that the action will lie without loss of service to the husband); Egbert v. Greenwalt, 44 Mich. 245, 6 N. W. 654, 38 Am. Rep. 260 (where defendant raped wife of plaintiff).

10. See the title “Alienating Affections.”

Criminal conversation involves adultery as a necessary element. Scott v. O'Brien, 129 Ky. 1, 110 S. W. 260, 130 Am. St. Rep. 419, 16 L. R. A. (N. S.) 742.

The proper remedy for the husband in such a case is a special action, *quia* the defendant has his wife *rapuit*; and not to lay it *per quod consortium amisit*. Holt, C. J., in Rigaut v. Gallisard, 7 Mod. 78, 87 Eng. Reprint 1106.

11. Colo.—Stark v. Johnson, 43 Colo. 243, 95 Pac. 930, 16 L. R. A.

gist of this action, like the one for alienating affections, is loss of the comfort and society of the spouse as a result of the adultery.¹²

What Does Not Bar the Action.—A recovery against one adulterer does not bar an action against another,¹³ nor does a judgment for enticing a wife away, bar an action for criminal conversation with her,¹⁴ nor the fact that the intercourse was accomplished by force.¹⁵

Abatement of Action.—The action of criminal conversation abates on the death of the defendant.¹⁶ An action for damages for criminal conversation may be maintained against one who enticed plaintiff's wife away and continued to live in adultery with her, though more than the statutory period had elapsed since the time of enticement, the wrong being a continuing one.¹⁷

Death of The Wife.—The subsequent death of the wife does not deprive the husband of his right of action.¹⁸

II. THE FORM OF ACTION.—The original form of this action was trespass *vi et armis*.¹⁹ even though the act was done with the consent of the wife,²⁰ as force was implied from the act itself and need

(N. S.) 674. **Can.**—Lellis *v.* Lambert, 24 Ont. App. 653.

12. *Evans v. O'Connor*, 174 Mass. 287, 54 N. E. 557, 75 Am. St. Rep. 316; *Bigaouette v. Paulet*, 134 Mass. 123, 45 Am. Rep. 307; *Weedon v. Timbrell*, 5 T. R. 357, 101 Eng. Reprint 199.

But for the effect of separation of the husband and wife, see: **Ill.**—Yundt *v.* Hartrunft, 41 Ill. 9; *Browning v. Jones*, 52 Ill. App. 597. **Ind.**—*Michael v. Dunkle*, 84 Ind. 544, 43 Am. St. Rep. 100. **Pa.**—*Fry v. Drestler*, 2 Yeates 278. **Vt.**—*Jenness v. Simpson*, 78 Atl. 886. **Eng.**—*Chambers v. Caulfield*, 6 East 244, 102 Eng. Reprint 1280; *Evans v. Evans*, 68 L. J. P. 70, 81 L. T. N. S. 60; *Izard v. Izard*, L. R. 14 Pro. Div. 45, 58 L. J. P. 83, 60 L. T. N. S. 399.

To bar the husband's action the renunciation of his marital rights must be fixed and absolute. *Chambers v. Caulfield*, *supra*.

13. *Shannon v. Swanson*, 208 Ill. 52, 69 N. W. 869; *Gregson v. M'Taggart*, 1 Camp (Eng.) 415.

14. *Schnell v. Blohm*, 40 Hun (N. Y.) 378.

15. **Cal.**—*Bedan v. Turney*, 99 Cal. 649, 34 Pac. 442. **Mich.**—*Egbert v. Greenwalt*, 44 Mich. 245, 6 N. W. 654, 38 Am. Rep. 260. **Ore.**—*Jacobsen v. Siddal*, 12 Ore. 280, 7 Pac. 108, 53 Am. Rep. 360.

16. *Garrison v. Burden*, 40 Ala.

513; *Clarke v. McClelland*, 9 Pa. 128. See also *Cox's Admr. v. Whitfield*, 18 Ala. 738.

17. *Bailey v. King*, 27 Ont. App. 703.

18. **Ill.**—Yundt *v.* Hartrunft, 41 Ill. 9. **Wis.**—*Lee v. Hammond*, 114 Wis. 550, 90 N. W. 1073. **Eng.**—*Wilton v. Webster*, 7 C. & P. 198, 32 E. C. L. 491.

19. 3 Black. Com. 139; *Bigaouette v. Paulet*, 134 Mass. 123, 45 Am. Rep. 307. See **U. S.**—*Crocker v. Crocker*, 98 Fed. 702. **Cal.**—*Bedan v. Turney*, 99 Cal. 649, 34 Pac. 442. **Eng.**—*Macfadzen v. Olivant*, 6 East 387, 102 Eng. Reprint 1335; *Lellis v. Lambert*, 24 Ont. App. 653.

20. 3 Black. Com. 139, and the following: **Cal.**—*Bedan v. Turney*, 99 Cal. 649, 34 Pac. 442. **Mass.**—*Bigaouette v. Paulet*, 134 Mass. 123, 45 Am. Rep. 307. **N. C.**—*McClure's Exrs. v. Miller*, 11 N. C. 133. **S. C.**—*Haney v. Townsend*, 1 McCord 206. **Eng.**—*Macfadzen v. Olivant*, 6 East 387, 102 Eng. Reprint 1335; *Rigaut v. Gallisard*, 7 Mod. 78, 87 Eng. Reprint 1106.

In *Rigaut v. Gallisard*, 7 Mod. 78, 87 Eng. Reprint 1106, Chief Justice Holt says: "The law indulges the husband with an action for assault and battery for the injury done to him, though it be with the consent of the wife, because the law will not allow her a consent in such a case to the prejudice of her husband, because of

not be proved. But it seems that trespass on the case would also lie.²¹

In England however, the action for criminal conversation has been abolished, and the seducer may be made a co-respondent in divorce proceedings and damages may be recovered against him in the divorce action, or the husband may by petition claim damages for adultery with his wife without demanding any other relief.²²

III. THE PLEADINGS.—A. THE COMPLAINT OR PETITION. The declaration, petition or complaint in an action for criminal conversation must allege that the woman was the wife of the plaintiff at the time when she was debauched.²³

The means by which the seduction was accomplished need not be alleged.²⁴

Every particular act of adultery need not be alleged. This belongs to the class of actions in which a *continuando* may be laid. So there is no ground for a motion to require times and places of alleged acts of adultery to be alleged with particularity.²⁵

Aggravation.—Facts may be alleged which are intended to aggravate damages.²⁶

the interest he has in her.” See 3 Black. Com. 139; *Crocker v. Crocker*, 98 Fed. 702.

So force was implied. *Tinker v. Colwell*, 193 U. S. 483, 24 Sup. Ct. 505, 48 L. ed. 754; *Bedan v. Turney*, 99 Cal. 649, 34 Pac. 442.

21. Chitty Pl. (16th Am. ed.) 150, and the following: Ill.—*Shannon v. Swanson*, 104 Ill. App. 465. Ind.—*Van Vacter v. McKillip*, 7 Blackf. 578. Mich.—*Egbert v. Greenwalt*, 44 Mich. 245, 6 N. W. 654, 38 Am. Rep. 260. S. C.—*Haney v. Townsend*, 1 McCord 206. Vt.—*Claffin v. Wilcox*, 18 Vt. 605. Eng.—*Chamberlain v. Hazelwood*, 5 Mees. & W. 515; *Maefadzen v. Olivant*, 6 East 387, 102 Eng. Reprint 1335.

22. 20 & 21 Viet., ch. 85, §§28, 33, 59 (1857); *Lord v. Lord*, L. R. (1900) Prob. Div. 297, 69 L. J. P. 54; *Stone v. Stone*, 34 L. J. P. & M. 33, 11 L. T. N. S. 515, 3 Swab. & Trist. 608, 13 W. R. 414; *Keyse v. Keyse*, L. R. 11 Prob. Div. 100; *Spedding v. Spedding*, 31 L. J. P. & M. 96.

23. *Hauck v. Grautham*, 22 Ind. 53, holding it sufficient to charge, “she then and there being the wife of the said plaintiff.”

An allegation that the woman was the plaintiff's wife at the time the action is brought is not necessary, nor that defendant knew her to be such (*Wales v. Miner*, 89 Ind. 118), but as an allegation of marriage this is sufficient (*Wales v. Miner*, 89 Ind. 118;

Hauck v. Grautham, 22 Ind. 53). See also *Calcraft v. Harborough*, 4 C. & P. (Eng.) 499, 19 E. C. L. 494; *Lord v. Lord*, L. R. (1900) Prob. Div. 297, 69 L. J. P. 54.

Venue laid as in other transitory actions. *Guard v. Hodge*, 10 East 32, 103 Eng. Reprint 687.

24. *Bedan v. Turney*, 99 Cal. 649, 34 Pac. 442; *Wales v. Miner*, 89 Ind. 118.

Means immaterial except as affecting damages. Cal.—*Bedan v. Turney*, 99 Cal. 649, 34 Pac. 442. Ill.—*Yundt v. Hartrunfft*, 41 Ill. 9. Ind.—*Moore v. Hammons*, 119 Ind. 510, 21 N. E. 1111; *Wales v. Miner*, 89 Ind. 118. Mich.—*Egbert v. Greenwalt*, 44 Mich. 245, 6 N. W. 654, 38 Am. Rep. 260. Wis.—*Lee v. Hammond*, 114 Wis. 550, 90 N. W. 1073.

25. Ind.—*Lemmon v. Moore*, 94 Ind. 40. Mich.—*Johnston v. Disbrow*, 47 Mich. 59, 10 N. W. 79. Neb.—*Smith v. Meyers*, 52 Neb. 70, 71 N. W. 1006.

The proof of adultery is not confined to the exact place (*Johnston v. Disbrow*, 47 Mich. 59, 10 N. W. 79; *Yatter v. Miller*, 61 Vt. 147, 17 Atl. 850), or time (*Long v. Booe*, 106 Ala. 570, 17 So. 716), alleged in the complaint.

26. Ia.—*Stumm v. Hummel*, 39 Iowa 478. N. H.—*Sanborn v. Neilson*, 4 N. H. 501. Eng.—*Trelawney v. Coleman*, 1 B. & Ald. 90, 106 Eng. Reprint 33.

“It is usual in actions for criminal

A charge of abduction may be treated as surplusage in a proper case.²⁷

Alienation of Affections.—In an action for criminal conversation it is not necessary to allege or prove alienation of affections.²⁸

B. AMENDMENTS AND BILL OF PARTICULARS.—A bill of particulars may be required in the discretion of the court; refusal cannot be assigned as error.²⁹

An amendment is permissible if the facts to be supplied thereby are germane to the action.³⁰

C. WHAT MUST BE OR NEED NOT BE PLEADED SPECIALLY.—The plaintiff's consent and connivance must be specially pleaded if relied upon as a defense,³¹ and the invalidity of the marriage, or that there was no marriage, must be specially pleaded in order to put it in issue.³²

The following are not pleadable in defense in an action of this character, though provable in mitigation of damages:³³ unchastity of

conversation to allege the seduction of the wife, and the consequent alienation of her affections, and loss of her company and assistance, and sometimes of her services; but these are matters of aggravation, except so far as they are the statement of a legal inference from the fact itself, and actual proof of them is not necessary to the husband's right of action." *Bigaouette v. Paulet*, 134 Mass. 123, 45 Am. Rep. 307, 308. To the same effect see *Stark v. Johnson*, 43 Colo. 243, 95 Pac. 930, 16 L. R. A. (N. S.) 674.

27. *Levy v. Harris*, 29 App. Div. 453, 51 N. Y. Supp. 963.

28. *Keath v. Shiffer*, 37 Pa. Super. Ct. 573. And see *supra*, I.

29. *Ind.*—*Lemmon v. Moore*, 94 Ind. 40. *Neb.*—*Smith v. Meyers*, 52 Neb. 70, 71 N. W. 1006. *N. Y.*—*Tilton v. Beecher*, 59 N. Y. 176, 17 Am. Rep. 337; *Shaffer v. Holm*, 28 Hun 264. *Can.*—*Murray v. Brown*, 16 Ont. Pr. 125.

An allegation that the act took place at divers times within a certain period calls for a bill of particulars. *Shaffer v. Holm*, 28 Hun (N. Y.) 264. See the title "Bills of Particulars."

30. In an action for criminal conversation, amendment that defendant administered drugs to plaintiffs wife as means of accomplishing the debauchery, and that the plaintiff took the children and separated from his wife when he discovered the illicit relations, is germane to the original action and admissible. *Wilson v. Brock*, 134 Ga. 782, 68 S. E. 497.

31. *Morning v. Long*, 109 Iowa 288, 80 N. W. 390.

See, on the question of consent and connivance, *U. S.*—*Woldson v. Larson*, 164 Fed. 548, 90 C. C. A. 422. *Conn.*—*Norton v. Warner*, 9 Conn. 172. *Ga.*—*Cook v. Wood*, 30 Ga. 891, 76 Am. Dec. 677. *Del.*—*Prettyman v. Williamson*, 1 Penne. 224, 39 Atl. 731. *Ill.*—*Lowe v. Massey*, 62 Ill. 47; *Rea v. Tucker*, 51 Ill. 110, 99 Am. Dec. 539. *Ia.*—*Morning v. Long*, 109 Iowa 288, 80 N. W. 390; *Putle v. Zimbleman*, 39 Iowa 641, 88 N. W. 895. *Md.*—*Kohlhoss v. Mobley*, 102 Md. 199, 62 Atl. 236. *N. H.*—*Brown v. Spaulding*, 63 N. H. 622, 4 Atl. 394; *Cross v. Grant*, 62 N. H. 675; *Sanborn v. Neilson*, 4 N. H. 501. *N. J.*—*Inderlied v. Bullen* (N. J. L.), 77 Atl. 469. *N. Y.*—*Smith v. Masten*, 15 Wend. 270; *Schorn v. Berry*, 63 Hun 110, 17 N. Y. Supp. 522; *Bunnell v. Greathead*, 49 Barb. 106. *Pa.*—*Silvernail v. Westerman*, 11 Luz. Leg. Reg. 5. *Wis.*—*Lee v. Hammond*, 114 Wis. 550, 90 N. W. 1073. *Eng.*—*Winter v. Henn*, 4 Car. & P. 494, 19 E. C. L. 491; *Duberley v. Gunning*, 4 T. R. 651, 100 Eng. Reprint 1226; *Worsley v. Bisset*, 2 T. R. 168, 100 Eng. Reprint 91.

If the husband be guilty of negligence only or of loose or improper conduct not amounting to consent it goes only in reduction of damages. *Duberly v. Gunning*, *supra*.

32. *Kenrick v. Horder*, 26 L. J. Q. B. 214, 7 El. & Bl. 628, 90 E. C. L. 628, followed in *Ford v. Langlois*, 19 U. C. Q. B. 312.

33. Facts in mitigation may be proved under the general issue not guilty. *Harter v. Crill*, 33 Barb. (N. Y.) 283 (see, however, in next succeeding

plaintiff and his wife;³⁴ impotency of the husband;³⁵ former unhappy relations;³⁶ that the husband had treated his wife with intolerable severity;³⁷ that the husband is living apart from his wife;³⁸ that the plaintiff and his wife were divorced before the institution of the action;³⁹ that the husband has forgiven his wife or that he has co-

note, New York cases decided under a later code provision); *Shattuck v. Hammond*, 46 Vt. 466.

34. *Harrison v. Price*, 22 Ind. 165.

In New York under the Code of Civil Procedure, §536, plaintiff's immoral practices cannot be proved unless pleaded as a partial defense. *Billings v. Albright*, 66 App. Div. 239, 73 N. Y. Supp. 22. See also *Cole v. Beyland*, 67 N. Y. Supp. 1024.

As to husband's misconduct, see *Ill. Réa v. Tucker*, 51 Ill. 110, 99 Am. Dec. 539; *Browning v. Jones*, 52 Ill. App. 597. **Ind.**—*Harrison v. Price*, 22 Ind. 165. **N. H.**—*Cross v. Grant*, 62 N. H. 675; *Sanborn v. Neilson*, 4 N. H. 501. **N. Y.**—*Purdy v. Robinson*, 133 App. Div. 155, 117 N. Y. Supp. 295. **Vt.** *Shattuck v. Hammond*, 46 Vt. 466, 14 Am. Rep. 631. **Eng.**—*Bromley v. Wallace*, 4 Esp. 237, *overruling Wyndham v. Wycombe*, 4 Esp. N. P. 16.

As to wife's unchastity, see: **Ind.** *Harrison v. Price*, 22 Ind. 165. **Ia.** *Conway v. Nicol*, 34 Iowa 533. **N. H.** *Sanborn v. Neilson*, 4 N. H. 501. See also *Clouser v. Clapper*, 53 Ind. 548.

That the wife is a prostitute without the husband's privity goes only in mitigation of damages. *Howard v. Bartonswood*, cited in 1 Selw. N. P. 10.

35. *Bedan v. Turney*, 99 Cal. 649, 34 Pac. 442.

36. *Bailey v. Kennedy* (Iowa), 126 N. W. 181.

37. *Jenness v. Simpson* (Vt.), 78 Atl. 886.

38. **Ill.**—*Browning v. Jones*, 52 Ill. App. 597. **Ind.**—*Michael v. Dunkle*, 84 Ind. 544, 43 Am. Rep. 100. **Mass.** *Bigaouette v. Paulet*, 134 Mass. 123, 45 Am. Rep. 307. **Eng.**—*Evans v. Evans*, 68 L. J. P. 70, 81 L. T. (N. S.) 60 (holding that the loss of consortium is not the only ground on which damages may be assessed against a co-respondent, but that a man is wronged by the seduction of his wife far beyond the loss which he sustains by the breaking up of his home); *Izard v. Izard*, L. R. 14 Prob. Div. 45, 58

L. J. P. 83, 60 L. T. Rep. (N. S.) 399.

But where the spouses are living apart under articles of separation, it has been held in this country that the husband has no right of action. *Fry v. Drestler*, 2 Yeates (Pa.) 278. And see *Bartelot v. Hawker*, 1 Peake N. P. (Eng.) (1790) 7; *Weedon v. Timbrell*, 5 T. R. 357, 101 Eng. Reprint 199 (holding that the gist of the action is loss of consortium, and therefore action would not lie after separation); *C. v. D.*, 12 Ont. L. R. 24; *Milloy v. Wellington*, 7 Ont. W. R. 862; *Milloy v. Wellington*, 4 Ont. W. R. 561; *Milloy v. Wellington*, 4 Ont. W. R. 82; *Patterson v. McGregor*, 28 U. C. Q. B. 280.

In *Cross v. Grant*, 62 N. H. 675, the court says in discussing the effect of separation: "If the husband by his conduct compels the separation from him by his wife, he may as to her have lost his legal right to the solace and comfort of her society, but not as to all the world. His consent is not thereby extended to other men for sexual commerce with her. Although separated from her husband, and by his fault, she remains his wife until divorced, and for her support he is liable. Her enforced separation does not release him from his marital duties. There is always hope of reconciliation. The proper nurture, training and instruction of children require the united labor and affection of both parents. Their mutual comfort and support, and the good of society require that they should live together in one family. The policy of the law encourages them if living apart to come together again. Reconciliation would or should be followed by purity in their marriage relation, and happiness in their home. If, while separated, she is debauched, the hope of reconciliation is greatly diminished, and may be wholly extinguished."

39. **Ind.**—*Wales v. Miner*, 89 Ind. 118; *Michael v. Dunkle*, 84 Ind. 544, 43 Am. Rep. 100. **Ia.**—*Wood v.*

habited with her since the wrong with knowledge of her infidelity.⁴⁰

IV. QUESTIONS FOR JURY.—It is the office of the jury, and not of the court, to determine, under proper instructions, whether the averments of the petition have been proved.⁴¹ If there is no evidence to sustain a judgment for plaintiff the court should direct a verdict for the defendant.⁴²

V. INSTRUCTIONS.—Instructions in an action for criminal conversation are governed by the rules which apply to civil actions generally.⁴³

VI. NEW TRIAL.—A new trial will be granted for newly discovered evidence.⁴⁴ Unless it appears that the verdict was influenced

Mathews, 47 Iowa 409. **Mich.**—Gleason v. Knapp, 56 Mich. 291, 22 N. W. 865, 56 Am. Rep. 388, holding that where a husband knowing of his wife's adultery, did not set it up in her suit for divorce, the decree of divorce in her favor, bars his right of action against her paramour for criminal conversation. **N. Y.**—Purdy v. Robinson, 133 App. Div. 155, 117 N. Y. Supp. 295, holding that an action for divorce by wife on ground of adultery does not bar an action by the husband for criminal conversation occurring prior to the time of bringing the divorce action, or between the time of bringing the divorce action and the final decree therein. See also **Del.**—Prettyman v. Williamson, 1 Penne. 224, 39 Atl. 731. **N. C.**—Johnson v. Allen, 100 N. C. 131, 5 S. E. 666. **Wis.**—Lee v. Hammond, 114 Wis. 550, 90 N. W. 1073. **Can.**—C. v. D., 8 Ont. L. R. 308, 12 Ont. L. R. 24 on effect of foreign divorce and marriage with defendant.

40. **Ga.**—Sikes v. Tippins, 85 Ga. 231, 11 S. E. 662. **Ill.**—Shannon v. Swanson, 203 Ill. 52, 69 N. E. 869. **Ind.**—Clouser v. Clapper, 59 Ind. 548. **Ia.**—Stumm v. Hummel, 39 Iowa 478; Verholf v. Houwenlengen, 21 Iowa 429. **Mich.**—Smith v. Hochenberry, 138 Mich. 129, 101 N. W. 207. **Neb.**—Smith v. Meyers, 52 Neb. 70, 71 N. W. 1006. **N. H.**—Cross v. Grant, 62 N. H. 675; Sanborn v. Nielson, 4 N. H. 501.

41. Wheeler v. Abbott (Neb.), 131 N. W. 942. And see Brunelle v. Ruell, 140 Mich. 256, 103 N. W. 602.

If not material on the question of venue the jury need not answer an interrogatory as to the place of adultery. Lemmon v. Moore, 94 Ind. 40.

Damages.—Ward v. Thompson (Wis.), 131 N. W. 1006.

Collusion or Connivance.—Shannon v. Swanson, 104 Ill. App. 465.

Happiness of Married Life.—Ward v. Thompson (Wis.), 131 N. W. 1006; Lee v. Hammond, 114 Wis. 550, 90 N. W. 1073.

42. Wilson v. Brock, 134 Ga. 782, 68 S. E. 497; Powers v. Sumbler, 83 Kan. 1, 110 Pac. 97.

43. **Ga.**—Wilson v. Brock, 134 Ga. 782, 68 S. E. 497. **Ind.**—Wales v. Miner, 89 Ind. 118. **Ia.**—Puth v. Zimbleman, 99 Iowa 641, 68 N. W. 895, holding that a charge to allow the plaintiff for the loss suffered "In the affection, society, companionship or services of his wife" is not erroneous in the absence of request for more specific reference to the duty resting upon the husband. **Pa.**—Sherwood v. Titman, 55 Pa. 77.

It has been held that instructions to the jury to consider the mental anguish of the plaintiff is proper. **Ala.** Long v. Booe, 106 Ala. 570, 18 So. 716. **Del.**—Prettyman v. Williamson, 1 Penne. 224, 39 Atl. 731. **Neb.**—Smith v. Meyers, 52 Neb. 70, 71 N. W. 1006. **Eng.**—Wilton v. Webster, 7 C. & P. 198, 32 E. C. L. 491.

Must Conform to Evidence.—In Belcher v. Ballou, 124 Iowa 507, 100 N. W. 474, the court says: "The woman who has admittedly been a faithful wife and mother for a quarter of a century, and then deserts her husband for the arms of an adulterer, is so rare an exception to her kind, that the brand of infamy should not be placed upon her, even indirectly, unless the charge be supported by something more substantial than the highly wrought suspicions of a mind inflamed by jealousy."

44. Smith v. Masten, 15 Wend.

by passion or prejudice, a new trial will not usually be granted,⁴⁵ on the ground that the allowance of damages was excessive,⁴⁶ or inadequate.⁴⁷

(N. Y.) 270, as to improprieties of plaintiff.

But a new trial should not be granted because plaintiff out of his consideration for his child, after verdict in his favor, has taken his wife back, there being no intimation that they separated for purposes of trial. *McMillan v. Jelly*, 17 U. C. C. P. 702.

45. **Ia.**—*Puth v. Zimbleman*, 99 Iowa 641, 68 N. W. 895. **N. Y.**—*Smith v. Masten*, 15 Wend. 270. **S. C.** *Torre v. Summers*, 2 Nott & M. 267, 10 Am. Dec. 597. **Eng.**—*Duberley v. Gunning*, 4 T. R. 651, 100 Eng. Reprint 1226.

46. **Ia.**—*Puth v. Zimbleman*, 99 Iowa 641, 68 N. W. 895. **Wash.**—*Speck v. Gray*, 14 Wash. 589, 45 Pac. 143. **Wis.** *Lee v. Hammond*, 114 Wis. 550, 90 N. W. 1073. **Can.**—*Milloy v. Wellington*, 4 Ont. W. R. 82; *McMillan v. Jelly*, 17 U. C. C. P. 702.

47. In *Ward v. Thompson* (Wis.), 131 N. W. 1006, the court says: "The amount of damages to be given in cases of this kind is peculiarly a question for the jury and its assessment, though it may seem quite small, will not be set aside unless it is clear that some

error, passion or prejudice has intervened to which the inadequate assessment of damages can be reasonably attributed." In this case a verdict of \$300 was sustained.

The following verdicts have been sustained: **Ill.**—*Croze v. Rutledge*, 81 Ill. 266, \$15,000. **Ind.**—*Wales v. Miner*, 89 Ind. 118, \$1,000. **Ia.**—*Puth v. Zimbleman*, 99 Iowa 641, 68 N. W. 895, \$1,500. **Ky.**—*Dorman v. Seebree*, 21 Ky. L. Rep. 634, 52 S. W. 809, \$4,375. **N. Y.** *Billings v. Albright*, 66 App. Div. 239, 73 N. Y. Supp. 22 (\$6,000); *Smith v. Masten*, 15 Wend. 270 (\$3,000). **Wash.** *Speck v. Gray*, 14 Wash. 589, 45 Pac. 143, \$15,000, action for alienation of affections. **Eng.**—*Duberley v. Gunning*, 4 T. R. 651, 100 Eng. Reprint 1226, \$25,000.

See also **Ia.**—*Heisler v. Heisler*, 127 N. W. 823. **Miss.**—*Sivley v. Sivley*, 96 Miss. 137, 51 So. 457. **Mo.**—*Fuller v. Robinson*, 230 Mo. 22, 130 S. W. 343.

Mental anguish as an element of damages in these cases is discussed in *Stark v. Johnson*, 43 Colo. 243, 95 Pac. 930, and in the annotation thereto in 16 L. R. A. (N. S.) 674.

CROSS-BILL

By CHARLES COAN,
Of the Los Angeles Bar.

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CROSS-REFERENCES:

Bills and Answers;
Cross-Complaint;

Equity Jurisdiction
and Procedure.

I. DEFINITION.—The cross-bill is a mode of defense,¹ auxiliary to and depending upon the original suit; that is to say, it is an ancillary suit,² the original bill and cross-bill constituting but one cause.³

1. U. S.—*Weathersbee v. American Freehold*, etc. Co., 77 Fed. 523. **Ala.** *Gilman Sons & Co. v. New Orleans & S. R. Co.*, 72 Ala. 566; *Andrews v. Hobson's Admr.*, 23 Ala. 219. **Ga.**—*Canant v. Mappin*, 20 Ga. 730. **Ill.** *Roby v. South Park Comrs.*, 252 Ill. 575, 97 N. E. 225. **N. J.**—*New York & New Jersey Water Co. v. North Arlington* (N. J. Eq.), 75 Atl. 177; *Kirkpatrick v. Corning*, 39 N. J. Eq. 136. **N. Y.**—*Gallatian v. Erwin*, 8 Cow. 361, *Hopk. Ch.* 48. **Tenn.**—*Montgomery v. Olwell*, 1 Tenn. Ch. 169. **Va.**—*West Virginia O. & O. L. Co. v. Vinal*, 14 W. Va. 637, 677.

Cross-Petition.—In *Russell v. Lamb*, 82 Iowa 558, 48 N. W. 939, the answer of the defendant asked that the cross-petition be taken as a cross-bill. The court said: "The name given the pleading in the statute is 'cross-petition.' The same pleading is intended to be designated by both names. The law will not defeat rights because things are called by wrong names. But the term 'cross-bill' we think was not incorrectly used in the pleading. It is often used in our reports and digests." See *Kentucky Rev. Code* (1906), §96, subd. 3, and the title "**Cross Complaint**."

2. U. S.—*Lovell v. Latham & Co.*, 186 Fed. 602; *United States v. Reese*, 166 Fed. 347; *Cross v. DeValle*, 1 Wall. 1, 17 L. ed. 515; *Ayres v. Carver*, 17 How. 591, 15 L. ed. 179. **Ala.**—*Continental Life Ins. Co. v. Webb*, 54 Ala. 688; *Nelson v. Dunn*, 15 Ala. 501. **Fla.** *Special Tax School Dist. No. 1 v. Smith*, 61 Fla. 782, 54 So. 376. **Ga.**—*Ray v. Home & Foreign Invest. Co.*, 106 Ga. 492, 32 S. E. 603. **Ky.**—*May v. Armstrong*, 3 J. J. Marsh. 260. **Mo.**—*Mathiason v. City of St. Louis*, 156 Mo. 196, 56 S. W. 890. **Neb.**—*Armstrong v. Mayer*, 69 Neb. 187, 95 N. W. 51. **N. J.**—*Doremus v. Paterson*, 70 N. J. Eq. 296, 62 Atl. 3, *affirmed*, 71 N. J. Eq. 789, 71 Atl. 1134. **Vt.**—*Slason v. Wright*, 14 Vt. 208.

"In determining whether a bill is original and independent, or is ancillary and auxiliary to a matter already

before the court," such court "is not confined to the line which, in chancery pleadings, divides original bills from cross-bills and supplemental bills, but may look to the essence of the matter and to principles which, as regards parties, the federal courts have adopted in reference to their jurisdiction." *Schenck v. Peay*, 21 Fed. Cas. No. 12,450.

"The cross-bill is a proceeding to procure a complete determination of a matter already in litigation, and the new facts introduced by it are such, and only such, as are necessary to have before the court in the decision of the questions raised in the original suit, to enable it to do full and complete justice to all the parties before it in respect to the cause of action on which the orators rest their right to aid or relief." *Van Dyke v. Cole*, 81 Vt. 379, 70 Atl. 593, 1103.

"New and distinct matters, not included in the original bill . . . should not be embraced in the cross-suit . . . for the reason that they constitute the proper subject-matter of a new original bill. . . . Matters auxiliary to the cause of action set forth in the original . . . bill may be included in the cross-suit, and no others, as the cross-suit is, in general, incidental to and dependent upon the original suit." *The Dove*, 91 U. S. 381, 23 L. ed. 354.

For cross-bills in admiralty, see that title, Vol. I, II, G, 24.

3. U. S.—*United States v. Reese*, 166 Fed. 347; *Ayres v. Carver*, 17 How. 591, 15 L. ed. 179. **N. Y.**—*Field v. Schiefel*, 7 John. Ch. 250. **Tenn.**—*Comfort v. McTeer*, 7 Lea 662. **W. Va.**—*West Virginia O. & O. L. Co. v. Vinal*, 14 W. Va. 637, 677. **Eng.**—*Kemp v. Mackrell*, 3 Atk. 812, 26 Eng. Reprint 1264.

In *Nebraska*, while the code contains no provisions with reference to cross-petitions, the practice of filing them has long obtained in that state, "and the right to bring a cross suit auxiliary to and dependent upon the original suit, yet distinct for many

II. NECESSITY FOR CROSS-BILL.—When matter can be set up by answer and is purely matter of defense,⁴ or where a defendant may, by answer, obtain all the relief he is entitled to, it is not proper or necessary for a cross-bill to be filed,⁵ but a defendant can pray nothing by his answer except that he be dismissed by the court. If he desires any other relief he must seek it by cross-bill.⁶

purposes, has been recognized, at least repeatedly." *Armstrong v. Mayer*, 69 Neb. 187, 192, 95 N. W. 51, *citing* *Havemeyer v. Paul*, 45 Neb. 373, 63 N. W. 932; *Patten v. Lane*, 45 Neb. 333, 63 N. W. 938; *Arnold v. Badger Lumb. Co.*, 36 Neb. 841, 55 N. W. 269; *Carlow v. Aultman & Co.*, 28 Neb. 672, 44 N. W. 873; *Hapgood v. Ellis*, 11 Neb. 131, 7 N. W. 845.

In Montana there is no such pleading as a cross-bill. *Alwyn v. Morley*, 41 Mont. 191, 108 Pac. 778.

4. **Ala.**—*Winkleman v. White*, 147 Ala. 481, 42 So. 411; *Parker v. Marks*, 82 Ala. 548, 3 So. 5. **Fla.**—*Herrin v. Abbe*, 55 Fla. 769, 46 So. 183, 18 L. R. A. (N. S.) 907; *Sanderson's Admr. v. Sanderson*, 17 Fla. 820. **Ill.**—*Thomas v. Thomas*, 250 Ill. 354, 95 N. E. 345, *reversing* 155 Ill. App. 619; *Prichard v. Littlejohn*, 128 Ill. 123, 21 N. E. 10. **N. J.**—*Krueger v. Ferry*, 41 N. J. Eq. 432, 5 Atl. 452. **Tenn.**—*Montgomery v. Howell*, 1 Tenn. Ch. 169. **W. Va.**—*Armstrong v. Wilson*, 19 W. Va. 108.

Where matters set up in a cross-bill are equally available by answer, a cross-bill is unnecessary. *Herrin v. Abbe*, 55 Fla. 769, 46 So. 183, 18 L. R. A. (N. S.) 907; *Roby v. South Park Comrs.*, 252 Ill. 575, 97 N. E. 225; *Newberry v. Blatchford*, 106 Ill. 584.

5. **U. S.**—*Miller & Lux v. Rickey*, 146 Fed. 574. **Fla.**—*Herrin v. Abbe*, 55 Fla. 769, 46 So. 183, 18 L. R. A. (N. S.) 907. **Ga.**—*Tison v. Tison*, 14 Ga. 167. **Ill.**—*Dunbar v. American Tel. & Tel. Co.*, 238 Ill. 456, 87 N. E. 521, *reversing* 142 Ill. App. 6; *Boone v. Clark*, 129 Ill. 466, 21 N. E. 850. **Md.**—*Glenn v. Clark*, 53 Md. 580. **Tenn.**—*Montgomery v. Howell*, 1 Tenn. Ch. 169.

Custody of Children as Subject of Cross-Bill.—An action was begun by plaintiff for a divorce on the ground of desertion. An answer was filed denying the desertion, but no mention was made either in the bill or the answer of the existence of any children of the marriage. Later a cross-bill was filed in which no divorce was asked

for, but the care and custody of the children of the marriage was prayed for. A demurrer to that portion of the cross-bill relating to the children was interposed which was overruled, and the plaintiff, electing to stand by it, the cross-bill was taken as confessed. When the cause came on for hearing on the original bill and answer thereto, the cross-bill was taken as confessed. The plaintiff moved to dismiss her bill without prejudice for want of prosecution but on objection the motion was denied. No evidence in support of the bill was offered, and subsequently judgment was entered dismissing the bill and granting the prayer of the cross-bill, from which plaintiff appealed. It was held that all of the questions involved could have been presented by answer and that a cross-bill was useless and unnecessary. The plaintiff's action should have been dismissed on her application and the court was without authority to grant the relief ordered. *Thomas v. Thomas*, 250 Ill. 354, 95 N. E. 345, *reversing* 155 Ill. App. 619.

6. *Weathersbee v. American Freehold L. M. Co.*, 77 Fed. 523, *approved* in *Royal Union Mut. Life Ins. Co. v. Wynn*, 177 Fed. 289. See also *Rosenbleet v. Rosenbleet*, 122 Ill. App. 408, 414.

"A cross bill is a proper mode of defense to a suit seeking to set aside a contract, when the defendant seeks to have the complainant's contentions denied, and a decree for affirmative relief establishing the validity of the contract." *American Graphophone Co. v. Smith*, 26 App. Cas. (D. C.) 563.

Action To Quiet Title.—In order that a defendant obtain affirmative relief in a statutory action to quiet title he must file a cross-bill. In such case possession is not necessary, though it would be in order to maintain an original bill for the reason that a court of equity having obtained jurisdiction, will retain it for all purposes. *Sloss-*

Inadequacy of legal remedies is not an essential element of a cross-bill.⁷

III. PURPOSE AND OBJECT.—A. IN GENERAL.—The purpose of filing a cross-bill is usually either to obtain affirmative relief by a defendant in the original suit,⁸ against the plaintiff in such

Sheffield Steel & Iron Co. v. Lollar, 170 Ala. 239, 54 So. 272.

In Colorado both under the code and the chancery practice and before the adoption of the code, "a defendant seeking specific relief in a suit in chancery must do so by cross bill." Bessemer I. D. Co. v. Woolley, 32 Colo. 437, 446, 76 Pac. 1053.

Object of Cross-Bill.—"A definition of a cross-bill, contemporaneous with its origin, is, it is a mode of defense. One object to be attained by its use is to discover evidence to defend against that which is alleged against the defendant, and another is to secure affirmative relief not attainable on his answer touching matters in the original bill." Newberry v. Blatchford, 106 Ill. 584, 599. See also Morgan's L. & T. R. Co. v. Texas Cent. R. Co., 137 U. S. 171, 200, 11 Sup. Ct. 61, 34 L. ed. 625.

7. Ashe-Carson Co. v. Bonifay, 147 Ala. 376, 41 So. 816.

8. U. S.—Springfield Mill. Co. v. Barnard & Leas Mfg. Co., 81 Fed. 261, 26 C. C. A. 389; Royal Mut. Life Ins. Co. v. Wynn, 177 Fed. 289; Under-Feed Stoker Co. v. American Stoker Co., 169 Fed. 891; Mitchell v. International Tailoring Co., 169 Fed. 145. Ala.—Ashe-Carson Co. v. Bonifay, 147 Ala. 376, 41 So. 816; Cotton v. Scott, 97 Ala. 447, 12 So. 65; Watts v. Eufaula Nat. Bank, 76 Ala. 474. Ariz.—Mallory v. Globe-Boston Copper Min. Co., 11 Ariz. 296, 94 Pac. 1116. Ark.—Marr v. Lewis, 31 Ark. 203, 25 Am. Rep. 553. Fla.—Smith v. Connor, 53 Fla. 856, 44 So. 340 (right to affirmative relief necessitates filing of cross-bill); Ocala F. & M. Works v. Lester, 49 Fla. 347, 38 So. 56. Ga.—Turk v. Turk, 3 Ga. 422, 46 Am. Dec. 434. Ill.—Irwin v. Dyke, 109 Ill. 528; White v. White, 103 Ill. 438; Smith v. West, 103 Ill. 332. Ind.—Parrott v. Crawford, 5 Ind. Ter. 103, 82 S. W. 688. Ia.—Minden Canning Co. v. Hensley, 149 Iowa 169, 126 N. W. 1115; Holladay v. Johnson, 12 Iowa 563; MacGregor v. MacGregor, 9 Iowa 65. Mass.—Bassill v. Bassill, 207

Mass. 365, 93 N. E. 600; Andrews v. Gilman, 122 Mass. 471 (a cross-bill is proper way to seek affirmative relief against the plaintiff). Mich.—Vroman v. Thompson, 51 Mich. 452, 16 N. W. 808; Vary v. Shea, 36 Mich. 388. Miss. Millsaps v. Pfeiffer, 44 Miss. 805. N. J. Monaghan v. Collins (N. J. Eq.), 71 Atl. 617; Tallman v. Wallack, 54 N. J. Eq. 655, 33 Atl. 1059. N. Y.—Braman v. Wilkinson, 3 Barb. 151. N. C.—Weisman v. Smith, 59 N. C. 124. Pa. Borekman's Appeal, 10 Atl. 425; McIlvain v. Markit Co., 2 W. N. C. 208. Tenn.—Hagar v. Wilson, 46 S. W. 1033; Lewis v. Glass, 92 Tenn. 147, 20 S. W. 571. Vt.—Ward v. Seymour, 51 Vt. 320. Wash.—Distler v. Dabney, 7 Wash. 431, 35 Pac. 138, 1119.

Setting Up New Matter Involving Affirmative Relief.—Its purpose is "usually to set up some matter that is not disclosed by the original bill, which is effective to give the defendant in the original suit or the complainant in the cross bill some other or affirmative relief." United States v. Reese, 166 Fed. 347.

In Nebraska a defendant is not restricted to the counterclaim provided for in §§100 and 101 of the code, "but in a proper case may seek affirmative relief either against the plaintiff or against co-defendants by cross petition." Armstrong v. Mayer, 69 Neb. 187, 95 N. W. 51.

In Tennessee, a cross-bill need not necessarily be a bill of discovery, "but may well be based on any proper matters of equity growing out of the original bill, or connected with it, on which the respondent might be entitled to affirmative relief." Odom v. Owen, 2 Baxt. (Tenn.) 446.

Nature of Cross-Bill Seeking Affirmative Relief.—When affirmative relief is sought by cross-bill, "it is not to this extent a pure cross bill, but partakes of the nature of an original bill seeking further aid of the court, beyond the purposes of defense." Crisman v. Heiderer, 5 Colo. 589.

Affirmative Relief Not Always Avail-

suit,⁹ or a codefendant,¹⁰ or a person not a party to the action,¹¹ to obtain a discovery in aid of the defense in the suit,¹² to enable the

able.—No affirmative relief can be granted on a cross-bill, the allegations of which are inconsistent with and directly opposed to what is set forth in the original answer. *Harton v. Little*, 166 Ala. 340, 51 So. 974; *Hatchett v. Blanton*, 72 Ala. 423; *Dill v. Shahan*, 25 Ala. 694, 703, 60 Am. Dec. 540; *Graham v. Tankersley*, 15 Ala. 634, 646.

Gambling Contract.—Under a statute permitting an action in equity to recover back money lost in gambling, the defendant may, by cross-bill, also recover back money lost by defendant to plaintiff in the same way. *Berns v. Shaw*, 65 W. Va. 667, 64 S. E. 930.

9. **U. S.**—*Brandon Mfg. Co. v. Prime*, 14 Blatch. 371, 4 Fed. Cas. No. 1,810. **Ala.**—*Hendrix v. Southern R. Co.*, 130 Ala. 205, 30 So. 596, 89 Am. St. Rep. 27. **Ill.**—*Conwell v. McCowan*, 53 Ill. 363. **Mass.**—*Atlanta Mills v. Mason*, 120 Mass. 244. **Miss.**—*Thomason v. Neeley*, 50 Miss. 310. **N. J.**—*Manley v. Mickle*, 55 N. J. Eq. 563, 37 Atl. 738. **Pa.**—*Williams v. Concord Cong. Church*, 193 Pa. 120, 44 Atl. 272; *Freeland v. South Penn. Oil Co.*, 189 Pa. 54, 41 Atl. 1000. **Va.**—*Cox v. Price*, 22 S. E. 512.

10. **U. S.**—*Angusta Commercial Bank v. Sandford*, 103 Fed. 98. **Ala.**—*Morton v. New Orleans, etc. R. Co.*, 79 Ala. 590; *Watts v. Eufaula Nat. Bank*, 76 Ala. 474. **Ill.**—*Howe v. South Park Comrs.*, 119 Ill. 101, 7 N. E. 333; *Ellison v. Salem, etc. Coal Co.*, 43 Ill. App. 120. **Ind.**—*Fletcher v. Holmes*, 25 Ind. 458. **Ia.**—*Minden Canning Co. v. Hersley*, 149 Iowa 168, 126 N. W. 1115. **Ky.**—*Talbot v. McGee*, 4 T. B. Mon. 375. **Mass.**—*Forbes v. Thorpe*, 95 N. E. 955. **Mich.**—*Feige v. Babcock*, 111 Mich. 538, 70 N. W. 7. **N. Y.**—*Carpenter v. Gray*, 37 N. J. Eq. 389; *Brinkerhoff v. Franklin*, 21 N. J. Eq. 334. **S. D.**—*Phillips v. Branch Mint Min. & M. Co.*, 131 N. W. 308.

11. *Minden Canning Co. v. Hensley*, 149 Iowa 168, 126 N. W. 1115.

12. **U. S.**—*Morgans L. & T. R. Co. v. Texas Cent. R. Co.*, 137 U. S. 171, 11 Sup. Ct. 61, 34 L. ed. 625; *Springfield Mill. Co. v. Barnard & Leas Mfg. Co.*, 81 Fed. 261, 26 C. C. A. 389;

Lovell v. Latham & Co., 186 Fed. 602; *Royal Union Mut. Life Ins. Co. v. Wynn*, 177 Fed. 289; *Mercantile Trust Co. v. Atlantic & Pac. R. Co.*, 70 Fed. 518. **Ala.**—*Gilman Sons & Co. v. New Orleans & S. R. R. Co.*, 72 Ala. 566. **Ga.**—*Josey v. Rogers*, 13 Ga. 478. **Ill.**—*Roby v. South Park Comrs.*, 252 Ill. 575, 37 N. E. 225. **Ia.**—*Compton v. Comer*, 4 Iowa 577. **Miss.**—*Millsaps v. Pfeiffer*, 44 Miss. 805. **N. J.**—*Doremus v. Paterson*, 70 N. J. Eq. 296, 62 Atl. 3, *affirmed*, 71 N. J. Eq. 789, 71 Atl. 1134; *Chester Iron Co. v. Beach*, 40 N. J. Eq. 63. **Tenn.**—*Montgomery v. Olwell*, 1 Tenn. Ch. 169. **W. Va.**—*Cecil v. Karnes*, 61 W. Va. 543, 56 S. E. 885.

A cross-bill is sometimes used to obtain a discovery of facts. *The Dove*, 91 U. S. 381, 23 L. ed. 354.

“A cross-bill is a species of pleading, used for the purpose of obtaining a discovery necessary to the defense, or to obtain some relief founded on the collateral claims of the party defendant to the original suit.” *Tison v. Tison*, 14 Ga. 167.

Cross-Bill for Discovery.—On cross-bill for discovery and for production and inspection of documents, it is necessary to state with certainty what the documents are, and their materiality and competency under the issues. *Oro Light & Power Co. v. City of Oroville*, 162 Fed. 975.

“True Cross-Bills” and Pleas in the Nature of Cross-Bills.—“The tendency in the federal courts is to consider ‘true cross bills’ as defensive only in which new and distinct matter may not be embraced. *Bowker v. United States*, 186 U. S. 135, 22 Sup. Ct. 802, 46 L. ed. 1090. But the extent to which matter not connected with the original cause of action may be brought in controversy by a ‘cross-bill’ or ‘cross-complaint’ appears to vary in different jurisdictions, and to be almost a matter of discretion. Wherefore the distinction between a ‘true cross-bill’ and one in the nature of an ‘original bill’ has often been overlooked with the result that there is much confusion in the decisions on the subject. The courts of Arkansas recog-

defendant to interpose a more complete defense than that which he could present by answer,¹³ and that is necessary to the defense of the party filing the cross-bill,¹⁴ or to obtain full relief between the parties, and a complete determination of all controversies which arise out of the matters charged in the original bill.¹⁵

nize the distinction between a 'true cross-bill'; i. e., one which is merely defensive or intended to obtain full relief touching the matter in the original bill, and one which introduces new matter and is in its nature an original bill. *Trapnall v. Hill*, 31 Ark. 346." *Ledbetter v. Mandell*, 141 App. Div. 556, 126 N. Y. Supp. 497.

13. **U. S.**—*Springfield Mill. Co. v. Barnard & Leas Mfg. Co.*, 81 Fed. 261, 26 C. C. A. 389; *Royal Union Mut. Life Ins. Co. v. Wynn*, 177 Fed. 289. **Ala.** *Davis v. Cook*, 65 Ala. 617. **Mass.** *Richards v. Todd*, 127 Mass. 167. **W. Va.**—*Cecil v. Karnes*, 61 W. Va. 543, 56 S. E. 885.

See also *Teel v. Dunnihoo*, 230 Ill. 476, 82 N. E. 844.

Germane Facts.—New facts may be set out and new issues made by the filing of the cross-bill, the only requirement being that they shall be germane to the original bill. *Sears v. Scranton Trust Co.*, 228 Pa. 126, 137, 77 Atl. 423.

14. **U. S.**—*Schenck v. Peay*, 21 Fed. Cas. No. 12,450. **Ill.**—*Roby v. South Park Comrs.*, 252 Ill. 575, 97 N. E. 225. **Miss.**—*Stansel v. Hahn*, 96 Miss. 616, 50 So. 696. **W. Va.**—*Hansford v. Chesapeake Coal Co.*, 22 W. Va. 70.

The general rule being that where a party defendant finds it necessary for his defense and to prevent an injustice resulting to him from the position in which the case stands, he is at liberty to file a cross-bill. *Ewing v. Seaboard Air Line R.*, 175 Fed. 517; *Schenck v. Peay*, 21 Fed. Cas. No. 12,450; *Bassill v. Bassill*, 207 Mass. 365, 93 N. E. 600.

"Under the chancery practice where the purpose of a cross bill is defensive merely, it need not be based on equitable grounds, nor seek equitable relief." *Armstrong v. Mayer*, 69 Neb. 187, 194, 95 N. W. 51. See also *Ala.* *Nelson v. Dunn*, 15 Ala. 501. **Me.** *Lambert v. Lambert*, 52 Me. 544. **Miss.**—*Gilmer v. Felhour*, 45 Miss. 627.

A cross-bill will not be stricken out on demurrer, where it may appear in

the course of investigation and the further hearing of the case, that a cross-bill is necessary to give the defendant the required relief. *Ewing v. Seaboard Air Line R.*, 175 Fed. 517.

Right of Party Brought in by Cross-Bill To File Cross-Bill.—In *Blair v. Illinois Steel Co.*, 159 Ill. 350, 360, 42 N. E. 895, 31 L. R. A. 269, the court said: "It may be remarked, however, that the statute provides that any defendant may, after filing his answer, exhibit and file his cross-bill, and no good reason is perceived why defendants who are only brought into the suit by a cross-bill may not exhibit cross-bills, where the same are necessary or proper for the purposes of doing complete justice and terminating the litigation."

15. **U. S.**—*Morgan's L. & T. R. Co. v. Texas Cent. R. Co.*, 137 U. S. 171, 200, 11 Sup. Ct. 61, 34 L. ed. 625; *Chicago, etc. R. Co. v. Third Nat. Bank*, 134 U. S. 276, 10 Sup. Ct. 550, 33 L. ed. 900; *Springfield Mill. Co. v. Barnard & Leas Mfg. Co.*, 81 Fed. 261, 26 C. C. A. 389; *Lovell v. Latham & Co.*, 186 Fed. 602; *Mercantile Trust Co. v. Atlantic & Pac. R. Co.*, 70 Fed. 518. **Ala.**—*Ashe-Carson Co. v. Bonifay*, 147 Ala. 376, 41 So. 816. **Ky.**—*Winfrey v. Williams*, 5 B. Mon. 428. **Mass.**—*Forbes v. Thorpe*, 95 N. E. 955; *Bassill v. Bassill*, 207 Mass. 365, 93 N. E. 600. **Mich.**—*Village of Frankfort v. Schmid*, 151 Mich. 85, 114 N. W. 855. **Neb.** *Higgins v. Vandever*, 85 Neb. 89, 122 N. W. 843. **N. J.**—*Doremus v. Patereson*, 70 N. J. Eq. 296, 62 Atl. 3, affirmed, 71 N. J. Eq. 789, 71 Atl. 1134; *Haberman v. Kaufer*, 60 N. J. Eq. 271, 278, 47 Atl. 48. **Va.**—*Kavanaugh v. Shacklett's Admr.*, 111 Va. 423, 69 S. E. 335.

A cross-petition is maintainable under the Nebraska code, "as a cross-bill would be in chancery practice, either to aid in the defense of the original suit where affirmative equitable relief is required to make such defense effective or to obtain a complete adjudication of the controversies

between the original complainant and the cross-complainant over the subject-matter of the original suit; otherwise, the doctrine that a court of equity, having obtained jurisdiction, will retain the cause for a complete determination, and the jurisdiction of equity to prevent a multiplicity of suits would be seriously impaired." *Armstrong v. Mayer*, 69 Neb. 187, 193, 95 N. W. 51.

A cross-bill "is brought either to obtain a discovery of facts, in aid of the defense to the original bill, or to obtain full and complete relief to all parties as to the matters charged in the original bill." *Special Tax School Dist. No. 1 v. Smith*, 61 Fla. 782, 54 So. 376, *citing* *Van Zile Eq. Pl. & Pr.*, §212. See also *Morgan's L. & T. R. Co. v. Texas Cent. R. Co.*, 137 U. S. 171, 201, 11 Sup. Ct. 61, 34 L. ed. 625.

"A cross bill must grow out of the matters alleged in the original bill and is used to bring the whole dispute before the court, so that there may be a complete decree touching the subject-matter of the action." *Ex parte South & N. A. R. Co.*, 95 U. S. 221, 24 L. ed. 355.

Cross-Bill To Recover on Policy of Insurance Where Bill Is for Cancellation.—During the pendency of an action by an insurance company to cancel a policy for misrepresentation, the insured died; an amendment to the bill was filed containing a prayer for an injunction and enjoining the beneficiary from suing on, assigning or transferring the policy. The beneficiary having been granted leave to file a cross-bill, went into the facts of the case in his cross-bill and "set up his rights under the policy and that by reason of the injunction he could not sue at law, and concluded with a prayer for a decree in his favor for the amount of the policy." A demurrer was filed to the cross-bill on the ground that such matter was not germane to the cross-bill, and that the beneficiary had a complete and ample remedy at law. The demurrer was overruled and the cross-bill held proper on the ground that it was the only way that the controversy could be ended in that litigation and the rights of all the parties finally determined. *Royal Union Mut. Life Ins. Co. v. Wynn*, 177 Fed. 289.

"A cross-bill for relief is proper in cases where, in the original suit, all things in litigation touching the subject-matter cannot be brought before the court, but the defendant, in order to obtain a complete settlement of the controversy, is entitled to some relief which the scope of the plaintiff's suit will not afford him." *Richards v. Todd*, 127 Mass. 167, 170, *cited* in *Bassill v. Bassill*, 207 Mass. 365, 93 N. E. 600.

When Cross-Bill Maintainable Though Not in Aid of Defense.—A cross-bill by several defendants in the action, though not in aid of the defenses to the original suit is maintainable, though it admits plaintiff's rights, as a decree between themselves and other defendants would be necessary in order to prevent a decree for plaintiff from working injustice. *Rickey Land & Cattle Co. v. Miller & Lux*, 218 U. S. 258, 31 Sup. Ct. 11, 54 L. ed. 1032, *affirming* 152 Fed. 11, 22, 81 C. C. A. 207, 218.

Cross-Bill for Damages in Action for Rescission.—For the purpose of doing complete justice between the parties, and to finally dispose of a controversy, a court of equity may in an action to rescind a contract for the sale of machinery, permit a defendant to file a cross-bill praying for a decree in his favor for the amount of the balance of the purchase price and for damages. *Grabill v. Barnhart Bros. & Spindler*, 160 Mich. 81, 125 N. W. 16. To same effect, *Village of Frankfort v. Schmid*, 151 Mich. 85, 114 N. W. 855, s. c. 155 Mich. 313, 118 N. W. 961.

Granting Both Legal and Equitable Relief.—In pursuance of the principle that when a court of equity obtains jurisdiction for one purpose it will afford complete relief, the court in an action to enjoin the enforcement of a promissory note will permit a cross-bill to be filed praying for a decree for the amount due under the notes, and notwithstanding some equitable relief is also granted to plaintiff. *Zollman v. Jackson Tr. & Sav. Bk.*, 141 Ill. App. 265, *affirmed*, 238 Ill. 290, 87 N. E. 297 (*distinguishing* *Correll v. Freeman*, 29 Ill. App. 39).

"When it is said that a court of equity will administer complete relief and adjudicate all controversies between the parties, the meaning is that a complete decree will be rendered

For this purpose the court may grant relief and exercise jurisdiction which it would not have authority to do under an original bill.¹⁶

B. OBJECTIONS WAIVED BY ANSWERING CROSS-BILL.—By filing an answer to a cross-bill the complainant treats it as a proper pleading and waives any objection to its necessity or propriety.¹⁷

C. WHEN CROSS-BILL UNNECESSARY FOR AFFIRMATIVE RELIEF. While ordinarily affirmative relief will not be granted a defendant unless he files a cross-bill,¹⁸ in actions to partition real estate, to settle the affairs of a partnership, or for the foreclosure or redemption of a mortgage where a statement of accounts is involved, or in a bill of an accounting, a defendant may have a decree in his favor without the aid of a cross-bill.¹⁹

with reference to the immediate subject-matter of the original suit. The subject-matter of that suit will not be dealt with piecemeal. It is not meant that all causes of action between the parties, or some of them, will be disposed of in the one cause where they are not involved in a complete disposition of the subject-matter of the bill." *Armstrong v. Mayer*, 69 Neb. 187, 198, 95 N. W. 51.

Cross-Bill Between Codefendants. When there are opposite and adverse interests existing between codefendants, as between themselves, without an adjustment of which a complete decree ending the litigation cannot be rendered, either defendant may file a cross-bill, or the court may order it filed, for the purpose of settling the rights and interests of all parties by one decree. *Gilman Sons & Co. v. New Orleans & S. R. R. Co.*, 72 Ala. 566.

Relief by Subrogation.—Under the general authority conferred on a court of equity authorizing it to settle in one action the entire transaction out of which the action arose, and which forbids the settlement of controversies by piecemeal, a cross-complaint asking for subrogation is permissible. *Finnell v. Finnell*, 159 Cal. 535, 114 Pac. 820.

Action Involving Real Property.—The fact that the cross-bill not only brings into question the real property set forth in the original bill, but additional realty, does not militate against it. The court will assume jurisdiction on the ground that a multiplicity of suits is abhorrent to a court of equity and such a court will, whenever it assumes jurisdiction of the parties, and the subject-matter, seek to do complete justice

between the parties. *Morrison v. Morrison*, 140 Ill. 560, 30 N. E. 768. See also the title "**Cross-Complaints.**"

16. *Von Bernuth v. Von Bernuth*, 76 N. J. Eq. 487, 74 Atl. 700 (cross-bill for divorce by non-resident defendant); *Kavanaugh v. Shacklett's Admr.*, 111 Va. 423, 69 S. E. 335 (cross-bill for partition).

17. *Ackley v. Croucher*, 203 Ill. 530, 68 N. E. 86; *Prichard v. Littlejohn*, 128 Ill. 123, 21 N. E. 10.

18. *Ark.*—*Saunders v. Wood*, 15 Ark. 24. *Fla.*—*Wooten v. Bellinger*, 17 Fla. 289. *Ill.*—*Thomas v. Turner*, 157 Ill. App. 16. *Mass.*—*Braman v. Foss*, 204 Mass. 404, 90 N. E. 563; *Andrews v. Gilman*, 122 Mass. 471.

Cross-Bill by Minor.—A minor defendant is entitled to the protection of the court, without filing a cross-bill. *Gilmore v. Gilmore*, 109 Ill. 277.

Determination of Priority of Liens. "It has very frequently been held that it is not necessary for a defendant having a lien to file a cross-bill, but his rights may be determined under his answer. If the answers of the various parties claim liens, the court has power, without the filing of a cross-bill, to determine the existence and priority of the various liens and to distribute any surplus in discharge of such liens, according to their priority." *Gouwens v. Gouwens*, 222 Ill. 223, 78 N. E. 597; *Gardner v. Cohn*, 191 Ill. 553, 61 N. E. 492.

19. *Md.*—*Glenn v. Hebb*, 17 Md. 260. *Mass.*—*Braman v. Foss*, 204 Mass. 404, 90 N. E. 563; *Goldthwait v. Day*, 149 Mass. 185, 21 N. E. 359. *Mich.*—*Wyatt v. Sweet*, 48 Mich. 539, 12 N. W. 692, 13 N. W. 525. *N. H.*—*Raymond v. Caine*, 45 N. H. 201. *N. J.*—*Blair v.*

D. INTERPOSING CROSS-BILLS IN ACTION AT LAW.—Under the old chancery practice, cross-bill being a purely equitable remedy could not be interposed in an action at law. Such practice is, however, permitted in many of the code states, and facts material to the defense which do not constitute a defense in a law action may be set up by cross-bill.²⁰

Green, 45 N. J. Eq. 671, 18 Atl. 218. **R. I.**—Downes v. Worch, 28 R. I. 99, 65 Atl. 603; Jenks v. Smith, 14 R. I. 634. **Tenn.**—Polk v. Mitchell, 85 Tenn. 634, 4 S. W. 221. **Eng.**—Clarke v. Tipping, 9 Beav. 284, 50 Eng. Reprint 352; Fife v. Clayton, 13 Ves. Jr. 546, 33 Eng. Reprint 398; Done's Case, 1 P. Wms. 263, 24 Eng. Reprint 380.

When Cross-Bill Improper.—A bill having been filed for the purpose of removing trustees of a corporation after its dissolution which also contained a prayer that the corporation be declared insolvent and that a receiver be appointed to close up its affairs, one of the defendants, in addition to filing an answer and joining in the prayer for the appointment of the receiver, also filed a cross-bill in which he alleged that the complainant "had in his possession certificates issued by the defendant corporation by virtue of which he would be entitled in certain events to receive bonds of the Buffalo, Lockport & Rochester Railroad Co., and that the certificates held by him were much larger in number" than he was entitled to and praying that if a receiver be appointed, he be directed to compel all certificate holders or persons who had exchanged their certificates for bonds or stock to deliver them up or the market value thereof, to the end that such bonds or stock, or the market value thereof be equally distributed to those entitled thereto. A motion was made to strike out the cross-bill on the ground that the suit was not of a character which would permit a cross-bill to be filed by a defendant against the complainant, and that it tendered an issue not proper to be litigated in the suit. The court held that so far as affirmative relief was concerned, the defendant "had stated himself out of court" and granted the motion. *Tompkins v. Transit Finance Co.* (N. J. Eq.), 78 Atl. 398.

Actions for Partition.—As a general rule a cross-bill in a partition suit is neither necessary or proper. *Koon v.*

Koon, 55 Fla. 834, 46 So. 633. See also *Gilmore v. Gilmore*, 109 Ill. 277. *Compare Dickson v. Dickson*, 232 Ill. 577, 83 N. E. 1067, which goes on the theory that a cross-bill could be maintained, provided it showed grounds for equitable relief.

Action for Partition.—In an action in chancery for the partition of land, a cross-bill is not an appropriate pleading (*Prichard v. Littlejohn*, 128 Ill. 123, 21 N. E. 10; *Howe v. South Park Comrs.*, 119 Ill. 101, 7 N. E. 333), nor can a cross-bill be interposed in such an action, when all the pleadings have treated the action as one at law (*Wood v. Sheffer*, 248 Ill. 617, 94 N. E. 24).

Award of Damages Without Cross-Bill.—On the theory that he who seeks in a court of equity to be relieved of a forfeiture or penalty is required by fair dealing and good conscience to make adequate compensation, the court may in such cases award damages or compensation for breaches of conditions or covenants when a clear estimate of the damage or the amount of just compensation can be ascertained without the necessity of interposing a cross-bill. *Springfield, etc. Traction Co. v. Warrick*, 249 Ill. 470, 94 N. E. 933.

20. Cross-bill by Defendant in Action at Law.—A defendant in an action at law cannot file a complaint in equity in the nature of a cross-bill unless it be shown that he "is entitled to relief arising out of facts requiring the interposition of a court of equity, and material to his defense," and that such facts would not be available as a defense in the action at law. *Scheffelin v. Weatherred*, 19 Ore. 172, 23 Pac. 898.

When, in an action at law, it is desired to set up facts material to the defense, which do not constitute a defense in a law action, the remedy is by cross-bill. *Watson v. McLench*, 57 Ore. 446, 110 Pac. 482, 112 Pac. 416.

Breach of Contract.—In an action to recover on a contract of sale of the good will of a business, which con-

But where the cross-bill is more than defensive and seeks affirmative relief, the cross-bill must be limited to matters which are cognizable in a court of equity, if not to matters cognizable upon equitable grounds.²¹

IV. JURISDICTION. — A. GENERAL EQUITABLE JURISDICTION.

A court of equity which has properly acquired jurisdiction of a subject-matter for a necessary purpose may proceed to do final and complete justice between the parties, where it can be done in that court as well as by proceedings at law;²² and though the original bill may set

tract contained an agreement to remain out of the business for a term therein specified, defendant is entitled to maintain a cross-bill to recover from plaintiff such damages as defendant sustained from breach of plaintiff's agreement not to re-enter the business in the same city within the time specified in the contract. *Bradford v. Montgomery Furniture Co.*, 115 Tenn. 610, 92 S. W. 1104, 9 L. R. A. (N. S.) 979.

Action for Restitution on Gaming Contract.—In an action brought to recover money lost by plaintiff to defendant, the defendant may file a cross-bill seeking to recover money lost by defendant on a similar contract. *Berns v. Shaw*, 65 W. Va. 667, 64 S. E. 930, 23 L. R. A. (N. S.) 522. See also *McKinney v. Pope's Admr.*, 3 B. Mon. (Ky.) 93.

21. *Armstrong v. Mayer*, 69 Neb. 187, 195, 95 N. W. 51. See also: **U. S.**—*Jackson v. Simmons*, 98 Fed. 768, 39 C. C. A. 514; *Lautz v. Gordon*, 28 Fed. 264. **Ark.**—*Trapnall v. Hill*, 31 Ark. 345. **Colo.**—*Crisman v. Heiderer*, 5 Colo. 589. **Fla.**—*Griffin v. Fries*, 23 Fla. 173. **Ill.**—*Thomas v. Thomas*, 250 Ill. 354, 95 N. E. 345, reversing 155 Ill. App. 619; *Morrison v. Morrison*, 140 Ill. 560, 30 N. E. 768; *Gage v. Mayer*, 117 Ill. 632, 7 N. E. 97; *Tobey v. Foreman*, 79 Ill. 489. **Miss.**—*Wright v. Frank*, 61 Miss. 32. **Tenn.**—*Beal v. Smithpeter*, 6 Baxt. 356.

In *Armstrong v. Mayer*, 69 Neb. 187, 95 N. W. 51, the court says at page 196: "We are inclined to the opinion, however, that the rules of the chancery practice in this respect, are so far enlarged under the code that, although a cross petition is more than merely defensive, and seeks affirmative relief beyond the purposes of defense, such relief need not be equitable nor need the cross petition be based on

equitable grounds. It is true some courts, in code states, have adhered to the rule in its entirety. *Crisman v. Heiderer*, 5 Colo. 589; *Trapnall v. Hill*, 31 Ark. 345. But there seems to be sound reason and good authority for relaxing it." "The doctrine that a court of equity, having obtained jurisdiction of a controversy for some purpose clearly equitable, will administer complete relief in the one proceeding, was hampered somewhat, in its application, by the distinction between law and equity and the necessity that courts of equity keep within the limits appointed by that distinction. Where that distinction and its consequences no longer stand in the way, there is every reason to hold that the power of courts of equity to dispose of the whole controversy is enlarged so as to permit the legal as well as equitable incidents involved in a full determination of the subject-matter of the original suit to be adjudicated."

22. **U. S.**—*Morgan's Louisiana, etc. R. Co. v. Texas Cent. R. Co.*, 137 U. S. 171, 11 Sup. Ct. 61, 34 L. ed. 625; *Springfield Milling Co. v. Barnard & Leas Mfg. Co.*, 81 Fed. 261, 26 C. C. A. 389; *Royal Union Mut. Life Ins. Co. v. Wynn*, 177 Fed. 289. **Ga.**—*Bowman v. Long*, 27 Ga. 178. **Ill.**—*French v. Bellow Falls Sav. Inst.*, 67 Ill. App. 179; *Kaegebein v. Higgie*, 51 Ill. App. 538. **N. J.**—*Dedron v. Sparks* (N. J. Eq.), 72 Atl. 442; *Haberman v. Kaufer*, 60 N. J. Eq. 271, 47 Atl. 48.

"Where in a court of equity, an apparent legal burden on property is challenged, the court has jurisdiction of a cross-bill to enforce by its own procedure such burden. The court which denies legal remedies may enforce equitable remedies for the same debt; and an application for the latter is not foreign to a bill for the

up matter not cognizable in equity, the defect in jurisdiction may be supplied by the cross-bill.²³

B. UNITED STATES COURTS. — A cross-bill being only ancillary to litigation already pending, the citizenship of the parties is wholly immaterial, and the court will retain jurisdiction, although the court would not have had jurisdiction of the cross-bill as an original action.²⁴ If, therefore, the citizenship of the parties to the original suit is sufficient to give the court jurisdiction, it retains jurisdiction of the cross-bill therein without reference to the question of diversity of citizenship.²⁵

A cross-bill can be filed only against parties already before the court, and subject to its jurisdiction, either as plaintiffs or defendants, in the original suit.²⁶ There is, however, authority permitting the filing of a cross-bill against persons not parties to the original suit, when affirmative relief is sought.²⁷

V. FORM AND SUFFICIENCY. — A. GENERALLY. — The cross-bill "should state the parties to the original bill, the object, prayer, and proceeding thereon, as also the facts and rights of the party exhibiting it and which are necessary to be made the subject of cross-

former." *Chicago, M. & St. P. R. Co. v. Third Nat. Bank*, 134 U. S. 276, 288, 10 Sup. Ct. 550, 33 L. ed. 900. See also *American Graphophone Co. v. Smith*, 26 App. Cas. (D. C.) 563, 569.

Jurisdiction Dependent on Relief.

When affirmative relief is sought by a cross-bill, "the relief sought must be such as the court in point of jurisdiction is competent to administer," but if it be filed merely as a mode of defense to bring into the cause matters occurring after the cause is at issue, it requires no equity to support it. *Thomas v. Thomas*, 250 Ill. 354, 95 N. E. 345, reversing 155 Ill. App. 619; *Morrison v. Morrison*, 140 Ill. 560, 30 N. E. 768; *Tobey v. Foreman*, 79 Ill. 489.

23. *Radcliffe v. Scruggs*, 46 Ark. 96; *Conger v. Cotton*, 37 Ark. 286; *Sale v. McLean*, 29 Ark. 612; *Cockrell v. Warner*, 14 Ark. 345.

24. *Brooks v. Laurent*, 98 Fed. 647, 39 C. C. A. 201; *Ames Realty Co. v. Big Indian Min. Co.*, 146 Fed. 179.

25. *Milwaukee & M. R. Co. v. Chamberlain*, 6 Wall. (U. S.) 748, 18 L. ed. 859; *Lilienthal v. McCormick*, 117 Fed. 89, 54 C. C. A. 475; *Ames Realty Co. v. Big Indian Min. Co.*, 146 Fed. 179; *First Nat. Bank of Salem v. Salem Capital Flour Mills Co.*, 31 Fed. 580.

Vannerson v. Leverett, 31 Fed. 376,

is discussed in *Ames Realty Co. v. Big Indian Min. Co.*, *supra*, and the apparent conflict between that case and *First Nat. Bank of Salem v. Salem Capital Flour Mills Co.*, *supra*, is explained.

Into such cases the question of diverse citizenship does not enter, and the court has jurisdiction though all the parties, or some, are citizens of the same state as the party filing the cross-bill. *Schenck v. Peay*, 21 Fed. Cas. No. 12,450. Compare, however, *Patton v. Marshall*, 173 Fed. 350, 97 C. C. A. 610, in which it is said: "If a cross-bill assumes the character of an original bill, it will be dismissed if wanting in the element of diverse citizenship which will be necessary to give jurisdiction to the circuit court of the United States. *Cross v. Del Valle*, 1 Wall. (U. S.) 5, 17 L. ed. 515. See also *Delaware, L. & N. R. Co. v. Jersey City*, 168 Fed. 128."

When the relief sought by the cross-bill is ancillary to that sought by the original bill, the citizenship of the parties is wholly immaterial. *Ulmair v. Jaeger's Admr.*, 155 Fed. 1011, 1018.

26. *Schenck v. Peay*, 21 Fed. Cas. No. 12,450.

27. A discussion of this matter and the cases referring thereto will be found under V, *infra*.

litigation, or the ground upon which he resists the claim of the plaintiff."²⁸

B. PARTIES.—A cross-bill must be preferred by a defendant to the original bill, against the plaintiff in the same suit, or against other defendants or against both,²⁹ such bill being termed a cross-bill *ex vi*

28. *United States v. Reese*, 166 Fed. 347.

If the cross-bill be otherwise perfect, it is not invalidated by a defective title (*Lavis v. Consumers Brew. Co.*, 106 Fed. 435; *Russell v. Lamb*, 83 Iowa 558, 48 N. W. 939); nor by the fact that the prayer that it be allowed as a cross-bill be omitted (*Nelson v. Dunn*, 15 Ala. 501).

A cross-bill and answer should be separate, though they may both be in the same cover. *Ritchie v. McMullen*, 79 Fed. 522, 25 C. C. A. 50; *United Cigarette Mach. Co. v. Wright*, 132 Fed. 195.

"A petition by way of cross-bill, which makes nobody defendant, which prays for no process and under which no process is issued, is a nullity." *Washington, etc. R. Co. v. Bradley*, 10 Wall. (U. S.) 299, 19 L. ed. 894. See also *Wright v. St. Louis S. W. R. Co.*, 175 Fed. 845.

Sufficiency of Pleading.—In an action to quiet title the complaint alleged that judgment in ejectment has been recovered by plaintiff against defendant, and that plaintiff had been put in possession under a writ of possession. Defendant in his answer denied the execution of the writ and filed a cross-bill alleging possession of the land in question and other adjoining land and that defendant had been removed from the land adjoining the property in question by the officer, who had made a return that he had executed the writ. There was no averment in the cross-bill that the officer in executing the writ did not in fact place plaintiff in possession of the land in controversy nor that defendant had paid taxes on the land. The cross-bill was held bad on demurrer as there was no allegation that the officer did not in fact place plaintiff in possession of the land in controversy as, from the facts alleged, it may be that the marshal executed the writ by placing plaintiff in possession of the whole tract. *Center v. Cady*, 184 Fed. 605, 106 C. C. A. 609.

Designation of Party in Representative Capacity.—Where relief is asked for in the cross-bill against a party in several capacities and the cross-bill shows "the official character of the suitor, it is not necessary that he should be styled according to his office," and the court may consider him "in court on the cross-bill in all the capacities in which he is related to the subject of litigation." *Haberman v. Kaufer*, 60 N. J. Eq. 271, 279, 47 Atl. 48.

29. **U. S.**—*Morgan's L. & T. R. Co. v. Texas Cent. R.*, 137 U. S. 171, 200, 11 Sup. Ct. 61, 34 L. ed. 625; *The Dove*, 91 U. S. 381, 23 L. ed. 354; *United States v. Reese*, 166 Fed. 347. **Fla.**—*Special Tax School Dist. No. 1 v. Smith*, 61 Fla. 782, 54 So. 376. **Ga.** *Ray v. Home & Foreign Invest. Co.*, 106 Ga. 492, 32 S. E. 603; *McDougald v. Dougherty*, 14 Ga. 674. **N. J.**—*Doremus v. Paterson*, 70 N. J. Eq. 296, 62 Atl. 3, *affirmed*, 71 N. J. Eq. 789, 71 Atl. 1134; *Krueger v. Ferry*, 41 N. J. Eq. 432, 5 Atl. 452.

While "a cross-bill filed against a codefendant must rest on considerations of equity, a different and more liberal rule applies when the cross-bill is filed against the complainant." *Asbury Park & S. G. R. Co. v. Township Com. of Neptune Twp.*, 73 N. J. Eq. 323, 67 Atl. 790.

"It is correct practice for one defendant to bring to the attention of the court by a cross-bill any rights he may have against a codefendant as well as against the plaintiffs growing out of the subject-matter of the suit." *Forbes v. Thorpe* (Mass.), 95 N. E. 955, 960.

Absence of Statutory Provision for Cross-Bill Against Plaintiff.—Even where the codes expressly provide for cross-petitions against codefendants, cross-petitions for relief against the plaintiff not provided for in the codes, are recognized by the courts. *Armstrong v. Mayer*, 69 Neb. 187, 192, 95 N. W. 51, *citing Radcliffe v. Scruggs*, 46 Ark. 96; *Russell v. Lamb*, 82 Iowa

terminorum.³⁰ Whenever it is brought against codefendants in a suit, the complainant must be named as a defendant in the cross-bill.³¹

There is some conflict as to the right to bring in new parties by cross-bill, which is discussed in a subsequent part of this article.³²

But a cross-bill which seeks no relief against the complainant not necessary for the protection of his rights and which would not justify any relief against him will not be allowed to stand.³³

C. STATING CAUSE OF ACTION.—A cross-bill must be as perfect as any other bill,³⁴ and the same strictness in stating the grounds relied on is required when affirmative relief is sought, as is required of the plaintiff in the original bill.³⁵

A cause of action for which a defendant could not maintain an original bill cannot as a general rule be made the subject of a cross-bill.³⁶

D. MUST BE GERMANE TO ORIGINAL BILL.—The cross-bill must be confined to the matter stated in the original bill or be germane there-

558, 48 N. W. 939; *Cramer v. Clow*, 81 Iowa 255, 47 N. W. 59.

The Kentucky statute defines a cross-petition as the commencement of an action by a defendant against a codefendant or a person not a party to the action or against both, or by a plaintiff against a coplaintiff, or a person not a party to the action, or against both. Rev. Civil Code (1906) §96, subd. 3. Under this section it is held that "a defendant may have a cross-action against a codefendant alone, or a third person may be joined with the codefendant, or against a third person alone, but he cannot have a cross-action against the plaintiff alone or jointly with a third person." *Grimes v. Grimes*, 88 Ky. 20, 9 S. W. 840.

30. **U. S.**—*Shields v. Barrow*, 17 How. 130, 15 L. ed. 158; *Mercantile Trust Co. v. Atlantic & P. R. Co.*, 70 Fed. 518. **Ala.**—*Continental Life Ins. Co. v. Webb*, 54 Ala. 688. **Mich.**—*Griffin v. Griffin*, 112 Mich. 87, 70 N. W. 423. **W. Va.**—*West Virginia O. & O. L. Co. v. Vinal*, 14 W. Va. 637, 677, citing *Story's Eq. Pl.*, §389.

31. *West Virginia O. & O. L. Co. v. Vinal*, 14 W. Va. 637, 678, citing 2 Barb. Ch. Pr. 127.

32. See *infra*, V. F.

33. **U. S.**—*Ayres v. Carver*, 17 How. 591, 15 L. ed. 179; *Stuart v. Hayden*, 72 Fed. 402, 18 C. C. A. 618, 36 U. S. App. 462, affirmed in 169 U. S. 1, 18 Sup. Ct. 274, 42 L. ed. 639; *Mercantile Trust Co. v. Missouri*, etc. R.

Co., 41 Fed. 8. **Ala.**—*Tutwiler v. Dunlap*, 71 Ala. 126; *Andrews v. Hobson's Admr.*, 23 Ala. 219. **Ky.**—*Crabtree v. Banks*, 1 Mete. 482. **N. J.**—*Carpenter v. Gray*, 37 N. J. Eq. 389. **Tenn.**—*Pollard v. Wellford*, 99 Tenn. 113, 42 S. W. 23.

34. **U. S.**—*Greenwalt v. Duncan*, 16 Fed. 35, 5 McCrary 132. **Ala.**—*Hooper v. Armstrong*, 69 Ala. 343. **Ark.**—*Trappall v. Burton*, 24 Ark. 371. **Ill.**—*McCagg v. Heacock*, 42 Ill. 153. **N. J.**—*Borden v. Murphy*, 3 Atl. 408.

35. *Bessemer I. D. Co. v. Woolley*, 32 Colo. 437, 76 Pac. 1053; *San Juan*, etc. Min. Co. v. Finch, 6 Colo. 214, 223; *Parrott v. Crawford*, 5 Ind. Ter. 103, 82 S. W. 688 (mere conclusions are not sufficient). But see *Nelson v. Dunn*, 15 Ala. 501, that such bills are treated with greater indulgence than original bills.

36. Under *Feed Stoker Co. v. American Stoker Co.*, 169 Fed. 891; *New York & N. J. Water Co. v. North Arlington (N. J. Eq.)*, 75 Atl. 177.

Limitation of Rule.—"Cases arise where a cross-bill may be allowed to be filed after answer and to be disposed of before the original bill because of facts arising after the filing of the answer which entitles defendant to a defense." Under *Feed Stoker Co. v. American Stoker Co.*, 169 Fed. 891, citing **U. S.**—*Banque Franco-Egyptienne v. Brown*, 24 Fed. 106. **N. Y.**—*Scott v. Grant*, 10 Paige 485. **Pa.**—*Randolph's Bill*, 66 Pa. 178.

to,³⁷ but the filing of a general answer is a waiver of the objection that

37. **U. S.**—Cross *v.* DeValle, 1 Wall. 1, 17 L. ed. 515; Ayres *v.* Carver, 17 How. 591, 15 L. ed. 179; Springfield Mill. Co. *v.* Barnard Leas. Mfg. Co., 81 Fed. 261, 26 C. C. A. 389; Lovell *v.* Latham & Co., 186 Fed. 602; Randolph *v.* Robinson, 20 Fed. Cas. No. 11,561. **Ala.**—O'Neill *v.* Perryman, 102 Ala. 522, 14 So. 898; Continental Life Ins. Co. *v.* Webb, 54 Ala. 688; Andrews *v.* Hobson's Admr., 23 Ala. 219. **Ariz.** Mallory *v.* Globe-Boston Copper Min. Co., 11 Ariz. 296, 94 Pac. 1116, cross-bill to quiet title germane in action to set aside conveyance of mining claims. **Ark.**—Trapnall *v.* Hill, 31 Ark. 345; Pindall *v.* Trevor, 30 Ark. 249. **Colo.**—Crisman *v.* Heiderer, 5 Colo. 589. **Fla.**—Special School Tax Dist. No. 1 *v.* Smith, 61 Fla. 782, 54 So. 376. **Ga.**—Johnson *v.* Stanceliff, 113 Ga. 886, 39 S. E. 296; Ray *v.* Home & Foreign Invest. Co., 106 Ga. 492, 32 S. E. 603; McDougald *v.* Dougherty, 14 Ga. 674. **Ill.**—Zollman *v.* Jackson, etc. Bank, 238 Ill. 290, 87 N. E. 297; Patterson *v.* Northern Trust Co., 231 Ill. 22, 82 N. E. 840, 121 Am. St. Rep. 299; Hurd *v.* Case, 32 Ill. 45, 83 Am. Dec. 253. **Ky.**—May *v.* Armstrong, 3 J. J. Marsh. 260. **Md.**—Canton *v.* McGraw, 91 Md. 744, 47 Atl. 1030. **Mich.** Root *v.* Root, 164 Mich. 638, 130 N. W. 194; Hackley *v.* Maek, 60 Mich. 591, 27 N. W. 871. **Miss.**—Stansel *v.* Hahn, 96 Miss. 616, 50 So. 696. **Mo.**—Mathiason *v.* City of St. Louis, 156 Mo. 196, 56 S. W. 890. **Neb.**—Higgins *v.* Vandever, 85 Neb. 89, 122 N. W. 843. **N. J.** Doremus *v.* Paterson, 70 N. J. Eq. 296, 62 Atl. 3; Krueger *v.* Ferry, 41 N. J. Eq. 432, 5 Atl. 452; Carpenter *v.* Gray, 37 N. J. Eq. 389. **N. M.**—Perea *v.* Harrison, 7 N. M. 666, 41 Pac. 529. **Pa.**—Sears *v.* Scranton Trust Co., 228 Pa. 126, 137, 77 Atl. 423. **Tenn.**—Cohen *v.* Woollard, 2 Tenn. Ch. 686. **Vt.**—Rutland *v.* Paige, 24 Vt. 181. **W. Va.** Peters *v.* Case, 62 W. Va. 33, 57 S. E. 733, 13 L. R. A. (N. S.) 408 (annotated case); Hansford *v.* Chesapeake Coal Co., 22 W. Va. 70; West Virginia D. & O. L. Co. *v.* Vinal, 14 W. Va. 637, 677.

A claim for relief that is foreign to the cause of action cannot be set up. Krueger *v.* Ferry, 41 N. J. Eq. 432, 5 Atl. 452.

"At the opening of every text book

upon the subject or reported case, it is made clear that a cross-bill must be confined to the subject-matter of the original bill, or in some way connected with it so as to make it a proper subject of defense thereto." Allen *v.* Fury, 53 N. J. Eq. 35, 30 Atl. 551.

"While such a bill must be germane to the subject-matter of the original bill, it is, in fact, a separate and distinct suit commenced by the filing of the cross-bill." Thomas *v.* Thomas, 250 Ill. 354, 95 N. E. 345; Ballance *v.* Underhill, 4 Ill. 453.

Where the original bill did not pray for an accounting but was to secure the peaceable use of a school building, a cross-bill asserting a lien on the building and praying for an accounting will not be permitted. Special School Tax Dist. No. 1 *v.* Smith, 61 Fla. 782, 54 So. 376.

The question whether a "cross-bill" is germane to the original bill is not jurisdictional, and an error in deciding it can be corrected only on appeal. Ledbetter *v.* Mandell, 141 App. Div. 556, 126 N. Y. Supp. 497.

Inequitable Conduct of Complainant. In Peters *v.* Case, 62 W. Va. 33, 57 S. E. 733, 13 L. R. A. (N. S.) 408, the court said: "Admitting that a cross bill, or an answer praying affirmative relief, must be confined, in its allegations and prayer for relief, to the subject-matter of the bill, counsel for the appellant, relying upon the maxims, 'He who comes into equity must do so with clean hands;' and 'He who seeks equity must do equity,' say the new matter set up in their answer, and on which the decree against Peters was predicated, comes within that rule, since it shows inequitable conduct on the part of Peters, such in character as to deny to him the aid of a court of equity in respect to the subject-matter of his bill, or a mutual equity due from him to the defendant which the court could properly enforce in granting relief on his bill. The principles declared by the two maxims invoked do not seem to sustain the position of the appellant. They do not bear on the question of the relation between the subject-matter of the bill and the new matter set forth in the answer. They have no application until after such relationship has been established. Besides,

they operate, when applicable, to defeat the plaintiff, not to afford relief to the defendant on his cross bill. They simply say that a court of equity will not entertain the plaintiff, unless he comes with clean hands. Nor grant his prayer unless he will perform whatever duty he owes to the defendant, respecting the matter set up in the bill. They are defensive, not offensive. The decree in favor of the plaintiff is not now before this court. There has been no appeal from it. So far as this record discloses, it stands unreversed and unchallenged. Hence the time for insisting upon the application of said maxims seems to have passed."

Infringement of Patent.—In an action under §4915 of the Rev. St. (U. S. Corp. St. 1901, p. 3992) to compel the issuance of a patent, a cross-bill charging infringement is not germane to the original bill. *Kilbourn v. Hirner*, 163 Fed. 539. But see *Ide v. Ball Engine Co.*, 31 Fed. 901, where cross-bill in an action for infringement was permitted.

"Only where a defendant has a cause of action affecting the subject-matter of the main suit, may he file a cross-petition; . . . wholly distinct and independent transactions cannot be brought into an action by cross-petition." *Culbertson v. Salinger*, 131 Iowa 307, 314, 108 N. W. 454. See also *Mahaska Bank v. Christ*, 82 Iowa 56, 47 N. W. 886.

Cross-Bill for Divorce on Bill Praying for Injunction.—In an action brought by a husband against his wife to enjoin her from engaging in business in competition with him, it was held permissible for the wife to file a cross-bill for divorce in which she charged extreme cruelty, and that such matter set up in the cross-bill was germane to the bill. *Root v. Root*, 164 Mich. 638, 130 N. W. 194.

Cross-Bill in Divorce Action.—When the original bill asks for a divorce, it is permissible for a defendant to file a cross-bill praying for such relief in favor of defendant. *Slocum v. Slocum*, 86 Ark. 469, 111 S. W. 806; *Von Bernuth v. Von Bernuth*, 76 N. J. Eq. 487, 74 Atl. 700; *Arrowsmith v. Arrowsmith* (N. J. Eq.), 71 Atl. 702; *Costell v. Costell*, 69 N. J. Eq. 218, 60 Atl. 49. See also the title "Divorce."

In Delaware since the Act of March 29, 1907, (§13) where a divorce is ap-

plied for on the ground of adultery, no cross-bill can be filed. *Banks v. Banks*, 6 Penne. (Del.) 442, 67 Atl. 853.

In Ohio, the statute provides "when the wife files her petition for divorce or alimony, the husband may file a cross-petition for divorce, upon either cause hereinbefore mentioned. The wife may file her petition for alimony alone, or, if a petition for a divorce has been filed by the husband, she may file a cross-petition for alimony, with or without a prayer for the dissolution of the marriage contract." Ohio Gen. Code (1910) §11,997.

Accounting.—In an action to restrain the repeal of an ordinance granting to a street railway company the right to locate tracks and for their removal, a defendant may by cross-bill demand an accounting for compensation provided for by such ordinance. *Asbury Park & S. G. R. Co. v. Township Com. of Neptune Twp.*, 73 N. J. Eq. 323, 67 Atl. 790.

Rights of Junior Mortgagee.—It has been held that a junior mortgagee cannot, by cross-bill, seek to foreclose his own mortgage as against a prior mortgagee, it being a distinct and independent cause of action. *Newton v. Gage*, 155 Fed. 598, 610.

Removal of Obstructions.—"A defendant who has obstructed a private road on his premises to the use of which plaintiff was entitled and for the vindication of his right to which the plaintiff seeks an injunction, cannot, as a matter of affirmative relief, as upon a cross-bill, have a decree against the plaintiff compelling him to remove obstructions which he has placed in another portion of the same road on his premises, which the defendant claims the right to use." *Peters v. Case*, 62 W. Va. 33, 57 S. E. 733.

Rule Similar in Chancery and Under the Code.—"We see no reason to doubt that the matters set up in the cross petition must be germane to the original suit under the Code, quite as much as under the chancery practice. This has been assumed generally, without much discussion. . . . The only relaxation of the rule that there cannot be two original bills in one cause, so far as we know, has been with respect to cross bills between co-defendants to foreclose second mortgages or other junior liens. The practice of filing cross petitions for this

the cross-bill is not germane to the subject-matter of the original bill.³⁸

E. PLEADING NEW MATTER.—1. When Permissible.—A defendant, by cross-bill, can introduce only such new facts as are necessary for the court to have before it in order to do complete justice with respect to the matters set up in the original bill.³⁹

purpose has always obtained here and has been recognized repeatedly, although not allowed in strictness under the old practice. But in such cases the cross petition is in substance germane to the original controversy. The subject-matter thereof is the determination of the priorities of liens, the ascertainment of the amounts thereof, and the subjection of the property to plaintiff's claim. The defendants who hold subsequent liens are given complete relief, as against their co-defendants, along these same lines. That this practice has not impaired the general rule is made clear by the refusal of the courts to allow controversies over the title, claims for partition, and the like, to be tried in suits for foreclosure. *Shellenbarger v. Biser*, 5 Neb. 195; *Hurley v. Cox*, 9 Neb. 230, 2 N. W. 705. We think therefore, that a cross petition is not maintainable for purposes of affirmative relief as a cross suit beyond the requirements of a complete adjudication upon the subject-matter of the original suit." *Armstrong v. Mayer*, 69 Neb. 187, 198, 95 N. W. 51.

Matter Not Within Original Defense. Matter which could not have been pleaded by an original defendant had he desired to do so, cannot be made the subject of a cross-complaint by a new party to the action. *Curran v. St. Charles Car Co.*, 32 Fed. 835. See the title "**Cross-Complaint.**"

38. Ill.—*Ackley v. Croucher*, 203 Ill. 530, 68 N. E. 86. **Mo.**—*Boland v. Ross*, 120 Mo. 208, 25 S. W. 524. **Pa.**—*Sears v. Seranton Trust Co.*, 228 Pa. 126, 137, 77 N. E. 423.

If the cause of action set forth in the cross-bill arose by the filing of the bill, and is germane to it, or if it existed before, and the bill uncovers facts transpiring before it was brought, and discovers equitable rights to the defendants, they may ask relief from those facts by cross-bills and need not bring a separate action. *Carlton v. Southern Mut. Ins. Co.*, 72 Ga. 371, 393.

39. Ala.—*Continental Life Ins. Co. v. Webb*, 54 Ala. 688; *Nelson v. Dunn*, 15 Ala. 501. **Ark.**—*Pindall v. Trevor*, 30 Ark. 249. **Fla.**—*Special School Tax Dist. v. Smith*, 61 Fla. 782, 54 So. 376; *Price v. Stratton*, 45 Fla. 535, 33 So. 644. **Ga.**—*Latimer v. Irish-American Bank*, 119 Ga. 887, 47 S. E. 322. **Ill.**—*Thomas v. Thomas*, 250 Ill. 354, 95 N. E. 345; *Patterson v. Northern Trust Co.*, 231 Ill. 22, 82 N. E. 840; *Morrison v. Morrison*, 140 Ill. 560, 30 N. E. 768. **Ky.**—*May v. Armstrong*, 3 J. J. Marsh. 260, 20 Am. Dec. 137. **Mich.**—*Hackley v. Mack*, 60 Mich. 591, 27 N. W. 871; *Andrews v. Kibbee*, 12 Mich. 94, 83 Am. Dec. 766. **Miss.**—*District Grand Lodge, I. O. O. F. v. Leonard*, 92 Miss. 777, 46 So. 532; *Gilner v. Felhour*, 45 Miss. 627. **Neb.**—*Higgins v. Vandever*, 85 Neb. 89, 122 N. W. 843. **N. J.**—*Doremus v. Paterson*, 70 N. J. Eq. 296, 62 Atl. 3, *affirmed*, 71 N. J. Eq. 789, 71 Atl. 1134; *Krueger v. Ferry*, 41 N. J. Eq. 432, 5 Atl. 452. **Tenn.**—*Hildebrand v. Beasley*, 7 Heisk. 121.

A cross-bill "praying affirmative relief must be confined to matters stated in the original bill and cannot introduce new and distinct matters not embraced therein." *Peters v. Case*, 62 W. Va. 33, 57 S. E. 733.

"The new issues which a defendant may introduce by cross bill are limited to such as it is necessary for the court to have before it in deciding the questions raised in the original suit in order to do complete justice to all parties with respect to the cause of action on which the plaintiff bases his claim for relief." *Armstrong v. Mayer*, 69 Neb. 187, 195, 95 N. W. 51. See also **U. S.**—*Cross v. De Valle*, 1 Wall. 1, 17 L. ed. 515. **Conn.**—*Rowan v. Sharp's Rifle Mfg. Co.*, 33 Conn. 1. **Ga.**—*Brownlee v. Warmack*, 90 Ga. 775, 17 S. E. 102. **Mo.**—*Mathiason v. City of St. Louis*, 156 Mo. 196, 56 S. W. 890. **N. J.**—*Ferry v. Krueger*, 43 N. J. Eq. 295, 14 Atl. 811; *Krueger v. Ferry*, 41 N. J. Eq. 432, 5 Atl. 452.

Setting Up New Facts.—"The new

2. Setting Up Strange Issues.—New matter not embraced in the original bill,⁴⁰ and which virtually introduces an independent action and asks for totally different relief, though growing out of the same transaction cannot be set up by cross-bill.⁴¹

If a defendant attempts by cross-bill, to engraft on the litigation introduced by complainant's bill, questions not necessary to the proper determination of complainant's right to relief, the cross-bill will be dismissed.⁴²

F. BRINGING IN NEW PARTIES.—There is to some extent a conflict of authority as to the right to bring in new parties by cross-bill.⁴³

facts which it is proper for a defendant to introduce into a pending litigation, by means of a cross-bill, are such, and such only, as it is necessary for the court to have before it in deciding the questions raised in the original suit, to enable it to do full and complete justice to all the parties before it in respect to the cause of action on which the complainant rests his right to aid or relief. If a defendant, in filing a cross-bill, attempts to go beyond this, and to introduce new and distinct matter, not essential to the proper determination of the matter put in litigation by the original bill, although he may show a perfect case against either the complainant, or one or more of his codefendants, his pleading will not be a cross-bill, but an original bill." *Krueger v. Ferry*, 41 N. J. Eq. 432, 5 Atl. 452.

40. *Ayres v. Carver*, 17 How. (U.S.) 591, 15 L. ed. 179; *Hogg v. Hoag*, 107 Fed. 807, *affirmed*, 154 Fed. 1003, 83 C. C. A. 677; *Culbertson v. Salinger*, 131 Iowa 307, 108 N. W. 454; *Mahaska Bank v. Christ*, 82 Iowa 56, 47 N. W. 886.

Under a bill to obtain the appointment of a trustee in place of a deceased trustee, a cross-bill will be entertained on behalf of the beneficiaries of the trust "for the purpose of enforcing the rights of the parties to the trust fund." In such case a relief in the way of an accounting may be had and the beneficiaries may also resort thereto for the purpose of compelling restitution from the representatives of the deceased trustee or others connected with the trust, and to ask that the fund be administered in its integrity. *Hogg v. Hoag*, 107 Fed. 807, *affirmed*, 154 Fed. 1003, 83 C. C. A. 677.

Bringing in New Interests.—A cross-bill which brings into the controversy new parties with distinct interests cannot be maintained. *Cecil v. Karnes*, 61 W. Va. 543, 56 S. E. 885.

41. *Nashville & C. R. Co. v. United States*, 101 U. S. 639, 25 L. ed. 1074; *Patton v. Marshall*, 173 Fed. 350, 97 C. C. A. 610; *Thruston v. Big Stone Gap Imp. Co.*, 86 Fed. 484; *Fidelity Trust & Safety Vault Co. v. Mobile St. R. Co.*, 53 Fed. 850; *Johnson R. Signal Co. v. Union Switch & Signal Co.*, 43 Fed. 331; *Doremus v. Paterson*, 70 N. J. Eq. 296, 62 Atl. 3, *affirmed*, 71 N. J. Eq. 789, 71 Atl. 1134; *Krueger v. Ferry*, 41 N. J. Eq. 432, 5 Atl. 452.

42. **U. S.**—*Cross v. De Valle*, 1 Wall. 1, 17 L. ed. 515; *Ayres v. Carver*, 17 How. 591, 15 L. ed. 179; *Lovell v. Latham & Co.*, 186 Fed. 602; *Randolph v. Robinson*, 20 Fed. Cas. No. 11,561.

Ala.—*Continental Life Ins. Co. v. Webb*, 54 Ala. 688; *Andrews v. Hobson's Admr.*, 23 Ala. 219. **Ga.**—*Ray v. Home & Foreign Invest. Co.*, 106 Ga. 492, 32 S. E. 603; *McDougald v. Dougherty*, 14 Ga. 674. **Ky.**—*May v. Armstrong*, 3 J. J. Marsh. 260. **Mich.** *Root v. Root*, 164 Mich. 638, 130 N. W. 194; *Hackley v. Mack*, 60 Mich. 591, 27 N. W. 871. **N. J.**—*Doremus v. Paterson*, 70 N. J. Eq. 296, 62 Atl. 3, *affirmed*, 71 N. J. Eq. 789, 71 Atl. 1134; *Krueger v. Ferry*, 41 N. J. Eq. 432, 5 Atl. 452; *Carpenter v. Gray*, 37 N. J. Eq. 389. **Vt.**—*Rutland v. Paige*, 24 Vt. 181. **W. Va.**—*Hansford v. Chesapeake Coal Co.*, 22 W. Va. 70; *West Virginia O. & O. L. Co. v. Vinal*, 14 W. Va. 637, 677.

43. *Sears v. Scranton Trust Co.*, 228 Pa. 126, 137, 77 Atl. 423.

"Whether under any circumstances, it is admissible to bring in a new party by cross bill, is possibly an un-

It is held that if the cross-bill be filed merely as a defense to the original bill, persons not parties to the original bill cannot be made parties to the cross-bill, but if affirmative relief be sought and it appears that persons not parties to the original suit are necessary parties for that purpose, such persons may be brought in as parties by the cross-bill.⁴⁴ Courts taking the other view, hold that new parties

settled question, though Mr. Justice Curtis, in *Shields v. Barrow*, 17 How. 145, expressed a very decided opinion that such practice was unknown and indefensible. Whether that point was authoritatively decided in that case is debatable, and there are reputable authorities which take a contrary view." *Toler v. East Tennessee*, V. & G. R. Co., 67 Fed. 168, 173.

Trend of Authority.—"It may be doubted if the practice of bringing in new parties by a cross bill is not an innovation. The origin and purpose of cross bills indicate it, and until a comparatively recent date the practice was not usual, if it was permitted under any circumstances. Metford, Cooper and other early writers are silent upon the subject, except as they imply that it is not permissible by stating that the cross bill is designed to afford complete relief to the parties to the original bill. Most of the text writers pass without mention, the subject of bringing in new parties by cross bill, . . . considering the more recent cases reinforced by statutes and codes, the trend is toward the practice; and the statement that 'the undoubted weight of authority is to the effect that if a cross bill is brought for relief as well as for defense, and shows that persons not parties to the original bill are necessary parties to the cross bill, they may properly be made such,' is probably true." *Griffin v. Griffin*, 112 Mich. 87, 70 N. W. 423.

44. U. S.—*Ulman v. Jaeger's Admr.*, 155 Fed. 1011, 1017 (construing West Virginia practice); *Mercantile Trust Co. v. Atlantic & Pac. R. Co.*, 70 Fed. 518; *McComb v. Chicago*, St. L. & N. O. R. Co., 7 Fed. 426; *Brandon Mfg. Co. v. Prime*, 14 Blatch. 371, 4 Fed. Cas. No. 1,810. Colo.—*Allen v. Tritch*, 5 Colo. 222. Fla.—*Indian River Mfg. Co. v. Wooten*, 43 Fla. 271, 37 So. 731; *Price v. Stratton*, 45 Fla. 535, 33 So. 644. Ill.—*Higgins v. Curtiss*, 82 Ill. 28; *Hurd v. Case*, 32 Ill. 45, 83 Am. Dec. 249; *Jones v. Smith*, 14 Ill. 229.

N. Y.—*Underhill v. Van Cortlandt*, 2 Johns. Ch. 339. Pa.—*Sears v. Scranton Trust Co.*, 228 Pa. 126, 137, 77 Atl. 423; *Kerin v. Mercantile Trust Co.*, 226 Pa. 557, 75 Atl. 843. Tenn.—*Pollard v. Wellford*, 99 Tenn. 113, 42 S. W. 23; *Hildebrand v. Beasley*, 7 Heisk. 121. *Compare Cobb v. Baxter*, 1 Tenn. Ch. 405, which follows *Shields v. Barrow*, *infra*. W. Va.—*Martin v. Kester*, 46 W. Va. 438, 33 S. E. 238; *Kanawha Lodge v. Swann*, 37 W. Va. 176, 16 S. E. 463, *distinguishing* *McMullen v. Egan*, 21 W. Va. 250, and *West Virginia O. & O. L. Co. v. Vinal*, 14 W. Va. 637.

See also the following cases where new parties were permitted to come in by cross-bill: Ala.—*Coster's Exrs. v. Bank of Georgia*, 24 Ala. 37. Ga.—*McMillan v. Toombs*, 74 Ga. 535. Ill.—*Scott v. Milliken*, 60 Ill. 108. Ia.—*Bunce v. Bunce*, 59 Iowa 533, 13 N. W. 705. Ky.—*Loughridge v. Cawood*, 97 Ky. 533, 31 S. W. 125; *Sharp v. Pike's Admr.*, 5 B. Mon. 155. N. Y.—*Whitbeck v. Edgar*, 2 Barb. Ch. 106; *Brown v. Story*, 2 Paige 594. Ohio.—*Resor v. McKenzie*, 2 Disney 210. Va.—*Briscoe v. Ashby*, 24 Gratt. 454.

Compare *Shields v. Barrow*, 17 How. (U. S.) 130, 15 L. ed. 158, of which case Judge Wheeler, in *Brandon Mfg. Co. v. Prime*, *supra*, said: "Opposed to all this, there is the remark of Mr. Justice Curtis, in *Shields v. Barrow*, 17 How. (58 U. S.) 130, and the reasons given by him in support of it, to the effect, that new parties cannot, in any case, properly be added by cross-bill, without citing any authority for it, and books and cases that have followed that remark without citing any other authority. That precise question was not involved in that case, but the mere dictum of such a judge of such a court would ordinarily be followed, especially by lower courts. An examination of his reasoning shows, that he made the suggestion without much examination, probably, and his reasoning does not cover the whole ground as to all

classes of cases. The modes of procedure he suggests would probably be ample in all cases of cross-bills brought for discovery in aid of a defense merely to the original bill, but not in cases of those brought for relief as well as defence, where new parties would be necessary to the relief sought."

Judge Wellborn, in *Newton v. Gage*, 155 Fed. 598, 611, discusses both *Shields v. Barrow* and *Brandon Mfg. Co. v. Prime, supra*, and concludes: "This brief summary of the facts shows clearly that, Justice Curtis' declaration, that 'new parties cannot be introduced into a cause by a cross-bill' was not 'mere dictum,' but a direct ruling upon one of the controlling issues of the case."

Pollard v. Wellford, 99 Tenn. 113, 42 S. W. 23, approves the ruling in *Hilderbrand v. Beasley, supra*, but limits the application thereof, the court saying: "The Chancellor being of opinion that said Continental National Bank, not being a party to the original cause, and not being connected with any litigation between the parties to this cause, ordered this cross bill to be stricken from the files. In this we think there was no error. We do not sustain the action of the Chancellor upon the ground that a new party may not be brought into a lawsuit by cross bill. The cross bill in this case was formal, and not a mere answer filed as a cross bill under the statute. We approve the rule laid down by Judge McFarland in *Hilderbrand v. Beasley*, 7 Heis. 121. Said that eminent Judge: 'The elementary authorities hold that a cross bill must be confined to matters growing out of the original bill, and, according to some authorities, new parties cannot be introduced into a case by cross bill. See 2 Dan. Ch. Prac., citing 17 How. 145. But, under our practice, we should not be inclined to carry the doctrine so far . . . It is the policy of the law to prevent a multiplicity of suits, and, upon the facts stated in the cross bill, the relief to which the complainant may be entitled herein could not be fully given without making Fort a party.' See, also *Gibson's Suits in Chancery*, Sec. 662. It is true that in an answer filed as a cross bill, under the statute, new parties cannot be brought before the Court. 9 Heis., 754; 3 Tenn. Ch., 356; 2 Bax. 446. In this case, however, we find that the question sought to

be made by the Union & Planters' Bank had no material connection with any litigation between the parties to this cause, and the action of the Chancellor was correct."

In New Jersey there is some conflict as to whether new parties can be brought in by cross-bill. *Richman v. Donnell*, 53 N. J. Eq. 32, 30 Atl. 533, states the rule that, new matter by way of defense, which requires the introduction of new parties, cannot be set up by cross-bill, while in *Haberman v. Kaufer*, 60 N. J. Eq. 271, 47 Atl. 48, and *Green v. Stone*, 54 N. J. Eq. 387, 34 Atl. 1099, in which other local cases are cited, the rule stated is that where it is necessary to bring in new parties to a cross-bill, in order to grant affirmative relief in aid of a defense it may be done.

New parties not essential to the case set out in the bill of complaint, cannot be brought in by cross-bill. *Forbes v. Thorpe* (Mass.), 95 N. E. 955.

"The later cases draw a very just and proper distinction between a cross-bill merely defensive in its character and one which seeks affirmative relief. In the former no new parties can be introduced; in the latter, they may, if the ends of justice so require." *Kanawha Lodge v. Swann*, 37 W. Va. 176, 16 S. E. 462.

Pennsylvania.—In *Sears v. Scranton Trust Co.*, 228 Pa. 126, 137, 77 Atl. 423, the court referring to the rule above stated, said: "We find no discussion upon this point in our cases, but equity rule No. 40 assumes that new parties may be added by cross bill, and expressly provides how service shall be made upon parties so brought into a suit; and in *Given v. Sands*, 216 Pa. 463, 66 Atl. 70, a new party was so introduced."

Virginia and West Virginia.—In West Virginia the practice of bringing in new parties by cross-bill is recognized and is sustained by the case of *Kanawha Lodge v. Swann*, 37 W. Va. 176, 16 S. E. 462. On the contrary in Virginia, *Derbyshire v. Jones*, 94 Va. 140, 26 S. E. 416, "would seem to hold the opposite view, though not decisive." *Ulman v. Jaeger's Admr.*, 155 Fed. 1011.

Absence of Statute.—"In several jurisdictions where there are no provisions on this subject in the codes, the equity practice which allows affirm-

cannot be introduced into a case by cross-bill for any purpose.⁴⁵

G. FILING BY INTERVENOR.—A cross-bill cannot be filed by one not a party to the action,⁴⁶ and an application for permission to inter-

active relief upon cross-bill has been adopted even to the extent of allowing new parties to be brought in." *Armstrong v. Mayer*, 69 Neb. 187, 192, 95 N. W. 51; *citing Killian v. Andrews*, 130 Ind. 579, 30 N. E. 700; *Hopkins v. Gilman*, 47 Wis. 581, 3 N. W. 382.

45. **U. S.**—*Patton v. Marshall*, 173 Fed. 350, 97 C. C. A. 610, 26 L. R. A. (N. S.) 127; *Newton v. Gage*, 155 Fed. 598; *Adelbert College, etc. v. Toledo W. & W. R. Co.*, 47 Fed. 836, 846; *Randolph v. Robinson*, 20 Fed. Cas. No. 11,561. **Miss.**—*Wright v. Frank*, 61 Miss. 32; *Shaw v. Millsaps*, 50 Miss. 380; *Bishop v. Miller*, 48 Miss. 364. **N. M.**—*Perea v. Harrison*, 7 N. M. 660, 41 Pac. 529. **Va.**—*Derbyshire v. Jones*, 94 Va. 140, 26 S. E. 416, *citing Shields v. Barrow*, 17 How. (U. S.) 130, 15 L. ed. 158; *McMullen v. Eagan*, 21 W. Va. 250, and *West Virginia O. & O. L. Co. v. Vinal*, 14 W. Va. 637, as supporting this view, but holding that new parties might possibly be brought in when necessary to a complete defense or settlement of the controversy.

The introduction of new parties asserting rights in conflict with those asserted in the original bill will not be permitted. *Continental Life Ins. Co. v. Webb*, 54 Ala. 688.

In Mississippi it is held that though the statute permitted a defendant to have his answer considered as a cross-bill without service of process on the defendants therein "unless new parties be introduced," that clause refers only to defendants in the original bill who are parties to the cross-bill. *Ladner v. Ogden*, 31 Miss. 332.

In Tennessee when the cross-bill discloses no ground for relief as against the original complainant, new parties cannot be brought in by the cross-bill, and referring to the rule in that state the chancellor said: "In *Cobb v. Baxter*, 1 Tenn. Ch. 405, I held that it was good ground of demurrer to a cross-bill that it undertakes to bring in as defendants new parties who are neither complainants nor defendants to the original bill. That opinion was followed by a note to the effect that, in *Hildebrand v. Beasley*, 7 Heisk. 121, our Supreme Court had intimated that

under our practice the doctrine would not be carried so far. Afterwards, however, at the December term, 1873, that court, in the case of *Odom v. Owen*, 2 Baxt. 446, s. c., 1 Tenn. Leg. Rep. 83, held that under the Code, sec. 4323, which allows a defendant to file his answer as a cross-bill, a new party could not be brought in in that mode; 'the statute contemplating,' say the court, 'that as the matter of the cross-bill should be in the answer to the original bill, its allegations as a cross-bill should be against the parties to the original bill to which it is an answer.''" *McGavock v. Morrison*, 3 Tenn. Ch. 355.

Objection of Lack of Parties.—New parties cannot be introduced by cross-bill; if the interest of the defendant requires additional parties, objection of non-joinder should be taken and plaintiff forced to amend or have his bill dismissed. *Shields v. Barrow*, 17 How. (U. S.) 130, 15 L. ed. 158; *Patton v. Marshall*, 173 Fed. 350, 97 C. C. A. 610; *United States Gypsum Co. v. Hoxie*, 172 Fed. 504.

46. "The rule is elementary that a cross-bill can only be filed by a defendant or defendants in the original bill against the complainant therein, or other defendant's, or against both, touching matters alleged in the original bill. *Story's Eq. Pl.* (8th Ed.) §389 *et seq.*; *Bates' Fed. Eq.* §374 *et seq.*; *Street's Fed. Eq.* §§1046-1049. Ordinarily new parties cannot be brought into a suit as defendants in the federal court by cross-bill. If the interest of a defendant requires their presence, he takes the objection of nonjoinder, and the complainant is forced to amend, or the bill is dismissed. *Shields v. Barrows*, 17 How. 130-144, 15 L. ed. 158; *Bank v. Carrollton Railroad*, 11 Wall. 624-632, 20 L. ed. 82; *Smith v. Woolfolk*, 115 U. S. 143-148, 5 Sup. Ct. 1177, 29 L. ed. 357. This rule is generally followed in the federal courts, though it may not be in the state courts, especially in those states where a statute authorizes third parties to be made defendants to a cross-bill, as is the case in Iowa." *United States Gypsum Co. v. Hoxie*, 172 Fed. 504.

vene with the object of filing a cross-bill will not generally be entertained,⁴⁷ though it has been permitted on the ground of public policy and for the purpose of defending the public interest.⁴⁸

H. PRAYER FOR RELIEF.—It should pray that the cross-cause and the original cause may be heard at the same time, and that one decree be made and entered in both causes, thus disposing of the rights of all the parties in the subject-matter of the litigation.⁴⁹ Only equitable relief of a kind that a court of equity has jurisdiction to grant can be applied for.⁵⁰

I. VERIFICATION.—There is no rule that requires a cross-bill to be verified, but it is said that when extraordinary equitable relief is prayed for, the cross-bill or cross-petition should be verified, and is subject to be stricken for want thereof.⁵¹ Such defect may be corrected by amendment.⁵²

VI. FILING OF CROSS-BILL.—A. TIME FOR FILING.—The proper time for filing a cross-bill, when such a bill is necessary, is at the time of filing the answer, and before the joining of issue by the filing of the replication.⁵³ It is irregular if filed before the answer

47. U. S.—*Thruston v. Big Stone Gap Imp. Co.*, 86 Fed. 484. Fla.—*Doke v. Williams*, 45 Fla. 248, 34 So. 569. Miss.—*Whitney v. Hanover Nat. Bank*, 71 Miss. 1009, 15 So. 33, 23 L. R. A. 531.

And see *Ex parte Printup*, 87 Ala. 148, 6 So. 418, and the title "Intervention."

Compare *Curran v. St. Charles Car Co.*, 32 Fed. 835, in which the court intimates that if sufficient facts had been stated the cross-bill would have been permitted.

48. *Attala County v. Niles*, 58 Miss. 48. And see *Ex parte Gray*, 157 Ala. 358, 368, 47 So. 286.

The supreme court of Florida in *Doke v. Williams*, 45 Fla. 248, 34 So. 569, discussing the case above cited, said: "The Supreme Court of Mississippi, in *Board of Supervisors of Attala County v. Niles*, 58 Miss. 48, permitted intervention by the Board of Supervisors to resist an injunction obtained against a road overseer who acted under the board and who refused to defend. No authority for such practice was cited and the decision of the court was placed on the ground that the public, the real party in interest, should be permitted to defend through its representative, the board, as otherwise the successive overseers who might be appointed by the board, willing perhaps to be so relieved of their duties, could,

by failing to defend, jeopardize public interests."

49. *United States v. Reese*, 166 Fed. 347.

Prayer for Judgment Pro Confesso. A defendant is not entitled to judgment as confessed in the absence of a reply unless the defendant asks the court for the entry of default against the plaintiffs. *Stevens v. Fitzpatrick*, 218 Mo. 708, 720, 118 S. W. 51.

Reference to Cross-Bill in Final Judgment.—When a cross-bill failed to state a cause of action, and the evidence fell short of sustaining such cross-bill, it was not error to ignore the cross-bill in the final judgment when there was a general finding of the issues in favor of the plaintiff. *Stevens v. Fitzpatrick*, 218 Mo. 708, 720, 118 S. W. 51.

50. Colo.—*Crisman v. Heiderer*, 5 Colo. 589. Fla.—*Ballard v. Kennedy*, 34 Fla. 483, 16 So. 327. Ill.—*Morrison v. Morrison*, 140 Ill. 560, 568, 30 N. E. 768; *Tobey v. Foreman*, 79 Ill. 489.

51. *McLauchlin v. McLauchlin*, 128 Ga. 653, 58 S. E. 156, which was an action for divorce and the cross-bill prayed for alimony and an injunction.

52. *McLauchlin v. McLauchlin*, 128 Ga. 653, 58 S. E. 156.

53. 2 Dan. Ch. Pr. 1650, and the following cases: *Stevens v. Stevens*, 24 N. J. Eq. 77, 86; *Vanderveer's Admr.*

to the original bill is put in;⁵⁴ but it is not such an irregularity as of itself would warrant the dismissal of the cross-bill.⁵⁵

v. Holcomb, 21 N. J. Eq. 105; *Irving v. De Kay*, 10 Paige (N. Y.) 319.

The general rule is that cross-bills should be filed at the same time with the answer to the original bill, and they may be filed subsequently to the filing of the answer, but never before the complainant in the cross-bill has answered the original bill. *Ballard v. Kennedy*, 34 Fla. 483, 16 So. 327.

Reason for Rule and Exceptions. The reason is, "that there is ordinarily no use for delaying it beyond that period, because the matters of defense upon which a cross-bill is founded, must be stated in the answer to the original suit, as well as in the cross-bill, and it can, therefore, seldom be necessary to delay the filing of the cross-bill till after the original cause is at issue. . . . But the reason of the rule fails in such cases as this, where the attorney general is made a defendant as the representative of the state. He may be profoundly ignorant of the facts which constitute a defense to the state, or its protection against the adjudication which is sought against or affecting its interest. Therefore, his answer may be and usually is a mere form—a general answer. . . . Such an answer is put in without oath, and is not liable to be excepted to, even though it be a cross-bill filed by the defendant in an information, for the purpose of obtaining a discovery of matters alleged to be material to his defense to the information. 1 Daniell's Ch. Pr. 130; *Deare v. Atty. Gen.*, 1 Y. & C. Exch. R. 209. It is evident that the reason for requiring that a cross-bill be filed between the filing of the answers to the original suit and the replication thereto, will ordinarily fail where the Attorney General is a party in respect of the interests of the state." *Stevens v. Stevens*, 24 N. J. Eq. 77.

Between Co-Defendants.—This rule does not apply to a cross-bill by one defendant against a co-defendant. *Vanderveer's Admr. v. Holcomb*, 21 N. J. Eq. 105.

History and Origin.—For the purpose of determining the time for filing a cross-bill resort must be had to the origin of the practice. Both the cross-

bill and the bill are derived from the civil law. "They answer to the *conventio* and *reconventio* in the Roman tribunal. If the *reconventio* came in before the *litis contestatio*, or joining of issue in the suit, it was in time, and both cases went on *pari passu*. The same probatory term was assigned to both and the same time was given for publication. It is from this we find in the old books of practice that the cross-bill should be filed before or at the time of answering the original bill which generally answered to the *litis contestatio* of the Roman law. If it did not come in before that time, the causes could not proceed together, as the original cause was then gone from the praetorian forum to the judices (2 Bro. C. & A. L. 348. How. Eq. Side, 287)." Where the *reconventio* or cross-bill came in after the *litis contestatio* or joining issue, the plaintiff was not estopped from examining his witnesses unless the defendant in the *reconventio* was in contempt for not answering. "The practice on this subject in the Irish Court of Chancery is undoubtedly more conducive to the ends of justice, and is best adapted to our system of taking testimony orally. There the cross-bill must be filed on oath, and the certificate of counsel that it is not intended for delay, and that it is necessary for the attainment of justice in the cause. And the proceedings in the original cause are not to be delayed in any case, unless upon the special order of the court founded upon notice of the application to the complainant therein." *White v. Buloid*, 2 Paige (N. Y.) 164.

54. *Randolph v. Robinson*, 2 N. J. L. J. 171, 20 Fed. Cas. No. 11,561; *Ballard v. Kennedy*, 34 Fla. 483, 16 So. 327.

If against a complainant it should in general be filed at the time of filing the answer, and in all cases before the closing of the testimony; the first statement does not apply when one defendant files a cross-bill against another, nor does the last to cases in which no testimony has been taken. *Vanderveer's Admr. v. Holcomb*, 21 N. J. Eq. 105.

55. *Randolph v. Robinson*, 20 Fed.

B. LEAVE TO FILE DISCRETIONARY. — 1. When Leave Unnecessary. While no general rule can be laid down there is authority that a cross-bill may be filed at the time of filing the answer by a party to the action as matter of right and without asking leave of court.⁵³

2. When Leave Required. — a. Before Hearing. — If after the answer is filed and the cause is at issue, it appears that "a cross-bill is necessary to the complete determination of the matters already in litigation, the court may permit one to be filed at any time before the hearing,"⁵⁷ and permission may be granted to file a cross-bill after

Cas. No. 11,561. But see *Ballard v. Kennedy*, 34 Fla. 483, 16 So. 327, that such cross-bill may be stricken from the files on motion.

56. Danl. Ch. Pr. (6th Am. ed.) 1548, note a; *Street's Fed. Eq. Pr.* 1059; *Neal v. Foster*, 34 Fed. 496, 13 Sawy. 236. See also *Brooks v. Moody*, 25 Ark. 452. See, however, *Indiana Mfg. Co. v. Nichols & Shepard Co.*, 190 Fed. 579, 588, in which the court held that a cross-bill filed without leave is irregular. It does not, however, appear at what point in the proceedings this cross-bill was filed.

There was such a provision in the rules (Rule 21) of the circuit court for the northern district of California.

In Colorado, a cross-bill may be filed without leave of court by a defendant in a suit in chancery when he has any equities arising out of the subject-matter of litigation which entitle him to affirmative relief against other parties thereto. *Venner v. Denver Union Water Co.*, 40 Colo. 212, 90 Pac. 623.

In Illinois, the filing of a cross-bill is a matter of right, and requires no leave of court, but it should be filed in proper time. "It does not follow that because a defendant to a bill has the right to file a cross-bill he may do so after hearing and decree, and thus call in question matters which, but for such cross-bill would be concluded by such decree." *Fread v. Fread*, 165 Ill. 228, 46 N. E. 268. To same effect *Nix v. Thackaberry*, 240 Ill. 352, 359, 88 N. E. 811; *Ruprecht v. Muhlke*, 225 Ill. 188, 195, 80 N. E. 106; *Howison v. Ruprecht*, 121 Ill. App. 5.

Defendant Who Answers. — "A defendant who has answered requires no leave to file a cross-bill, and it is not too late to file a cross-bill after a reference has been made." *Inter-State Bldg. Assn. v. Ayres*, 177 Ill. 9, 52 N. E. 342, affirming 71 Ill. App. 529.

Right of Stranger To File. — "The only case I have found on the subject is *Bronson v. Railroad Co.*, 2 Wall. 283. There a cross-bill filed without leave of the court was set aside as irregular. But it was filed by a person not a party to the suit, who petitioned the court for leave to answer for a defendant corporation, then in default, of which he was a stockholder, and also to file a cross-bill. Leave was given to file the answer, but as to the cross-bill the order of the court was silent. The party filed the answer for the corporation, and also a cross-bill, which was subsequently set aside because filed without leave, by a stranger to the suit." *Neal v. Foster*, 34 Fed. 496, 13 Sawy. 236.

Filed With Answer or Before Replication. — A cross-bill may be filed without leave of court at the time of the filing of the answer to the original bill or before replication has been made thereto. *New York & N. J. Water Co. v. Borough of North Arlington* (N. J. Eq.), 75 Atl. 177.

57. *Huff v. Bidwell*, 151 Fed. 563, 81 C. C. A. 43; *Herrin v. Abbe*, 55 Fla. 769, 46 So. 183, 18 L. R. A. (N. S.) 907; *Finlayson v. Lipscomb*, 16 Fla. 751.

"The proper time for filing a cross-bill is before a replication is filed to the answer of the defendant to the original bill." *Braman v. Wilkinson*, 3 Barb. (N. Y.) 151.

In Florida, "a cross-bill may, upon proper showing, be filed before hearing, when it appears that the suit as instituted is insufficient to bring before the court all matters necessary to enable it fully to decide upon the rights of all the parties." *Herrin v. Abbe*, 55 Fla. 769, 46 So. 183, 18 L. R. A. (N. S.) 907; *Finlayson v. Lipscomb*, 16 Fla. 751, 759.

Requirement for Stay When Cross-

answer, and to be disposed of before the original bill, because of facts arising after the filing of the answer which entitle the defendant to a defense.⁵⁸

b. *After Hearing.*—The practice of filing a cross-bill after the original suit has been heard and its merits passed on, is disapproved by the courts.⁵⁹ In such a case the cross-bill cannot be filed unless permission be granted by the court.⁶⁰

3. **Matter of Discretion.**—When leave is necessary, the granting or refusal of permission to file a cross-bill is largely in the discretion of the court,⁶¹ and unless it appears affirmatively that the party against whom the cross-bill was filed was prejudiced by reason of its being filed at the time it was, the discretion of the court will not be disturbed.⁶²

Leave Nunc Pro Tunc.—When a cross-bill is irregularly filed, the court, by an order *nunc pro tunc* may grant leave to file the same.⁶³

C. **TERMS ON LEAVE TO FILE.**—On an application for leave to file

Bill Filed After Issue Joined.—"If a cross-bill is filed after issue is joined in the original cause, proceedings will only be stayed upon showing a satisfactory excuse for the delay in filing the cross-bill." *Braman v. Wilkinson*, 3 Barb. (N. Y.) 151.

Filing of Several Cross-Bills by Co-defendants.—When, under a cross-bill filed by one defendant, full relief can be given to all parties, it is improper for another defendant to also file a cross-bill. *Gilman Sons & Co. v. New Orleans & S. R. Co.*, 72 Ala. 566.

As Admission of Plaintiff's Standing in Court.—A cross-bill will be treated as an admission of plaintiff's right to maintain the action only where and to the extent that the jurisdiction invoked or the relief prayed for in it is dependent upon the fundamental case set up in the original bill, *i. e.*, "to cases where the relation of the cross-bill to the original bill is such that the former must necessarily fall with a dismissal of the latter." *Reading & Temple Elec. R. Co. v. Reading & S. W. R. Co.*, 11 Pa. Dist. 30.

58. *Under Feed Stoker Co. v. American Stoker Co.*, 169 Fed. 891; *Banque Franco-Egyptienne v. Brown*, 24 Fed. 106; *Scott v. Grant*, 10 Paige (N. Y.) 485.

Filing Without Permission.—When upon an application for leave to file an answer and cross-bill, permission is given to file the answer, but not to put in the cross-bill, and subsequently a cross-bill is filed, the court may set it aside. *Bronson v. La Crosse R. Co.*, 2 Wall. (U. S.) 283, 17 L. ed. 725.

59. *Bronson v. La Crosse & M. R. Co.*, 2 Black. (U. S.) 528, 17 L. ed. 359; *Huff v. Bidwell*, 151 Fed. 563, 81 C. C. A. 43; *Howison v. Ruprecht*, 121 Ill. App. 5.

In *Finlayson v. Lipscomb*, 16 Fla. 751, 759, the court said: "But no case can be found where a cross-bill is permitted after final decree."

60. Ill.—*Howison v. Ruprecht*, 121 Ill. App. 5. N. H.—*Roberts v. Peavey*, 29 N. H. 392. Tenn.—*Montgomery v. Olwell*, 1 Tenn. Ch. 169.

In a proper case such leave will be granted. *Richards v. Shaw*, 77 N. J. Eq. 399, 77 Atl. 618; *Stevens v. Stevens*, 24 N. J. Eq. 77; *White v. Buloid*, 2 Paige (N. Y.) 164.

Unreasonable delay will prevent permission. Ga.—*Josey v. Rogers*, 13 Ga. 478. Ill.—*Howison v. Ruprecht*, 121 Ill. App. 5, five years after dismissal of original bill unreasonable delay. Tenn.—*Williams v. Sax* (Tenn. Ch.), 43 S. W. 868. W. Va.—*Baker v. Oil Tract Co.*, 7 W. Va. 454.

61. *Morgan's L. & T. R. Co. v. Texas Cent. R. Co.*, 137 U. S. 171, 201, 11 Sup. Ct. 61, 34 L. ed. 625; *Indiana South. R. Co. v. Liverpool L. & G. Ins. Co.*, 109 U. S. 168, 3 Sup. Ct. 108, 27 L. ed. 895; *Huff v. Bidwell*, 151 Fed. 563, 81 C. C. A. 43; *Venner v. Denver Union Water Co.*, 40 Colo. 212, 90 Pac. 623, 634.

62. *Venner v. Denver Union Water Co.*, 40 Colo. 212, 90 Pac. 623, 634.

63. *Indiana Mfg. Co. v. Nichols & Shepard Co.*, 190 Fed. 579, 588.

a cross-bill, the court may impose such terms as are required by the exigencies of the case.⁶⁴ When the purpose of the cross-bill is to prevent the use of property under a claim of title thereto, which would take time to determine, it is proper for the court to prescribe that it be not received unless upon terms.⁶⁵ A provision that an injunction is to be applied for and a bond be given as is required of other litigants for the same kind of relief, has been held not to be inequitable.⁶⁶

D. POWER TO DIRECT FILING OF CROSS-BILL.—When necessary to properly settle the rights of the respective parties, the court need not depend on the voluntary action of the parties,⁶⁷ but may direct a cross-bill to be filed after hearing, where it finds itself unable to make a satisfactory decree without further facts than those which the parties have laid before it,⁶⁸ or may direct the filing of a cross-bill after

64. *Moore Prtg. & Typewriter Co. v. National Sav. & Tr. Co.*, 218 U. S. 422, 31 Sup. Ct. 64, 54 L. ed. 1093 (in which it was held not to be unreasonable to require as part of the terms imposed, that defendant apply for an injunction and file a bond, as required by equity rule 42); *Hall v. Calvert* (Tenn. Ch.), 46 S. W. 1120.

Annexing Conditions on Leave To File.—When leave to file a cross-bill is given after the application has been long delayed, the court may on granting leave provide that it be on condition that it shall not delay the hearing of the original bill. *Brown v. Bell*, 4 Hayw. (Tenn.) 287.

65. *Moore Prtg. & Typewriter Co. v. National Sav. & Tr. Co.*, 218 U. S. 422, 31 Sup. Ct. 64, 54 L. ed. 1093, *affirming* 31 App. Cas. (D. C.) 452.

66. *Moore Prtg. & Typewriter Co. v. National Sav. & Tr. Co.*, 218 U. S. 422, 31 Sup. Ct. 64, 54 L. ed. 1093, *affirming* 31 App. Cas. (D. C.) 452.

67. *Sims v. Burk*, 109 Ind. 214, 9 N. E. 902; *Holbrook v. Schofield* (Mass.), 98 N. E. 97.

68. **Ill.**—*Howison v. Ruprecht*, 121 Ill. App. 5. **Mass.**—*Holbrook v. Schofield*, 98 N. E. 97. **N. H.**—*Roberts v. Peavy*, 29 N. H. 392. **N. Y.**—*Field v. Schieffelin*, 7 Johns. Ch. 250. **Tenn.** *Hall v. Calvert*, 46 S. W. 1120.

Filing Cross-Bill After "Settlement."

A cross-bill may be filed by a co-defendant who has been impleaded in the action at any time before the final settlement of the action; it being true beyond peradventure that a cross-bill cannot be filed after the controversy

has been settled. A "settlement," however, must include the rights of all the parties, and no arrangement can be entered into by some of the parties to the action and disregarding the rights of others which will be regarded by a court of equity as a settlement of the controversy. *Ulman v. Jaeger's Admr.*, 155 Fed. 1011.

In *Davis v. American & Foreign Christian Union*, 100 Ill. 313, it was held that a cross-bill filed before the hearing was in time, though several years had elapsed since the filing of the original bill. In *Chicago Artesian Well Co. v. Conn. Mut. Life Ins. Co.*, 57 Ill. 424, a cross-bill after decree was permitted where the cross-bill did not seek to open the decree or disturb any proceeding which had been in the suit, its sole purpose being to set aside a sale made by one of the parties after the decree was made. See also *Ruprecht v. Muhlke*, 225 Ill. 188, 195, 80 N. E. 106, where a cross-bill was permitted to be filed after decree where the final decree was not interfered with, the sole object being to reach, through a receiver, the rents, issues and profits of the property which was the subject of the action, during the period of redemption.

Error To Dismiss.—In an action for reformation of a deed wherein it appeared that one of the defendants is entitled to equitable relief, the court should not dismiss the bill as to such defendant, but should direct that a cross-bill be filed to enable the court to justly and finally settle the titles of all the parties. *Holbrook v. Schofield* (Mass.) 98 N. E. 97.

the filing of a decree, opening the decree so as to permit this to be done.⁶⁹

E. FILING AFTER TERM.—After the dismissal of the original bill and after the expiration of the term at which the final decree is entered, the court has no jurisdiction to entertain a cross-bill.⁷⁰

F. FILING BY CLASS.—When the defendants are brought into court, as a class or classes, they may defend in the same manner, and if a cross-bill be a legitimate mode of defense, by asserting rights and springing out of the subject-matter of the bill, and asking relief thereon, it may be filed by them as a class.⁷¹

G. MATTER ARISING AFTER CAUSE AT ISSUE.—A cross-bill may be filed purely as a matter of defense based upon facts arising after the cause is at issue, when such facts are material to the defense.⁷² In such case the defense cannot be taken by plea or answer, but must be made the subject of a cross-bill.⁷³ Such a cross-bill requires no equity to support it.⁷⁴

Matter arising since the joining of issue upon which a defendant seeks affirmative relief may also be made the subject of a cross-bill.⁷⁵

69. *Sims v. Burk*, 109 Ind. 214, 9 N. E. 902; *Richards v. Shaw*, 77 N. J. Eq. 399, 77 Atl. 618.

70. *Howison v. Ruprecht*, 121 Ill. App. 5.

71. *Carlton v. Southern Mut. Ins. Co.*, 72 Ga. 371.

72. Ill.—*Roby v. South Park Comrs.*, 252 Ill. 575, 97 N. E. 225; *Thomas v. Thomas*, 250 Ill. 354, 95 N. E. 345, reversing 155 Ill. App. 619; *Morrison v. Morrison*, 140 Ill. 560, 30 N. E. 768; *Tobey v. Foreman*, 79 Ill. 489; *Ferris v. McClure*, 36 Ill. 77; *French v. Bellows Falls Sav. Inst.*, 67 Ill. App. 179. Me.—*Lambert v. Lambert*, 52 Me. 544. Tenn.—*Montgomery v. Howell*, 1 Tenn. Ch. 169. And see *Mills v. Larrance*, 186 Ill. 635, 58 N. E. 219.

Similarity to Plea of P*uis Darrien Continuance.*—“A cross-bill is the only means, in equity practice, for a defendant to interpose by way of defense and for affirmative relief, matters arising after the filing of the bill, as is a plea of *puis darrien continuance* of matters occurring between the declaration and the plea in a suit at law.” *French v. Bellows Falls Sav. Inst.*, 67 Ill. App. 179. To same effect, *Lambert v. Lambert*, *supra*.

Under the “strict practice,” a defendant is put to his cross-bill to raise a defense, arising *pendente lite* affecting a codefendant. *National Bank of*

the Metropolis v. Sprague, 21 N. J. Eq. 530.

73. *Thomas v. Thomas*, 250 Ill. 354, 95 N. E. 345, reversing 155 Ill. App. 619; *Jenkins v. International Bank*, 111 Ill. 462.

Setting up a release under seal executed by complainant after commencement of the action, is sufficient on its face without an allegation of a consideration therefor, the seal importing consideration, though the seal would not be a bar to an inquiry by the court nor to an issue between the parties as to the consideration, but if the defendant to the cross-bill desired such an inquiry, or issue, she should have set the matter up in her answer. *Mills v. Larrance*, 186 Ill. 635, 58 N. E. 219.

Foreign matter cannot be introduced in a cross-bill, unless it has arisen after the filing of the original bill. *Hansford v. Chesapeake Coal Co.*, 22 W. Va. 70, 75.

74. *Thomas v. Thomas*, 250 Ill. 354, 95 N. E. 345, reversing 155 Ill. App. 619.

75. *French v. Bellows Falls Sav. Inst.*, 67 Ill. App. 179.

So held in actions for divorce where the defendant by cross-bill prays for divorce against the petitioner, and sets up facts which were not available when his answer was filed. *Von Bernuth v. Von Bernuth*, 76 N. J. Eq. 487, 74 Atl.

VII. PLACE OF FILING.—A cross-bill is always brought in the court in which the original suit is pending.⁷⁶

VIII. NECESSITY FOR ANSWER.—GENERAL RULE.—A cross-bill, as a rule, must be supported by an answer,⁷⁷ and must be consistent therewith.⁷⁸ Furthermore, the allegations of the answer must support the cross-bill.⁷⁹ And for the purpose of dealing with the rights and interests of all the parties, the court may permit the filing of a supplemental answer and cross-bill and permit the original answer to stand.⁸⁰

IX. ANSWER AS CROSS-BILL.—An answer when asking for affirmative relief may sometimes be treated as a cross-bill.⁸¹ And an

700; *Martin v. Martin*, 33 W. Va. 695, 11 S. E. 12.

76. *United States v. Reese*, 166 Fed. 347.

77. *Rheinfort v. Abel*, 76 N. J. Eq. 485, 74 Atl. 479.

78. *Ala.*—*Horton v. Little*, 166 Ala. 340, 345, 51 So. 974; *Hatchett v. Blanton*, 72 Ala. 423. *N. J.*—*Stout v. Cement Co.*, 76 N. J. Eq. 518, 74 Atl. 966; *Jackson v. Grant*, 18 N. J. Eq. 145. *N. Y.*—*Draper v. Gordon*, 4 Sandf. Ch. 210. *Va.*—*Hudson v. Hudson's Exrs.*, 3 Rand. 117.

79. *Stout v. Portland Cement Co.*, 76 N. J. Eq. 518, 74 Atl. 966.

If affirmative relief be asked in the cross-bill, such relief cannot be granted if the allegations of the cross-bill are opposed to or inconsistent with what is alleged in the original answer. *Horton v. Little*, 166 Ala. 340, 51 So. 974; *Hatchett v. Blanton*, 72 Ala. 423; *Dill v. Shahan*, 25 Ala. 694, 703, 60 Am. Dec. 540; *Graham v. Tankersley*, 15 Ala. 634, 646.

80. *Rheinfort v. Abel*, 76 N. J. Eq. 485, 74 Atl. 479.

81. *U. S.*—*United States v. Reese*, 166 Fed. 347. *Ark.*—*Cocke v. Clausen*, 67 Ark. 455, 55 S. W. 846; *Ivey v. Drake*, 36 Ark. 228; *Allen v. Allen*, 14 Ark. 666. *Ga.*—*Ray v. Home, etc. Agency Co.*, 106 Ga. 492, 32 S. E. 603. *Miss.*—*Jackson v. Lemler*, 83 Miss. 37, 35 So. 306. *Va.*—*Adkins v. Edwards*, 83 Va. 300, 2 S. E. 435; *Mettert v. Hagan*, 18 Gratt. 231.

See, however, *Hoge v. Eaton*, 135 Fed. 411 (in which the court said: "A cross-bill in an answer is not known in the practice of the federal courts"); *White v. White*, 103 Ill. 438 (holding that answer cannot be treated

as cross-bill when affirmative relief desired).

Action for Infringement of Patent. In an action for infringement of re-issue patent a defendant may by answer in the nature of a cross-bill set up an interfering patent and obtain a decree canceling the reissued patent on the ground of fraud, but such answer must be specific and set out the fraudulent facts relied on. *Coffield Motor Washer Co. v. A. D. Howe Co.*, 172 Fed. 668.

The Alabama Code of 1876, §§3801-3804, provided "that a defendant may obtain relief against the complainant, for any cause connected with, or growing out of the subject-matter of the bill, by alleging in his answer, and as a part thereof, the facts upon which such relief is prayed, and that the complainant shall answer the same. The matter thus put in issue 'must be considered in the nature of a cross-bill, and be heard at the same time as the original bill.'" *Gilman Sons & Co. v. New Orleans & S. R. Co.*, 72 Ala. 566.

In Georgia it is provided (Civ. Code §4969) that "a petition in the nature of a cross bill need not be filed in this State," but that the "defendant in every case may set up in his answer any matter which, under the English practice, should be the subject of a cross bill," and the court in *Latimer v. Irish American Bank*, 119 Ga. 387, 895, 47 S. E. 322, said: "Following this reform in the practice in equity cases, it may be regarded as an established rule that matters which were appropriate to a cross bill under the English practice can now be adopted as regular defenses, and that the complainant is as much bound to take no-

answer which fails to come up to the measure of a cross-bill may be treated as such by acquiescence of all the parties.⁸²

X. REPLY AS CROSS-BILL.—The Kentucky statute provides that plaintiff's reply to an answer may be made a cross-petition.⁸³

XI. SERVICE OF CROSS-BILL AND PROCESS THEREON.

tice of these matters as of any other matters which could be set up on the answer under the former practice."

The Kentucky statute provides that "no pleading except an answer to an original petition, or the plaintiff's reply to such answer, shall be made a cross-petition." Rev. Ky. Code (1900), §111.

In Maryland "the practice of allowing cross relief to be sought by answer instead of by a cross-bill when that can be done with justice to all parties was early adopted (Alexander's Ch. Pr. III; Young v. Twigg, 27 Md. 632)." Munich Re-Insurance Co. v. United States Surety Co., 113 Md. 200, 77 Atl. 579.

The Mississippi statute provides that "a defendant in a chancery suit may make his answer a cross-bill against the complainant, or his co-defendants, or defendant, or all of them; and may introduce any new matter therein material to his defense, and may require the same to be answered; and in the same manner may require of the complainant or any of the defendants a discovery of any matter material to his defense, and he shall have process thereon against the defendants to such cross-bill, and the like proceedings thereon as in other bills or cross-bills." Mississippi Code (1906), ch. 19, §587.

This statute permitting a defendant in a chancery suit "to make his answer a cross-bill" against the complainant or his co-defendant, does not require that "the part of the pleading constituting the cross bill be separate and distinct from the part constituting the answer, and a repetition of averments contained in the answer is not necessary." Phoenix Ins. Co. v. Smith, 95 Miss. 347, 43 So. 1020.

In Ohio an answer demanding affirmative relief may be styled a cross-petition. Ohio Gen. Code (1910), §11,303.

Under the West Virginia Code (ch. 125, §§35, 36) an answer calling for affirmative relief has the same effect

as a cross-bill. Kanawha Lodge v. Swann, 37 W. Va. 176, 16 S. E. 462.

Matter Not in Bill.—When the answer sets up as a defense matter which does not appear in the bill, and the only relief thereby sought, is such as is *directly* and not *collaterally* incident to such defense, and no cross-discovery is sought, it is not in the nature of a cross-bill. Tison v. Tison, 14 Ga. 167.

Necessity of Cross-Bill.—Upon a bill filed for an injunction, affirmative relief by way of foreclosure should not be granted to a defendant upon an answer, in the absence of a cross-bill. Smith v. Connor, 53 Fla. 856, 44 So. 340. See also *supra*, III.

An answer which after making a response to the original bill, proceeds to charge a co-defendant, and requiring him to answer, may authorize "a decree over against such co-defendants if it be proceeded in as upon a cross-bill, by process to answer and regular proceedings. We do not mean any technical distinction between a cross-bill and an answer in nature of a cross-bill. We do not mean there must be a paper, called a cross-bill, separate and distinct from the paper called the answer. But we mean that if one defendant uses his answer, for greater convenience and brevity, to frame thereon a prayer for relief against a co-defendant, he must take care that he engraft upon such answer the substantial parts of a bill, and proceed on it as in a suit instituted, and treat it as such." Talbot v. McGee, 4 T. B. Mon. (Ky.) 375.

Answer and Cross-Bill Cannot Be Joined in Absence of Statute.—In the absence of statutory provisions, a cross-bill and an answer are essentially separate and distinct pleadings; and it is irregular to join and blend them,—as irregular as it would be to join and blend an amended and supplemental bill. Gilman Sons & Co. v. New Orleans & S. R. Co., 72 Ala. 566.

82. United States v. Reese, 166 Fed. 347.

83. Rev. Codes (Ky.), 1906, §111.

Service of some sort, either by subpoena or substituted service, or a voluntary appearance is necessary in order to confer jurisdiction;⁸⁴ in that respect the bill and cross-bill do not constitute one suit.⁸⁵

Service on Attorney. — The general rule in chancery is that service of the subpoena or other process cannot be made upon the solicitor or attorney of the plaintiff in the original suit.⁸⁶ In the United States courts there are two exceptions to this rule: First in case of injunctions to stay proceedings at law;⁸⁷ and second, in cross-suits in equity, where the plaintiff at law in the first, and the plaintiff in equity in the second case, reside beyond the jurisdiction of the court.⁸⁸

84. **U. S.**—*Lowenstein v. Glidewell*, 5 Dill. 325, 15 Fed. Cas. No. 8,575. **Ky.** *Horine v. Moore*, 14 B. Mon. 311. **N. Y.** *Ledbetter v. Mandell*, 141 App. Div. 556, 126 N. Y. Supp. 497.

In **New Jersey**, Chancery rule 206a governs the question as to service of cross-bill. *Von Bernuth v. Von Bernuth*, 76 N. J. Eq. 487, 74 Atl. 700.

The **South Dakota** code contains no special provision defining specifically the proceedings to be had in cases of cross-bills. The proceedings are therefore governed by the chancery rules which require that in all cases in order to give the court jurisdiction of the subject-matter, "the cross-complaint shall be served upon the opposing party and we think this rule is applicable to proceedings to enforce mechanics' and miners' liens." *Phillips v. Branch Mint M. & M. Co. (S. D.)*, 131 N. W. 308, 312.

New York.—Service of a cross-bill is jurisdictional. *Ledbetter v. Mandell*, 141 App. Div. 556, 121 N. Y. Supp. 497.

Substituted Service. — Substituted service may be ordered by the court "when the 'cross-bill' is wholly or partially defensive in character and where, because of the non-residence of the plaintiff or his departure from the jurisdiction substituted service may be necessary to prevent a failure of justice." *Ledbetter v. Mandell*, 141 App. Div. 556, 126 N. Y. Supp. 497. See also *Bowen v. Christian*, 16 Fed. 729; *Lowenstein v. Glidewell*, 5 Dill. 325, 15 Fed. Cas. No. 8,575.

"An order giving leave to serve a cross-bill by substitution may be set aside." *Fidelity Trust & S. Vault Co. v. Mobile St. R. Co.*, 53 Fed. 850; *Rogers v. Riessner*, 31 Fed. 591; *Bowen v. Christian*, 16 Fed. 729.

Service of Cross-Bill on New Parties. In **Pennsylvania** equity rule 40 provides how service of cross-bill is made on new parties brought in thereby. *Sears v. Scranton Trust Co.*, 228 Pa. 126, 138, 77 Atl. 423.

Foreign Corporation.—In *Fidelity Tr. & Safety Vault Co. v. Mobile St. R. Co.*, 53 Fed. 850, the court was of the opinion that service on the president of a foreign corporation not doing business in the state at the time of such service was not a valid service under the laws of Alabama.

85. *Lowenstein v. Glidewell*, 5 Dill. 325, 15 Fed. Cas. No. 8,575; *Ledbetter v. Mandell*, 141 App. Div. 556, 126 N. Y. Supp. 497.

86. *Lowenstein v. Glidewell*, 5 Dill. 325, 15 Fed. Cas. No. 8,575.

The **Mississippi** statute provides that five days' notice in writing to the solicitor of the complainant in the original bill shall be sufficient to require the complainant to appear to such cross-bill and to answer within said time, unless the time to do so be extended. Code (Miss.), 1906, ch. 19, §587.

Waiver.—Though in the absence of special authority counsel cannot appear and waive process on a cross-bill, parties will nevertheless be estopped from taking advantage of such irregularity where they both personally and by counsel participate in the litigation from commencement to conclusion and accept their full share of the property involved in the litigation. *Kavanaugh v. Shacklett's Admr.*, 111 Va. 423, 69 S. E. 335.

87. *The Cortes Co. v. Thannhauser*, 9 Fed. 226; *Lowenstein v. Glidewell*, 5 Dill. 325, 15 Fed. Cas. No. 8,575.

88. *Fidelity Tr. & Safety Vault Co. v. Mobile St. R. Co.*, 53 Fed. 850; *Low-*

When the cross-bill is defensive in its nature, it is conceded that an order directing service of the subpoena upon the solicitors of record for the original complainant is proper;⁸⁹ but there is some question whether such practice is not limited to cases, where the cross-bill is wholly of that character, and that if offensive or affirmative in character, service must be made upon the defendants thereto in person.⁹⁰

XII. DEMURRER.—A. GROUNDS OF DEMURRER.—A cross-bill is demurrable on the same grounds as if it were an original bill.⁹¹

The objection that the relief sought by the cross-bill was available by answer is properly raised by demurrer,⁹² and a cross-bill which seeks to introduce new and distinct matter that is not embraced in

enstein v. Glidewell, 5 Dill. 325, 15 Fed. Cas. No. 8,575.

Service on Solicitor.—"In these cases, to prevent a failure of justice, the court will order service of the subpoena to be made upon the attorney of the plaintiff in the suit at law in the one case, and upon his solicitor in the suit in equity in the other." *Lowenstein v. Glidewell*, 5 Dill. 325, 15 Fed. Cas. No. 8,575.

Service was directed on attorney where the party resided beyond the sea. *Eckert v. Bauert*, 4 Wash. C. C. 370, 8 Fed. Cas. No. 4,266. See also *Ward v. Seabring*, 4 Wash. C. C. 472, 29 Fed. Cas. No. 17,160.

Party Outside Jurisdiction.—The objection that a cross-bill will not lie because the defendant therein is not within the jurisdiction of the court is untenable, "because in the United States courts, where a cross-bill, which is auxiliary to the original bill is filed, substituted service may be had upon the attorney of record." *Gregory v. Pike*, 29 Fed. 588.

89. *American Graphophone Co. v. Smith*, 26 App. Cas. (D. C.) 563.

Sufficiency of Order Directing Service.—An order directing service of a cross-bill on the solicitors of the complainant, naming them, is sufficient when the record shows that they were the sole solicitors for the company, not only in the equity case, but also in an action at law where it was the sole defendant. *American Graphophone Co. v. Smith*, 26 App. Cas. (D. C.) 563.

90. *American Graphophone Co. v. Smith*, 26 App. Cas. (D. C.) 563.

When Cross-Bill Substantially Defensive.—"If it is a good cross-bill, properly framed, and in any substantial part defensive, then we think the

service on the solicitor of the original complaint, the sole defendant thereto, would be sufficient to require an appearance and answer." *American Graphophone Co. v. Smith*, *supra*.

91. **U. S.**—*Greenwalt v. Duncan*, 16 Fed. 35, 5 McCrary 132. **N. J.**—*Doremus v. City of Paterson*, 70 N. J. Eq. 296, 62 Atl. 3, *affirmed*, 71 N. J. Eq. 789, 71 Atl. 1134 (multifariousness and misjoinder). **Tenn.**—*Hildebrand v. Beasley*, 7 Heisk. 121, multifariousness. See also *infra*, XIII.

A cross-bill which alleges no facts which, if proved, would constitute a valid defense to the bill or entitle defendant to any affirmative relief is demurrable. *Harding v. Olson*, 76 Ill. App. 475.

In Mississippi under the Code (1906), §587, a cross-bill which is in effect an original bill and introduces no new matter material in defending the original bill is demurrable. *District Grand Lodge U. O. O. F. v. Leonard*, 92 Miss. 777, 46 So. 532.

When Cross-Bill Fails To Show Equity.—A cross-bill which shows no equity on its face is demurrable. "A demurrer in chancery is always to the merits, and in bar of the relief sought, and proceeds upon the ground that, admitting the facts to be true as stated in the bill, still the complainant is not entitled to the relief he seeks." *Patterson v. Northern Trust Co.*, 231 Ill. 22, 27, 82 N. E. 840.

92. **Ill.**—*Roby v. South Park Comrs.*, 252 Ill. 575, 97 N. E. 225; *Wing v. Goodman*, 75 Ill. 159. **Mass.**—*Buckingham v. Wesson*, 54 Miss. 526. **N. J.**—*Beck v. Beck*, 43 N. J. Eq. 39, 10 Atl. 155.

See also *Gordon v. Johnson*, 79 Ill. App. 423.

the original action may and should be stricken on demurrer.⁹³

B. JUDGMENT ON DEMURRER.—GRANTING AFFIRMATIVE RELIEF. If a demurrer to a cross-bill is overruled and plaintiff elects to stand by his demurrer, the court has jurisdiction to award affirmative relief upon the cross-bill.⁹⁴

XIII. RELIEF BY MOTION TO STRIKE.—A motion to strike and not a demurrer is the proper remedy where the cross-bill disregards the established procedure,⁹⁵ though it has been held in some instances that either remedy might be invoked,⁹⁶ and that if a demurrer be filed the court may treat it as a motion to strike.⁹⁷

XIV. PLEAS TO CROSS-BILL.—The general rules governing pleas in equity apply,⁹⁸ and an answer to a cross-bill must fully answer the averments of such cross-bill.⁹⁹

The failure of the original plaintiff to answer a cross-bill will result in the cross-bill being taken as true should the original bill be dismissed,¹ but such failure will be regarded as waived if defendant goes to trial without asking for judgment *pro confesso*.²

A plea which seeks to negative averments of a cross-bill must do so by positive averments,³ as they cannot be extended by inference.⁴

93. *Peterson v. Lott* (Ga.), 73 S. E. 15; *Johnson v. Stancliff*, 113 Ga. 886, 39 S. E. 296.

94. *Crisman v. Heiderer*, 5 Colo. 589.

95. *Wright v. St. Louis S. W. R. Co.*, 175 Fed. 845.

96. *Roby v. South Park Comrs.*, 252 Ill. 575, 97 N. E. 225. In the case above cited the court refers to *Morgan v. Smith*, 11 Ill. 194, where the cross-bill was dismissed on motion to strike.

97. *Wright v. St. Louis & S. W. R. Co.*, 175 Fed. 845.

In *New Jersey* the remedy in case a cross-bill fails to allege ground for equitable relief is by motion to strike (*Clark v. Van Cleef*, 75 N. J. Eq. 152, 71 Atl. 260), the motion to strike being held to be equivalent to a demurrer (*Clark v. Van Cleef*, 75 N. J. Eq. 152, 71 Atl. 260; *Stevenson v. Morgan*, 63 N. J. Eq. 707, 53 Atl. 78). See the title "Demurrer."

98. *Leyden v. Lawrence*, 78 N. J. Eq. 453, 79 Atl. 615. See also *Baker v. Belknap's Estate*, 39 Vt. 168.

99. *Somerville Water Co. v. Borough of Somerville*, 78 N. J. Eq. 199, 78 Atl. 793, an answer to a cross-bill which fails to answer interrogatories is insufficient. See, however, *Beuthein v. Dillon*, 160 Mich. 396, 125 N. W. 363, holding that when the original complaint alleged that the lands claimed

therein were in a wild unenclosed estate, which allegation was denied in the cross-bill, and possession of the land by defendant was set up, the failure to specifically deny such possession in the answer to the cross-bill is not an admission thereof.

1. *Byrd v. Sabin*, 8 Ark. 279.

A sworn allegation of a cross-bill not controverted by the answer must be taken as *prima facie* true. *Citizens' State Bank v. First Nat. Bank* (Tex. Civ. App.), 120 S. W. 1141.

2. *Cribbs v. Walker*, 74 Ark. 104, 85 S. W. 244; *Pembroke v. Logan*, 71 Ark. 364, 74 S. W. 297.

When a cross-bill fails to state any facts upon which any judgment for the defendant could have been founded, the fact that there was no reply thereto will not warrant a judgment as confessed, especially when the defendant had previously filed an answer to which there was a reply and the cause having gone to trial as if all the issues were joined and where the court doubtless treated the plaintiff's reply as covering the after-filed cross-bill. *Stevens v. Fitzpatrick*, 218 Mo. 708, 720, 118 S. W. 51.

3. *Leyden v. Lawrence*, 78 N. J. Eq. 453, 79 Atl. 615; *Allen v. Randolph*, 4 Johns. Ch. (N. Y.) 693.

4. *Leyden v. Lawrence*, 78 N. J. Eq. 453, 79 Atl. 615.

Reply When Answer Taken as Cross-Bill. — A reply to an answer in the nature of a cross-bill cannot contain new grounds for the relief sought in the original bill.⁵

XV. AMENDMENTS. — A. To CROSS-BILL. — The cross-bill may be amended by leave of court,⁶ or without leave, and as of course, if so provided by statute.⁷

Amendment Conforming to Proof. — A cross-bill may be amended to conform to the proof.⁸

B. AMENDMENT OF ANSWER TO CROSS-BILL. — It is discretionary with the court to allow or refuse the answer to the cross-bill to be amended, and in the absence of abuse of discretion its action will not be interfered with on appeal.⁹

XVI. HEARING. — While it is not necessary that the bill and cross-bill be heard together, this is the usual practice, and when both causes are at issue the plaintiff in the cross-suit may have an order that they be heard together.¹⁰

Stay Pending Hearing. — If complainant in the cross-bill desires that the hearing of the original bill be stayed until the hearing of the cross-bill he should make an application for that purpose, as the filing of the cross-bill does not necessarily stay the hearing on the original bill. Such applications are usually granted when made in time, or where the furtherance of justice requires it.¹¹

XVII. DISMISSAL OF CROSS-BILL. — A. GENERAL RULE. — A cross-bill that seeks no discovery and no affirmative relief that cannot

5. *Munich Re-Insurance Co. v. United Surety Co.*, 113 Md. 200, 77 Atl. 579. See the titles "Departure," "Replication or Reply."

Waiver. — The court in *Munich Re-Insurance Co. v. United Surety Co.*, *supra*, says on this point: "But as the appellee not only did not make any objection to that mode of proceeding, but joined issue in the matters thus set out, we will consider the question although irregularly raised. In doing so, however, we must not be considered as sanctioning the practice."

6. *Hildebrand v. Beasley*, 7 Heisk. (Tenn.) 121.

Denial of Leave To Amend Not Abuse of Discretion. — An application for leave to amend a cross-bill is properly denied within the sound legal discretion of the court, when such application was not made until some days after final decree had been rendered on the original bill. *Dickson v. Dickson*, 232 Ill. 577, 83 N. E. 1067.

7. *Jackson v. Lemler*, 83 Miss. 37, 35 So. 306.

8. *Prichard v. Littlejohn*, 128 Ill. 123, 21 N. E. 10.

9. *Higgins v. Curtiss*, 82 Ill. 28. See the title "Bills and Answers."

10. *Randolph's Appeal*, 66 Pa. 178.

In Oregon the statute permits, in a proper case, that a cross-bill in equity may be filed in an action at law, and in such case the proceedings at law are stayed and the case proceeds as a suit in equity. *Scheffelin v. Weathered*, 19 Ore. 172, 23 Pac. 898.

11. **U. S.** — *Hunt v. Oliver*, 12 Fed. Cas. No. 6,894. **Ill.** — *Beauchamp v. Putnam*, 34 Ill. 378. **Miss.** — *Griswold v. Simmons*, 50 Miss. 137. **N. J.** — *Stevens v. Stevens*, 24 N. J. Eq. 77; *Williams v. Carle*, 10 N. J. Eq. 543. **N. Y.** — *Farmers' Loan & Trust Co. v. Seymour*, 9 Paige 538; *White v. Buloid*, 2 Paige 164.

be obtained by answer to the original bill, will be dismissed either on answer or motion or demurrer.¹²

B. DEFECT OF PARTIES.—A cross-bill will not be dismissed for want of parties defendant;¹³ and where it is necessary to bring in parties in order to consider the equities set up in the cross-bill, the remedy is to bring in such parties, and not a motion to strike.¹⁴

C. DISMISSAL OF ORIGINAL BILL.—Whether or not the dismissal of the original bill carries with it the cross-bill depends upon the character of the latter.¹⁵ If the cross-bill sets up matters purely defensive to the original bill and prays for no affirmative relief, the dismissal of the latter necessarily disposes of the former.¹⁶ In some jurisdictions by statute, after a cross-bill has been filed a complainant will not be permitted to dismiss his bill without the consent of the defendant.¹⁷ But where the cross-bill sets up, as it may, additional facts not alleged in the original bill, relating to the subject-matter, and prays for affirmative relief against the plaintiffs in the original bill in the case thus made, the dismissal of the original bill does not

12. *Thomas v. Thomas*, 250 Ill. 354, 95 N. E. 345, reversing 155 Ill. App. 619; *Howe v. South Park Comrs.*, 119 Ill. 101, 7 N. E. 333; *Newberry v. Blatchford*, 106 Ill. 584; *Akin v. Cassidy*, 105 Ill. 22; *Wing v. Goodman*, 75 Ill. 159.

Application for Same Relief as Prayed for in Bill.—The practice in chancery will not permit a defendant to file a cross-bill praying the same thing may be done as is sought to be accomplished by the original bill. A demurrer would lie to such a cross-bill, or it might be dismissed on motion. *Newberry v. Blatchford*, 106 Ill. 584, 600; *Morgan v. Smith*, 11 Ill. 194.

13. *Haberman v. Kaufer*, 60 N. J. Eq. 271, 279, 47 Atl. 48.

14. *Haberman v. Kaufer*, 60 N. J. Eq. 271, 279, 47 Atl. 48; *Wooster v. Cooper*, 56 N. J. Eq. 759, 36 Atl. 281. And see *supra*, V, F.

15. **U. S.**—*Pullman Palace Car Co. v. Central Transp. Co.*, 49 Fed. 261; *Lowenstein v. Glidewell*, 5 Dill. 325, 15 Fed. Cas. No. 8,575. **Ala.**—*Wilkinson v. Roper*, 74 Ala. 140. **Fla.**—*Ballard v. Kennedy*, 34 Fla. 483, 496, 16 So. 327. **Ill.**—*Chicago Artesian Well Co. v. Connecticut Mut. Life Ins. Co.*, 57 Ill. 424. **Ia.**—*Worrell v. Wade's Heirs*, 17 Iowa 96. **Ky.**—*Wickliffe v. Clay*, 1 Dana 585. **N. J.**—*Dawson v. Amey*, 40 N. J. Eq. 494, 4 Atl. 442. **Va.**—*Ragland v. Broadnax*, 29 Gratt. 401.

In *Mississippi* the cross-bill may be retained by order. *Sigman v. Lundy*,

66 Miss. 522; *Deweese v. Dewees*, 55 Miss. 315, action for divorce.

Effect of Dismissal on Answer. Though a plaintiff may have the right to dismiss his petition, and such dismissal carries with it so much of the answer as is purely defensive, the portion of the answer which is in the nature of a cross-bill is not affected by the dismissal and remains in court in order that the issues raised therein might be determined. *Ray v. Home & Foreign Invest. Co.*, 106 Ga. 492, 32 S. E. 603.

16. **U. S.**—*Cross v. Del Valle*, 1 Wall. 5, 17 L. ed. 515; *San Diego Flume Co. v. Souther*, 90 Fed. 164, 32 C. C. A. 548, 61 U. S. App. 134; *Lowenstein v. Glidewell*, 5 Dill. 325, 15 Fed. Cas. No. 8,575. **Ala.**—*Wilkinson v. Roper*, 74 Ala. 140. **Fla.**—*Ballard v. Kennedy*, 34 Fla. 483, 496, 16 So. 327. **N. J.**—*New York & N. J. Water Co. v. Borough of North Arlington (N. J. Eq.)*, 75 Atl. 177. **Ore.**—*Maffett v. Thompson*, 32 Ore. 546, 52 Pac. 565, 53 Pac. 854. **Va.**—*Equitable Life Assur. Soc. v. Wilson*, 110 Va. 571, 66 S. E. 836.

"A dismissal of the original bill, resting in the election of the complainant, at any time before the decree, carries with it the cross-bill." *Continental Life Ins. Co. v. Webb*, 54 Ala. 683; *Ladner v. Ogden*, 31 Miss. 332.

17. *Thomas v. Thomas*, 250 Ill. 354, 95 N. E. 345, reversing 155 Ill. App. 619.

dispose of the cross-bill, but it remains for disposition as if it had been filed as an original bill,¹⁸ nor will a dismissal of the action affect a cross-bill when an answer to the cross-bill has been filed.¹⁹

Dismissal of Cross-Bill Not Res Adjudicata.—The dismissal of a cross-bill under circumstances rendering the cross-bill unnecessary in order to obtain the relief sought by it, is not an adjudication that the party who filed the cross-bill has no rights in the subject-matter of the litigation.²⁰

XVIII. JUDGMENT ON CROSS-BILL.—When there is a material variance between the cross-bill and the decree, and the decree is

18. **U. S.**—*Holgate v. Eaton*, 116 U. S. 33, 6 Sup. Ct. 224, 29 L. ed. 538; *Chicago & A. R. Co. v. Union Rolling Mill Co.*, 109 U. S. 702, 3 Sup. Ct. 594, 27 L. ed. 1081; *Tower v. Stimpson*, 175 Fed. 130; *San Diego Flume Co. v. Souther*, 90 Fed. 164, 32 C. C. A. 548, 61 U. S. App. 134; *Markell v. Kasson*, 31 Fed. 104; *Lowenstein v. Glidewell*, 5 Dill. 325, 15 Fed. Cas. No. 8,575. **Ala.**—*Wilkinson v. Roper*, 74 Ala. 140. **Fla.**—*Spencer v. Spencer*, 59 Fla. 608, 52 So. 146; *Price v. Stratton*, 45 Fla. 535, 547, 33 So. 644; *Ballard v. Kennedy*, 34 Fla. 483, 16 So. 327. **Ill.**—*Pingrey v. Rulon*, 246 Ill. 109, 92 N. E. 592. **Ia.**—*Clark v. City of Des Moines*, 20 Iowa 454. And see *Worrell v. Wade's Heirs*, 17 Iowa 96. **N. J.**—*Somerville Water Co. v. Borough of Somerville*, 78 N. J. Eq. 199, 78 Atl. 793; *Von Bernuth v. Von Bernuth*, 76 N. J. Eq. 487, 74 Atl. 700 (action for divorce); *Coogan v. McCarran*, 50 N. J. Eq. 611, 25 Atl. 330. **Ore.**—*Maffett v. Thompson*, 32 Ore. 546, 52 Pac. 565, 53 Pac. 854. **R. I.**—*Wetmore v. Fiske*, 15 R. I. 354, 5 Atl. 375, 10 Atl. 627. **Va.**—*Equitable Life Assur. Soc. v. Wilson*, 110 Va. 571, 66 S. E. 836; *Ragland v. Broadnax*, 29 Gratt. 401. **W. Va.**—*West Virginia O. & O. L. Co. v. Vinal*, 14 W. Va. 637.

In *Maffett v. Thompson*, 32 Ore. 546, 52 Pac. 565, 53 Pac. 854, it is said: "The same principle has been held to obtain under the code practice of some of the states," citing **Cal.**—*Warner v. Darrow*, 91 Cal. 309, 27 Pac. 737; *Mott v. Mott*, 82 Cal. 413, 22 Pac. 1140, 1142. **Ga.**—*Jones v. Thacker & Co.*, 61 Ga. 329. **Ia.**—*Russell v. Lamb*, 82 Iowa 558, 48 N. W. 939; *Worrell v. Wade's Heirs*, 17 Iowa 96.

In an action to foreclose a mortgage on real estate, one of the defendants

filed a cross-bill in which he claimed to have a paramount lien on the mortgaged premises. Another defendant filed an answer to the cross-bill denying the validity of the lien set up in the cross-bill and claimed to be the owner of the land. The original petitioner thereupon dismissed his bill and upon the request of the defendant filing the cross-bill proceeded upon the issues raised by the cross-bill and the answer thereto and judgment was rendered in favor of the defendant filing the cross-bill. Upon appeal this was held no error. *Sigel-Campion Live Stock Com. Co. v. Haston*, 81 Kan. 656, 106 Pac. 1096.

Taking Note of Fractions of a Day. For the purpose of determining whether a cross-bill was filed prior to the filing of a motion to dismiss the original bill, the court may notice fractions of a day and determine which of the two papers were filed first. *Tower v. Stimpson*, 175 Fed. 130.

19. *Somerville Water Co. v. Borough of Somerville*, 78 N. J. Eq. 199, 78 Atl. 793.

20. *Dunbar v. American Tel. & Tele. Co.*, 238 Ill. 456, 490, 87 N. E. 521, reversing 142 Ill. App. 6; *Boone v. Clark*, 129 Ill. 466, 21 N. E. 850.

In *Dunbar v. American Tel. & Tele. Co.*, *supra*, the court said: "It would be a judicial outrage on the rights of Kellogg to dismiss his cross-bill on the ground that he could obtain all the rights he was entitled to under the original bill, and then deny him, upon the hearing of the original bill, such relief as he in equity is clearly entitled to, on the ground that his rights had already been adjudicated. Courts of equity were never designed to work out such unconscionable absurdities."

unsupported by the cross-bill, no judgment thereon can be sustained,²¹ nor can a decree be founded upon matter set up in the cross-bill foreign to the subject-matter of the bill.²² But a decree giving affirmative relief to a defendant will not be reversed on appeal, merely because no cross-bill was filed, the case having been tried out on the merits, and the evidence warranting the decree.²³

XIX. REVIEW OF ORDER DISMISSING CROSS-BILL.—An order sustaining a demurrer to the cross-bill, and dismissing it, is interlocutory, and is not reviewable so long as the original bill is undisposed of.²⁴

21. *Priehard v. Littlejohn*, 128 Ill. 123, 21 N. E. 10.

A decree on a cross-bill which is so defective that it is a nullity and which prayed for the reverse of what the original bill prayed, is fatally erroneous. And it is immaterial that objection was not made. *Washington, etc. R. Co. v. Bradley*, 10 Wall. (U. S.) 299, 19 L. ed. 894.

22. *Peters v. Case*, 62 W. Va. 33, 57 S. E. 733.

A decree founded upon matter set up in a cross-bill, foreign to the subject-matter of the bill, may be reversed on a bill of review for error of law. *Peters v. Case*, 62 W. Va. 33, 57 S. E. 733. See the title "Bills of Review."

23. *Richards v. Shaw*, 77 N. J. Eq. 399, 77 Atl. 618.

24. *McMahon v. Quinn*, 140 Ill. 199, 29 N. E. 731; *Sholty v. Sholty*, 140 Ill. 81, 29 N. E. 1041; *Fleece v. Russell*, 13 Ill. 31; *French v. Bellows Falls Sav. Inst.*, 67 Ill. App. 179.

See, however, *contra*, *Lehman v. Ford*, 47 Ala. 733, holding that a cross-bill regularly filed is so far an independent suit as to authorize an appeal from a decree dismissing the same on demurrer before the determination of the original bill.

In *French v. Bellows Falls Sav. Inst.*, *supra*, the court said: "Although in a limited sense the order sustaining the demurrer was a final one, yet it was not until the original bill was disposed of that it was final, in the sense of being appealable." See also the title "Cross-Complaint."

CROSS-COMPLAINT

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XII. PLEADING TO CROSS-COMPLAINT, 309.**XIII. AMENDMENT OF CROSS-COMPLAINT, 310****XIV. SUPPLEMENTAL CROSS-COMPLAINT, 310****XV. HEARING, 311****XVI. DISMISSAL OF ACTION AFTER FILING CROSS-COMPLAINT, 311****XVII. ENTRY OF JUDGMENT, 311****XVIII. APPEAL, 311****A. From Order of Dismissal, 311****B. Presumptions on Appeal From Judgment, 311****1. Sufficiency of Evidence, 311****2. Variance, 312****CROSS-REFERENCES:**

Cross-Bill;

Declaration and Complaint.

I. OFFICE OF CROSS-COMPLAINT.—A. PRINCIPLES GOVERNING.—The principles governing the filing of a cross-complaint are said to be analogous to and based on the old equitable principles governing cross-bills.¹

1. Cal.—Sullivan v. California Realty Co., 142 Cal. 201, 75 Pac. 767; East Riverside Dist. v. Holcomb, 126 Cal. 315, 58 Pac. 817. Wis.—First Nat. Bank of Omro v. Frank, 131 Wis. 416, 111 N. W. 526; Kollock v. Scribner, 98 Wis. 104, 73 N. W. 776. Eng.—*In re* Milan Tramways Co., L. R. 22 Ch. Div. 122, 52 L. J. Ch. 29, 48 L. T. (N. S.) 213, *affirmed*, L. R. 25 Ch. Div. 587, 53 L. J. Ch. 1008, 50 L. T. (N. S.) 545; Furness v. Booth, L. R. 4 Ch. Div. 586, 46 L. J. Ch. 112.

See the title "Cross-Bills."

Principles Governing.—The principles which govern the filing of cross-complaints and declaring who and for what purpose they may be used are to a great extent "those which apply to interventions and counterclaims and the bringing in of new parties, and those which apply to cross-bills under

the old equity practice. The general rule is, that a plaintiff may select those whom he desires to make defendants, and that new parties brought in against his will cannot be allowed to set up against him defenses and affirmative causes of action which the original defendant could not have set up; and this is especially so where the granting of the relief sought by the original complaint would not have prejudiced the other causes of action which the new parties seek to have adjudicated. Peculiar circumstances may make exceptions to the rule, but the general principle is as above stated." East Riverside Irr. Dist. v. Holcomb, 126 Cal. 315, 58 Pac. 817. To same effect: Ala.—Andrews v. Hobson, 23 Ala. 219, 239. Fla.—Fagan v. Barnes, 14 Fla. 53. Ky.—Daniel v. Morrison, 6 Dana 182. N. Y.—Chapman v. Forbes,

B. WHEN INTERPOSED BY DEFENDANT.—A cross-complaint is a pleading by a defendant to an action, which contains a statement of facts sufficient to constitute a cause of action against the plaintiff in reference to the transaction upon which the original action is founded, or affecting property to which the original action relates.²

A cross-complaint may also be filed by a defendant against one or

123 N. Y. 532, 26 N. E. 3; National Fire Ins. Co. v. McKay, 21 N. Y. 191.

Indiana Code Provision.—"Properly speaking, there is no such pleading known to our code as a cross-complaint. If the cross-proceeding be against the plaintiff, and grew out of the matters averred in the complaint as constituting the cause of action, it is a counterclaim. But, notwithstanding the silence of our code upon the subject of cross-complaint, the chancery practice of determining the rights of the parties on each side of a case is clearly recognized by our decisions; and in such cases the rules of pleading and practice of chancery courts, as modified by the spirit of the code, govern. Fletcher v. Holmes, 25 Ind. 458; Pomeroy Rem., sections 806, 808; Bliss Code Pl., section 390. Hence, it has become the established practice of our courts that cross-actions may be resorted to between parties on the same side of a case, and the pleading filed in instituting such cross-action is known under our practice as a 'cross-complaint.' While the mode of procedure is not prescribed by the code, and the chancery practice is proper to be resorted to in such proceedings, the basis of the procedure is nevertheless found in the statute (Rev. St. 1894, section 577; Rev. St. 1881, section 568), which provides that the court 'may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves.'" Heaton v. Lynch, 11 Ind. App. 408, 38 N. E. 224. See also the title "Cross-Bills," I, and Standley v. Northwestern Mut. Life Ins. Co., 95 Ind. 254; Douthitt v. Smith, 69 Ind. 463.

"The cases of *Sterne v. McKinney*, 79 Ind. 578 and *Sterne v. First Nat. Bank*, 79 Ind. 560, decide that where the matters set forth in the counterclaim or cross-complaint are not connected with the matters alleged in the complaint it is not error to dismiss the cross-complaint or counterclaim, on the motion of the plaintiff. The rule was

carried very far in *McMahan v. Spinning*, 51 Ind. 187, where it was held that the defendant could not set up, as a counterclaim to a complaint for work performed and materials furnished, a demand for damages for a failure to abide by an award of arbitrators to whom the matter of difference had been submitted, although the work and materials sued for were the same as those involved in the plaintiff's cause of action." *Standley v. Northwestern Mut. Life Ins. Co.*, 95 Ind. 254, 262.

2. Cal.—*Harrison v. McCormick*, 69 Cal. 616, 11 Pac. 456. See also *Hall v. Cole*, 38 Pac. 894. **Idaho.**—*Bacon v. Rice*, 14 Idaho 107, 93 Pac. 511. **Ky.** *Mattingly v. Eversole*, 113 S. W. 447. **Wis.**—*Cawker v. Central Bitulithic P. Co.*, 133 Wis. 29, 113 N. W. 419.

In *Indiana* "the term 'counterclaim' is used to denote the matters constituting the ground of defense as well as the pleading in which it is stated, and the term 'cross-complaint' is very frequently used to designate the pleading, although it has been said that 'counterclaim' is the proper title of the pleading. Whatever term may be used to designate the pleading, whether 'cross-complaint' or 'counterclaim,' it is only proper where it pleads matter connected with the subject of the original action which entitles the defendant to affirmative relief or mitigates the recovery." *Standley v. Northwestern Mut. Life Ins. Co.*, 95 Ind. 254, 264.

Complaint and Cross-Complaint.—The only real difference between a complaint and a cross-complaint is that the first is filed by the plaintiff and the second by the defendant. Both contain a statement of facts and each demands affirmative relief upon the facts stated. **Ark.**—*Gantt's Dig.* §808; *White v. Reagan*, 32 Ark. 281, 290. **Ind.**—*Board of Comrs. of Tippecanoe County v. Lafayette*, etc. R. Co., 50 Ind. 85; *Ewing v. Patterson*, 35 Ind. 326. **Wash.**—*Powell v. Nolan*, 27 Wash. 318, 334, 67 Pac. 712, 68 Pac. 389.

more co-defendants, showing that he is entitled to relief against one or all of such co-defendants, provided such relief involves or affects the subject-matter of the original action.³

In some of the code states provision is also made for the filing of a cross-complaint by a defendant against one not a party to the action, where the cause of action set up by the cross-complaint affects, or is affected by, the original cause of action.⁴

C. CROSS-COMPLAINT BY PLAINTIFF.—When a party comes into the action by intervention, such intervention may be adverse to the plaintiff. And when such a condition exists the intervenor becomes plaintiff in the intervention, and the plaintiff becomes defendant and has all the rights of a defendant in an ordinary action and may file a cross-complaint to the intervention.⁵

II. PURPOSE.—When a defendant seeks affirmative relief against a party to the action affecting the subject-matter thereof he may in addition to his answer file a cross-complaint,⁶ or may make

3. Ark.—Ringo *v.* Woodruff, 43 Ark. 469, 497. Ind.—Heaton *v.* Lynch, 11 Ind. App. 408, 38 N. E. 224. See also Wright *v.* Anderson, 117 Ind. 349, 20 N. E. 247; Browning *v.* Merritt, 61 Ind. 425. Ky.—Fritts *v.* Kirchdorfer, 136 Ky. 643, 124 S. W. 882; Mattingly *v.* Eversole, 113 S. W. 447. Wis.—Cawker *v.* Central Bitulithic P. Co., 133 Wis. 29, 113 N. W. 419.

Cross-Complaint and Counterclaim. "The difference between a counterclaim and a cross-complaint is this: In the former the defendant's cause of action is against the plaintiff, and in the latter against a co-defendant or one not a party to the action." White *v.* Reagan, 32 Ark. 281, 290. Compare Shain *v.* Belvin, 79 Cal. 262, 21 Pac. 747, in which it is said: "If a party calls his pleading a counterclaim, he will not afterward be allowed to maintain that it was really a cross-complaint, and required an answer." This is upon the principle that "a party will not be allowed to gain any advantage by giving his pleading two inconsistent characters. . . . The pleader should take one ground or the other, so that his adversary may know how to proceed."

Failure to plead a cross-demand will prevent the introduction of any evidence regarding it. Hart *v.* Cooper, 47 Cal. 77.

4. Cal.—Mackenzie *v.* Hodgkin, 126 Cal. 591, 59 Pac. 36, 77 Am. St. Rep. 209. Ky.—Dine *v.* Donnelly, 134 Ky.

776, 121 S. W. 685; Mattingly *v.* Eversole, 113 S. W. 447. Wis.—Cawker *v.* Central Bitulithic P. Co., 133 Wis. 29, 113 N. W. 419.

5. Wall *v.* Mines, 130 Cal. 27, 44, 62 Pac. 386.

When Plaintiff in Original Action May File Cross-Complaint.—"Intervention may be adverse to both plaintiff and defendant. Where it is adverse to either such party becomes defendant and the intervenor plaintiff in the intervention." The defendants in intervention may therefore file a cross-complaint to the intervention and possess all the rights given to a defendant to plead in an ordinary action. Wall *v.* Mines, *supra*.

In Kentucky the plaintiff may make his reply to the answer a cross-complaint. Fritts *v.* Kirchdorfer, 136 Ky. 643, 124 S. W. 882.

6. Cal.—Code Civ. Proc., §442; Alpers *v.* Bliss, 145 Cal. 565, 79 Pac. 171; City of Eureka *v.* Gates, 120 Cal. 54, 52 Pac. 125. Idaho.—Code Civ. Proc., §4188; Murphy *v.* Russell & Co., 8 Idaho 151, 67 Pac. 427. Ia.—Minden Canning Co. *v.* Hensley, 126 N. W. 1115. Utah.—Culmer *v.* Caine, 22 Utah 216, 61 Pac. 1008. Wis.—Wisconsin St., §2656a.

See also *infra*, IX. See also the title "Cross-Bills," III.

When Allowed.—"A cross-complaint is allowed 'when a defendant has a cause of action against a co-defendant, or a person not a party to the action

his answer a cross-complaint; one or the other of these methods must be invoked to entitle a defendant to such relief.⁷

The purpose of the statute is to prevent a multiplicity of suits, and after the court obtains jurisdiction of the action it will extend to all issues relating to and growing out of the subject-matter of the action.⁸

III. ACTIONS WHEREIN CROSS-COMPLAINT PERMISSIBLE.—A. **GENERALLY.**—A cross-complaint may be filed in any action wherein the complaint asks for legal relief, provided it grows out of the same transaction,⁹ and there are many cases in tort where a cross-complaint is proper and where affirmative relief will be granted.¹⁰ But a cross-complaint asking for relief at law cannot be interposed in an equitable action,¹¹ nor can equitable relief be sought

and affecting the subject-matter of the action.”” *White v. Reagan*, 32 Ark. 281, 289, *citing* Gantt’s Dig. §4559; *Trapnall v. Hill*, 31 Ark. 346.

The Utah statute provides that when a defendant has a cause of action affecting the subject-matter of the action against a co-defendant, he may in the same action file a cross-complaint against such co-defendant. *Utah Comp. Laws*, 1907, §2974.

“A cross-complaint may properly be interposed by a defendant when he is entitled to affirmative relief against a co-defendant or against a co-defendant and a plaintiff or other party, and such relief involves or affects the contract, transaction or property which is the subject-matter of the action.” *Cawker v. City of Milwaukee*, 133 Wis. 35, 113 N. W. 417. See also *Kollock v. Scribner*, 98 Wis. 104, 73 N. W. 776.

Matter which is not connected with the “subject of the action” and that does not affect the property to which the action relates cannot be made the subject of a cross-bill. *Yorba v. Ward*, 109 Cal. 107, 38 Pac. 48, 41 Pac. 793.

7. *Luttrell v. Reynolds*, 63 Ark. 254, 37 S. W. 1051; *Ringo v. Woodruff*, 43 Ark. 469, 497.

“Matters which are proper as a defense will not be turned into a counterclaim or cross-complaint merely by a prayer for affirmative relief.” *Shain v. Belvin*, 79 Cal. 262, 21 Pac. 747. See also *Carpenter v. Hewel*, 67 Cal. 589, 8 Pac. 314; *Brannan v. Paty*, 58 Cal. 330; *Doyle v. Franklin*, 40 Cal. 107.

8. *Murphy v. Russell & Co.*, 8 Idaho 151, 67 Pac. 427; *Stevens v. Home Sav. & Loan Assn.*, 5 Idaho 741, 51 Pac. 779;

Minden Canning Co. v. Hensley, 149 Iowa 168, 126 N. W. 1115.

“The filing and prosecution of the cross-complaint shall not delay the trial and decision of the original action when a judgment can be rendered therein that will not prejudice the rights of the parties to the cross-complaint.” *Kirby’s Ark. Dig.*, ch. 125, §6088, subd. 3.

9. Under the California code the word “transaction” includes only cases where the relief asked for in cross-complaint relates to the subject-matter of the transaction set forth in the original complaint, and a case where two different judgments would be required is not included. *Glide v. Kayser*, 142 Cal. 419, 76 Pac. 50.

As to right to file cross-complaint asking for subrogation, see *Finnell v. Finnell*, 159 Cal. 535, 114 Pac. 820, and also the title “Cross-Bills,” III.

The Iowa code provides for cross-petition, and it may be either a cross-petition at law or in equity depending upon the nature of the action. *Code*, §§3559, 3574.

The Wisconsin statute does not apply to the foreclosure of mechanics’ liens under §§3321-3326. *Dusick v. Green*, 118 Wis. 240, 95 N. W. 144.

10. *Van Bibber v. Hilton*, 84 Cal. 585, 24 Pac. 308, 598, *overruling* on this point *Heilbron v. King’s River & F. C. Co.*, 76 Cal. 11, 17 Pac. 933.

11. *Alpers v. Bliss*, 145 Cal. 565, 572, 79 Pac. 171.

In Arkansas if a cross-complaint be filed in an action in equity, a purely legal demand cannot be set up. *Trapnall v. Hill*, 31 Ark. 345.

by cross-complaint in an action at law;¹² though in some jurisdictions cross-complaints in actions at law asking for affirmative relief are permissible by statute.¹³

B. ACTIONS INVOLVING TITLE TO REALTY. — In actions wherein conflicting claims to ownership in real property are involved, cross-complaints are as a rule unnecessary, as the respective rights of the parties can be determined under the complaint and answer.¹⁴ It has also been held that a cross-complaint is unnecessary in an action of ejectment or to quiet title,¹⁵ but there are cases where a cross-complaint is necessary to the defendant's protection.¹⁶

12. *Biermann v. Guaranty Mut. Life Ins. Co.*, 142 Iowa 341, 120 N. W. 963; *Smith v. Griswold*, 95 Iowa 684, 64 N. W. 624.

13. *Carroll v. Bowne*, 55 Ore. 316, 106 Pac. 331.

14. *Mills v. Fletcher*, 100 Cal. 142, 34 Pac. 637; *Miller v. Luco*, 80 Cal. 257, 22 Pac. 195; *Meeker v. Dalton*, 75 Cal. 154, 16 Pac. 764; *Wilson v. Madison*, 55 Cal. 5; *Doyle v. Franklin*, 40 Cal. 106; *Pitcairn v. Harkness*, 10 Cal. App. 295, 101 Pac. 809.

In *Doyle v. Franklin*, 40 Cal. 107, referring to whether a bill to quiet title may be filed as a cross-complaint in an action of ejectment, it was said that it was not necessary to inquire into that question.

15. *Mills v. Fletcher*, 100 Cal. 142, 34 Pac. 637; *Miller v. Luco*, 80 Cal. 257, 22 Pac. 195; *Meeker v. Dalton*, 75 Cal. 154, 16 Pac. 764; *Wilson v. Madison*, 55 Cal. 5; *Doyle v. Franklin*, 40 Cal. 106. See also *Lewis v. Fox*, 122 Cal. 244, 54 Pac. 823; *Phillips v. Hagart*, 113 Cal. 552, 45 Pac. 843; *Odell v. Wilson*, 63 Cal. 159.

In ordinary actions of ejectment a defendant cannot by cross-complaint "set up matters which do not constitute a defense, but are intended merely as the foundation of a money judgment against plaintiff." *Hoffman v. Remnant*, 72 Cal. 1, 12 Pac. 804.

When Proper and Improper. — In an action to quiet title, when defendant relies on his own title, a cross-complaint is not necessary, but "where the defendant seeks to enforce an equitable title against the plaintiff as the holder of the legal title, a cross-complaint is proper." *Bacon v. Rice*, 14 Idaho 107, 93 Pac. 511.

16. U. S. — *Greenwalt v. Duncan*, 16 Fed. 612. Cal. — *Islais & S. W. Co. v.*

Allen, 132 Cal. 432, 64 Pac. 713; *Winter v. McMillan*, 87 Cal. 256, 25 Pac. 407, 22 Am. St. Rep. 243; *Coleman v. Cummins*, 77 Cal. 548, 20 Pac. 77 (in which a cross-complaint asking for foreclosure was filed but no question as to its propriety was raised). Colo. *Allen v. Tritch*, 5 Colo. 222. Ind. — *Ludlow v. Ludlow*, 109 Ind. 199, 9 N. E. 769. Kan. — *Venable v. Dutch*, 37 Kan. 515, 15 Pac. 520.

See also *Martin v. Molera*, 4 Cal. App. 298, 87 Pac. 1104 (in which the court quotes from *Winter v. McMillan*, 87 Cal. 256, 25 Pac. 407, 22 Am. St. Rep. 403, as follows: "But there may be cases in which full relief cannot be given the defendant upon answer, and as in ejectment, a cross-complaint in such cases is recognized as a proper pleading so that the whole controversy may be settled in one action," and said: "This doctrine has received express or implied sanction in a number of cases where the point was involved," and cites *Angus v. Craven*, 132 Cal. 691, 64 Pac. 1091; *Islais & S. W. Co. v. Allen*, 132 Cal. 432, 64 Pac. 713). See also *infra*, XV.

In *Johnson v. Taylor*, 150 Cal. 201, 208, 88 Pac. 903, 10 L. R. A. (N. S.) 818, the court said: "On the appeal from the judgment it is urged that the court erred in granting to the defendants the affirmative relief asked by them in their cross-complaints. This contention is based on the view, expressed several times by this court, that in an action to quiet title a cross-complaint by a defendant who claims title in himself is not necessary (*Wilson v. Madison*, 55 Cal. 5; *Miller v. Luco*, 80 Cal. 257, 22 Pac. 195; *Mills v. Fletcher*, 100 Cal. 142, 34 Pac. 637). If these cases have not been overruled, their authority has, as to the point under discussion, been seriously im-

IV. JURISDICTION.—When the court has jurisdiction of the subject-matter of the transaction set forth in the complaint and cross-complaint it will assume such jurisdiction, although the court would not have had jurisdiction of the cross-action originally by reason of the amount involved.¹⁷

V. FORM AND SUFFICIENCY.—A. IN GENERAL.¹⁸—The general rules relating to pleadings apply to cross-complaints,¹⁹ so that each paragraph thereof must be complete in itself and cannot be aided by others,²⁰ but this does not apply where the reference is merely for identification and not for the purpose of supplying a needed statement of fact.²¹

paired by Islais, etc. *Water Co. v. Allen*, 132 Cal. 432, 64 Pac. 713.”

In *Indiana* in an action to quiet title under Burn's St. (1908), §1116, in which defendant's title is assailed, it is proper for the defendant to assert his title in a cross-complaint and thereby litigate and have determined all matters affecting the title to the property. *Kraus v. Thomas* (Ind.), 96 N. E. 12.

Where the plaintiff in the ejectment action had before the beginning of the action made a contract to convey the land in suit to the defendant, it is permissible for such defendant to file a cross-complaint asking for specific performance. *Nunez v. Morgan*, 77 Cal. 427, 19 Pac. 753.

In an action for partition where plaintiff failed to make all persons interested parties to the action, a cross-complaint bringing in all parties interested is permissible and will not be stricken out because the original plaintiff by amended complaint seeks to correct his error. *Chalmers v. Trent*, 11 Utah 88, 39 Pac. 488.

17. *Sullivan v. California Realty Co.*, 142 Cal. 201, 75 Pac. 767. See also *Ames Realty Co. v. Big Indian Mining Co.*, 146 Fed. 166, 177; and the title “Cross-Bills,” IV.

18. See the title “Cross-Bills,” V.

19. See the title “Declaration and Complaint.”

The rule that a pleading must be construed against the pleader applies, and a pleading which “for further and separate answer and defense to the complaint, avers by way of cross-complaint,” etc., will be treated as a defense, and the words “by way of cross-complaint” may be treated as surplusage. *Shain v. Belvin*, 79 Cal. 262, 21 Pac. 747. See also *Cohn v. Kelly*,

132 Cal. 468, 64 Pac. 709; *Goldman v. Bashore*, 80 Cal. 146, 22 Pac. 82.

In pleading a contract within the statute of frauds, it is unnecessary to allege that the contract was in writing. *Nunez v. Morgan*, 77 Cal. 427, 19 Pac. 753.

“The rule that defects in a pleading may be cured by averments in the pleadings of the opposite party” applies to cross-complaints. *Abner, Double Co. v. Keystone Consol. Min. Co.*, 145 Cal. 490, 78 Pac. 1050. To same effect, *Cohen v. Knox*, 90 Cal. 266, 27 Pac. 215. “And the fact that there was a demurrer does not take it out of the rule.” *Cohen v. Knox*, *supra*. To same effect, see *Schenck v. Hartford Ins. Co.*, 71 Cal. 28, 11 Pac. 807.

But defects in the complaint cannot be overcome by averments in the answer to the cross-complaint. *Carroll v. Girard Fire Ins. Co.*, 72 Cal. 297, 13 Pac. 863.

20. *Coulthurst v. Coulthurst*, 58 Cal. 239; *Cookerly v. Duncan*, 87 Ind. 332; *Masters v. Beckett*, 83 Ind. 595; *Campbell v. Routt*, 42 Ind. 410.

“The only real difference between a complaint and a cross-complaint is, that the first is filed by the plaintiff and the second by the defendant. Both contain a statement of the facts, and each demands affirmative relief upon the facts stated. In the making up of the issues and the trial of questions of fact, the court is governed by the same principles of law and rules of practice in the one case as in the other.” *Ewing v. Patterson*, 35 Ind. 326.

A “cross-complaint must fall unless it is sustainable on its own allegations of fact.” *Collins v. Bartlett*, 44 Cal. 371, 331. See also *Coulthurst v. Coulthurst*, 58 Cal. 239.

21. *Cookerly v. Duncan*, 87 Ind. 332.

B. PARTIES.—1. Generally.—Parties defendant are as necessary to a cross-complaint as to an original complaint.²² They must be parties to the original action,²³ or such additional parties as are properly brought in, when necessary to a complete determination of the controversy before the court.²⁴

2. Bringing in New Parties.—When new parties are necessary for the determination of the issues raised by a cross-complaint they may and should be brought in,²⁵ and when a complete determination

Reference to Complaint in Cross-Complaint.—Where in an action to quiet title the complaint fully and accurately describes the land in question, an allegation in the cross-complaint omitting the county and state but prefaced by the averment that it "is the real estate in complaint mentioned" is a sufficient description of the property to which the cross-complaint asserts title. *Cookerly v. Duncan*, 87 Ind. 332.

22. *Pillow v. Sentelle*, 49 Ark. 430, 5 S. W. 783; *Ringo v. Woodruff*, 43 Ark. 469, 497.

23. *Harrison v. McCormick*, 69 Cal. 616, 11 Pac. 456.

24. **Bringing in New Parties.**—See the title "Cross-Bills," V, B.

Change From Chancery Practice.—Although it be conceded that a cross-complaint is a proper pleading in an action to quiet title, it is claimed that in an action of this nature new parties cannot be brought in by it. "Whether this could be done under the old chancery practice is a question upon which the authorities are not agreed; but our code system is much broader and more liberal in this regard." *Winter v. McMillan*, 87 Cal. 256, 25 Pac. 407, 23 Am. St. Rep. 243.

25. **Cal.**—*Alpers v. Bliss*, 145 Cal. 565, 79 Pac. 171; *Goodell v. Verdugo Canon Water Co.*, 138 Cal. 345, 71 Pac. 354; *Stockton Sav. & L. Soc. v. Harold*, 127 Cal. 612, 60 Pac. 165; *MacKenzie v. Hodgkin*, 126 Cal. 591, 59 Pac. 36; *City of Eureka v. Gates*, 120 Cal. 54, 52 Pac. 125; *Winter v. McMillan*, 87 Cal. 256, 25 Pac. 407, 22 Am. St. Rep. 243. **Idaho.**—*First Nat. Bank v. Bews*, 3 Idaho 486, 31 Pac. 816. **Ind.** *Shirk v. Mitchell*, 137 Ind. 185, 36 N. E. 850. **Utah.**—*Chalmers v. Trent*, 11 Utah 88, 39 Pac. 488.

Right To Bring in New Parties.—"It is argued by respondent that new parties cannot be brought in by a cross-complaint. This doctrine was held

in Mississippi, but a contrary view has been declared in Illinois, Colorado, West Virginia, Tennessee and other states (*Allen v. Tritch*, 5 Colo. 222; *Hurd v. Case*, 32 Ill. 45; *Kanawha Lodge v. Swann* (W. Va.), 16 S. E. 462; *Brandon Mfg. Co. v. Prime*, 14 Blatchf. 371, Fed. Cas. No. 1,810)." *Chalmers v. Trent*, 11 Utah 88, 39 Pac. 488.

Right Dependent on Necessity.—In *Merchants Trust Co. v. Bentel*, 10 Cal. App. 75, 101 Pac. 31, it was held that the right to bring in new parties still existed since the amendment of 1907 and that it might be done "whenever the court finds it necessary for a proper determination of the controversy before it; but this right is subject to the power of the court, to determine the controversy before it without bringing in new parties 'when this can be done without prejudice to the rights of others, or by a saving of their rights.'"

When a pleading is filed "by one defendant against one or more co-defendants and another who is not a defendant, showing that the cross-complainant is entitled to relief against such parties as to matters not apparent on the face of the complaint, it is necessary that such new party should be made a defendant, and process should issue against him." *Heaton v. Lynch*, 11 Ind. App. 408, 410, 411, 38 N. E. 224.

Cross-Complaint by Mortgagee of Entire Interest.—On a foreclosure of an undivided half interest in land, a prior mortgagee holding a mortgage upon the entire premises may by cross-complaint ask for a decree of foreclosure upon the whole property and bring in as parties the owner of the other undivided half interest and the holder of a mortgage covering such undivided interest. A judgment and decree in favor of the cross-complaint

of the controversy cannot be had without the presence of parties not before the court, an order should be made directing that such parties be brought in as parties to the action.²⁶ But new parties cannot be brought in in order to litigate questions which cannot affect the right of plaintiff to recover upon his complaint.²⁷

Necessity for Order of Court.—A new party cannot be brought into the action without an order of the court therefor.²⁸

C. STATING CAUSE OF ACTION.—Like a complaint a cross-complaint must itself contain all the requisite facts necessary to constitute a cause of action,²⁹ and such cause of action must, in order to be avail-

may properly foreclose the equity of redemption of the mortgagees of both such undivided interests and is conclusive on both. *Newhall v. Bank of Livermore*, 136 Cal. 533, 69 Pac. 248. See also *Stockton Sav. & L. Soc. v. Harrold*, 127 Cal. 612, 60 Pac. 165.

26. *Merchants Trust Co. v. Bentel*, 10 Cal. App. 75, 101 Pac. 31.

27. *Hunter v. First Nat. Bank*, 172 Ind. 62, 87 N. E. 734, citing local cases. See also *Lewis v. Fox*, 122 Cal. 244, 250, 54 Pac. 823.

The court has no authority to inject into an action irrelevant parties. The persons brought in as new parties must be persons who are essential to the determination of the controversy before the court. Nor can a defendant "inject into the action a controversy between himself and an outsider, even though it affects the property to which the action relates, unless some party already before the court is interested in, or will be affected by the determination of such controversy. 'The controversy' named in the concluding member of the above quoted sentence is 'any controversy between the parties before it' named in the first clause, and includes a controversy presented by a cross-complaint, as well as that presented by the original complaint." *Alper v. Bliss*, 145 Cal. 565, 571, 79 Pac. 171, citing numerous local cases.

In an action to enjoin the sale of land for an assessment for interest upon bonds brought by the landowners in an irrigation district against the collector, such collector cannot file a cross-complaint asking for affirmative relief, he representing the district for defense purposes only. Nor will bondholders be permitted to intervene for the purpose of maintaining a cross-complaint, they also being precluded

from asking affirmative relief. If the cross-complaint be a proper one the irrigation district would be the proper party. *Boskowitz v. Thompson*, 144 Cal. 724, 78 Pac. 290.

28. *Alpers v. Bliss*, 145 Cal. 565, 79 Pac. 171. See also the title "**Cross-Bills**," V, F.

29. *Harrison v. McCormick*, 69 Cal. 616, 11 Pac. 456; *Chase v. Evoy*, 58 Cal. 348; *Coulthurst v. Coulthurst*, 58 Cal. 239; *Kreichbaum v. Melton*, 49 Cal. 50; *Collins v. Bartlett*, 44 Cal. 371; *Doyle v. Franklin*, 40 Cal. 107; *Bowen v. Eaton*, 46 Ind. App. 65, 89 N. E. 961.

Cross-complaint in divorce must allege marriage and residence for the required period. *Coulthurst v. Coulthurst*, 58 Cal. 239.

In an action involving equitable relief a defendant is required to state the facts entitling him to relief "as fully as they are required in a bill in equity." *Winter v. McMillan*, 87 Cal. 256, 25 Pac. 407, 23 Am. St. Rep. 403, citing *Brodrib v. Brodrib*, 56 Cal. 563; *Kreichbaum v. Melton*, 49 Cal. 50. See also the title "**Cross-Bills**," IV, C.

In an action to quiet title defendant filed a cross-complaint "in which she asserted title to the whole of the land in controversy" and especially pleaded the facts upon which her claim was founded, adding the further averments that the deed to a grantee from whom all the parties derived title was erroneous but that in the deed to the cross-complainant the property was correctly described and alleging also occupation and undisputed possession. Upon demurrer this was held to be a good pleading and that the cross-complaint was not a cross-complaint to correct the record but one for granting title. *Kraus v. Thomas* (Ind.), 96 N. E. 12.

able to cross-complainant, exist when the cross-complaint is filed.³⁰

Matter which is properly matter of defense cannot be set up by cross-complaint.³¹ And the question whether the cross-complaint states a cause of action may be raised at any stage of the proceedings.³²

D. GERMANE TO ORIGINAL COMPLAINT.—Matter set up in a cross-complaint must be germane to the original complaint,³³ and must

A plea setting up as a cross-action that the plaintiff being purchasing agent for the defendant bought for him under contract a quantity of goods which contained concealed imperfections, which caused the defendant loss and damage, is properly stricken, on general demurrer, where no act of infidelity or negligence on the plaintiff's part (that is, no breach of the contract of agency) is alleged. *National Duck Mills v. Catlin & Co. (Ga.)*, 73 S. E. 418.

30. *Lewis v. Fox*, 122 Cal. 244, 54 Pac. 823.

31. *Dowd v. American Surety Co. (Ore.)*, 118 Pac. 198.

Where the answer sets up averments as a defense, which are properly set up as such, and not as the foundation of a claim for affirmative relief, it will not be considered a cross-complaint and plaintiff need not reply thereto. *Doyle v. Franklin*, 40 Cal. 107.

A denial in an answer "is not waived or overcome by an averment in the cross-complaint of substantially the same facts as those which the answer denies." *Meyers v. Merillion*, 118 Cal. 352, 50 Pac. 662.

32. *Macdougall v. Maguire*, 35 Cal. 274, 281; *Marriott v. Close*, 12 Colo. 561, 21 Pac. 909; *Emery v. Yount*, 7 Colo. 107, 1 Pac. 686.

Time for Making Objection.—In *Marriott v. Close*, *supra*, it was said that under the statute (Gen. St., 1883, §60) the question might be raised at any time during the progress of the cause and in any and every court.

Manner of Raising Objection.—The objection that the cross-complaint failed to state a cause of action can be presented either by demurrer or motion. **Colo.**—*Marriott v. Close*, 12 Colo. 561, 21 Pac. 909. **Ky.**—*Mattingly v. Eversole*, 113 S. W. 447. **N. Y.**—*Burnham v. De Bevoise*, 8 How. Pr. 159.

33. *Silver Creek, etc. Co. v. Hayes*, 113 Cal. 142, 45 Pac. 191; *Clark v. Taylor*, 91 Cal. 552, 27 Pac. 860; *Hunter*

v. First Nat. Bank, 172 Ind. 62, 87 N. E. 734.

"A cross-complaint must in all cases be germane to the subject-matter of the original complaint and the relief sought must be connected with the matters involved in the principal action or in some way depend upon the contract or transaction upon which the original action was founded." *Hunter v. First Nat. Bank*, 172 Ind. 62, 87 N. E. 734.

The rule requiring the cross-complaint to be limited to matter germane to what is alleged in the complaint, only requires that there be "some connection." *Stockton Sav. & L. Soc. v. Harrold*, 127 Cal. 612, 60 Pac. 165.

In an action for work and labor, a cross-complaint for damages for an excessive attachment levied on defendant's property in the action cannot be interposed. *Jeffreys v. Hancock*, 57 Cal. 646.

Cross-complaint for irrigation assessment on foreclosure of mortgage is permissible. *Weinreich v. Hensley*, 121 Cal. 647, 54 Pac. 254.

Paragraph of Cross-Complaint Held Not Germane.—In an action upon a note one of the sureties filed a cross-complaint alleging that certain stock pledged as collateral with the holder of the note represented the purchase price of the plant and property of the principal, which property had been sold to a third party and said pledged stock constituted all of the assets of the maker except the proceeds of the sale of certain lots and some rental money in the hands of a co-defendant as trustee, and that certain persons had subscribed for, and on payment of less than par value had received, stock in the corporation who made the note, prior to the execution of the note in suit. The prayer was for the appointment of a receiver to take possession and control of all assets, to require an accounting of the defendant trustee, and to enforce collection of the balance due on subscription for such shares

relate to or be dependent on the transaction on which the main case is founded, or affect the property to which the action relates.³⁴

E. PLEADING NEW MATTER.—A cross-complaint cannot set up new matter unrelated to the transaction upon which the original complaint is based or raise entirely different questions not involved in the original suit,³⁵ though new issues relating to the subject-matter may

of stock. It appeared furthermore that the surety filing the cross-complaint had not paid the defendant in question. It was held that this paragraph was not germane. *Hunter v. First Nat. Bank, supra.*

Matter Not Germane.—In an action brought to foreclose a street assessment lien, the defendant cannot by cross-complaint interpose a claim for trespass in piling dirt on defendant's property while the work was in progress. *Engelbrechtsen v. Gay*, 158 Cal. 27, 775, 109 Pac. 879.

Claim and Delivery.—In an action for claim and delivery, a cross-complaint claiming damages for unlawful trespass by the cattle claimed will not be entertained. *Glide v. Kayser*, 142 Cal. 419, 76 Pac. 50. See the title "**Cross-Bills**," V, D.

34. **Ark.**—*Trapnall v. Hill*, 31 Ark. 345. **Cal.**—*Goodell v. Verdugo Canon Water Co.*, 138 Cal. 345, 316, 71 Pac. 354; *East Riverside, etc. Dist. v. Holcomb*, 126 Cal. 315, 58 Pac. 817; *Van Bibber v. Hilton*, 84 Cal. 585, 24 Pac. 308, 598. **Idaho.**—*Hunter v. Porter*, 10 Idaho 72, 77 Pac. 434. **Ia.**—*Culbertson v. Salinger*, 131 Iowa 307, 108 N. W. 454. **Wis.**—*Wisconsin St.* (1899), §2656a.

Cross-Complaint and Counterclaim Compared.—A cross-complaint "must relate to or depend on the contract or transaction on which the main case is founded, or affect the property to which the action relates, but does not necessarily seek its relief against all or any of the original plaintiffs or defendants. . . . A counterclaim, while it must exist in favor of the defendant and against the plaintiff or plaintiffs, may go further and if the cause of action arose on contract, may set forth any other cause of action arising on contract as a counterclaim thereto. As to subject-matter, the counterclaim is the more comprehensive and liberal; but for relief against individual plaintiffs or defendants or bringing in new parties against whom a defendant

claims relief growing out of the subject-matter of the action, the cross-complaint is the available procedure." *Hunter v. Porter*, 10 Idaho 72, 77 Pac. 434.

For additional cases illustrating matter held properly pleadable by cross-complaint, see *Banta v. Wise*, 135 Cal. 277, 67 Pac. 129; *Campbell v. Heney*, 128 Cal. 109, 60 Pac. 532; *Stephenson v. Deuel*, 125 Cal. 656, 58 Pac. 258; *Taylor v. McLain*, 64 Cal. 513, 2 Pac. 399; *Colton L. & W. Co. v. Raynor*, 57 Cal. 588; *Willman v. Friedman*, 4 Idaho 209, 38 Pac. 937.

For illustrations showing matter not properly pleadable in cross-complaint, see *Lewis v. Fox*, 122 Cal. 244, 54 Pac. 823; *Clark v. Taylor*, 91 Cal. 552, 27 Pac. 860; *Hunter v. Porter*, 10 Idaho 72, 77 Pac. 434.

Actions for Divorce.—A cross-complaint may be interposed in actions for divorce or annulment of marriage (*Blakely v. Blakely*, 89 Cal. 324, 26 Pac. 1072; *Mott v. Mott*, 82 Cal. 413, 22 Pac. 1140; *Wadsworth v. Wadsworth*, 81 Cal. 182, 22 Pac. 648, 15 Am. St. Rep. 38), and settlement of property rights may be sought therein (*Mott v. Mott, supra.*) Compare *De Haley v. De Haley*, 74 Cal. 489, 16 Pac. 248, in which the right is considered doubtful. In *Mott v. Mott, supra*, Judge Fox, at page 417, distinguishes the case and said: "All that was said in that case on that subject was pure *dicta*, for in the case there was no cross-complaint, and the question was not at all involved. Nothing on the subject was necessary to the decision of the case."

Foreclosure of junior mortgage by cross-complaint is permitted. *Rodgers v. Parker*, 136 Cal. 313, 68 Pac. 975; *Haensel v. Pacific States Sav. & L. Bldg. Co.*, 135 Cal. 41, 67 Pac. 38; *United States M. Co. v. Marquam*, 41 Ore. 391, 69 Pac. 37. See also the title "**Cross-Bills**," IV, D.

35. *East Riverside, etc. Dist. v. Holcomb*, 126 Cal. 315, 58 Pac. 817.

be, and are usually, properly raised by the cross-complaint.³⁶

F. RELIEF.—The relief sought need not necessarily be against all or any of the original plaintiffs or defendants,³⁷ and in the absence of service of the cross-complaint on some of the co-defendants, the issues raised by the cross-complaint and an answer thereto may be disposed of so far as the rights of the particular parties are concerned, regardless of the absence of service on such co-defendants.³⁸

G. VERIFICATION.³⁹

VI. RIGHT TO FILE.—The cross-complaint may be filed with the answer, or if sought to be filed subsequently, leave of court must be obtained.⁴⁰ The granting or refusing leave to file is within the discretion of the court.⁴¹

VII. PLACE OF FILING.⁴²

VIII. NECESSITY FOR ANSWER.—Allegations of a cross-complaint not controverted by answer will be treated as confessed.⁴³

IX. ANSWER AS CROSS-COMPLAINT.—While it may not be good practice to embody an answer and cross-complaint in the one instrument, it is not prohibited unless so provided by statute.⁴⁴ Fur-

Same Rule as Applies to Cross-Bills.

"Decisions dealing directly with modern statutory cross-complaints, and declaring what parties may use them, and for what purpose they may be used, are quite meager. . . . The principles which govern are, however, to a great extent those which apply to interventions and counterclaims and the bringing in of new parties and those which would apply to cross-bills under the old equity practice." *East Riverside, etc. Dist. v. Holcomb*, 126 Cal. 315, 58 Pac. 817.

Matter which could not be set up by an original defendant had he desired to do so, cannot be set up by one brought in as a new party. *East Riverside, etc. Dist. v. Holcomb*, 126 Cal. 315, 58 Pac. 817. See also the title "**Cross-Bills**," V, D.

36. *Davis v. Cook*, 65 Ala. 617; *Chalmers v. Trent*, 11 Utah 88, 39 Pac. 488.

37. *Hunter v. Porter*, 10 Idaho 72, 77 Pac. 434.

38. *Rodgers v. Parker*, 136 Cal. 313, 68 Pac. 975; *Van Loben Sels v. Bunnell*, 131 Cal. 489, 63 Pac. 773. See also the title "**Cross-Bills**," V, G.

39. See the title "**Cross-Bills**," V, I.

40. California Code Civ. Proc. §242; Utah Comp. Laws §3231.

In Kentucky a cross-complaint can be filed only upon leave of court. Bul-

litt v. Eastern Kentucky Land Co., 25 Ky. L. Rep. 1954, 79 S. W. 217.

Under the California statute an order granting leave to file a cross-complaint made by a judge out of court without notice to the adverse party, may be modified or vacated by him. Such right being addressed to his judicial discretion, and in the absence of the abuse of such discretion the order of the court will not be disturbed on appeal. *Alpers v. Bliss*, 145 Cal. 565, 79 Pac. 171. See also the title "**Cross-Bills**," VI.

41. *Bullitt v. Eastern Kentucky Land Co.*, 25 Ky. L. Rep. 1954, 79 S. W. 217.

42. See the title "**Cross-Bills**," VII.

43. *Rudy v. Austin*, 56 Ark. 73, 56 S. W. 111. See the title "**Cross-Bills**," VIII.

Waiver of Failure To Answer.—The failure to answer a cross-complaint will be regarded as waived where the cross-complainant went to trial without asking for judgment for want of such answer. *Pembroke v. Logan*, 71 Ark. 364, 74 S. W. 297.

44. *Western Loan & Sav. Co. v. Smith*, 12 Idaho 94, 85 Pac. 1084.

When a defendant has a cause of action against a co-defendant, or a person not a party to the action, and affecting the subject-matter of the action, he may make his answer a cross-complaint against the co-defendant or

thermore, where the answer is in fact a cross-complaint it will be so treated by the court, notwithstanding the defendant designates it an answer.⁴⁵

other person. Kirby's Ark. Dig., ch. 125, §6088, subd. 1; Luttrell v. Reynolds, 63 Ark. 254, 37 S. W. 1051.

"It was not sufficient to state the facts and ask for the relief in the answer, but the answer should have been made a cross-complaint against the co-defendants who would have been affected by the relief if it had been granted. 'Parties defendant are as necessary to' cross-complaints 'as to original' complaints, 'and their appearance in both cases is enforced by process in the same manner,' unless there is a formal appearance entered on the record or answer filed. An answer in the nature of a cross-complaint, 'which makes nobody defendant, which prays for no process, and under which no process is issued' as in this case 'is a nullity.' Unless he be made a party defendant in the answer in the nature of a cross-complaint in the manner indicated, the co-defendant is not required to answer the allegations constituting the grounds of relief asked for against him; and as corollary to this it follows, no proof is required to disprove the allegations on which this relief is asked." Ringo v. Woodruff, 43 Ark. 469, 497.

Service on Co-Defendants.—An answer containing prayer for affirmative relief, served on all the co-defendants, will be regarded as a cross-complaint. Hibernia Sav. & L. Soc. v. London & L. Fire Ins. Co., 138 Cal. 257, 71 Pac. 334; Hibernia Sav. & L. Soc. v. Fella, 110 Cal. 27, 42 Pac. 425.

In Kentucky no pleading except the answer to an original petition or plaintiff's reply to such an answer can be made a cross-petition. Fritts v. Kirchdorfer, 136 Ky. 643, 124 S. W. 882.

Cross-Complaint as Answer.—Where the paper is sufficient as an answer but not as a cross-complaint, the averments sought to be pleaded in the way of a cross-complaint may be treated as mere surplusage. Ambrose v. Barrett, 121 Cal. 297, 53 Pac. 808, 54 Pac. 264. See also the title "**Cross-Bills**," II.

The Wisconsin statute provides that the answer may serve as a cross-complaint, where affirmative relief is therein demanded, but such answer must be

served upon the party against whom the same is asked or upon such person not a party, upon his being brought in. Wisconsin St., 1898, §2656a.

Where the answer contains none of the elements of a cross-complaint, as distinguished from a defense to plaintiff's action, and contains no prayer for affirmative relief, no such relief can be awarded. Hungarian Hill G. M. Co. v. Moses, 58 Cal. 168.

Form of Answer as Cross-Complaint. An answer which after stating several denials continued as follows: "And, for a further and separate answer and defense to said action, defendant avers, by way of cross complaint," and alleges that the note in suit was without consideration and then repeating the above quotation, alleged "two facts and a conclusion which, when taken in connection with the other pleadings, tend to show the thing previously averred, viz., that the note was without consideration. The document concludes with a prayer 'that said note be delivered up for cancellation, for general relief, and for costs.' " Held to be an answer and a cross-complaint. Shain v. Belvin, 79 Cal. 262, 21 Pac. 747.

45. Wittenbrock v. Parker, 102 Cal. 93, 106, 36 Pac. 374, 41 Am. St. Rep. 172, 24 L. R. A. 197; Holmes v. Richet, 56 Cal. 307 (an answer in which foreclosure of a lien is sought); Brown v. Massey, 19 Okla. 482, 92 Pac. 246.

"It is immaterial what the defendants call their pleading. Its character is to be determined by the court." Mills v. Fletcher, 100 Cal. 142, 148, 34 Pac. 637. See also Gregory v. Boven, 77 Cal. 121, 19 Pac. 232; Meeker v. Dalton, 75 Cal. 154, 16 Pac. 764; Harrison v. McCormick, 69 Cal. 616, 11 Pac. 456; Holmes v. Richet, 56 Cal. 307, 38 Am. Rep. 54.

The indorsement of an admission of service on a paper and a consent that the pleading stand as and for defendant's answer and cross-complaint does not make it such so as to compel an answer thereto. Harrison v. McCormick, 69 Cal. 616, 11 Pac. 456. See also the title "**Cross-Bills**," IX.

X. REPLY AS CROSS-COMPLAINT.—In some jurisdictions plaintiff's reply can be made a cross-complaint.⁴⁶

XI. SERVICE OF CROSS-COMPLAINT AND PROCESS THEREON.—**A. SERVICE OF CROSS-COMPLAINT.**—Upon the filing of a cross-complaint service thereof is required on all parties affected thereby.⁴⁷

B. ISSUANCE AND SERVICE OF PROCESS.—Where new parties are brought into the action by cross-complaint process must issue and be served upon them as in any ordinary action unless they voluntarily

46. *Fritts v. Kirchdorfer*, 136 Ky. 643, 124 S. W. 882. And see the title "**Cross-Bills**," X.

47. *Cal.*—Code Civ. Proc., §442. *Rodgers v. Parker*, 136 Cal. 313, 68 Pac. 675; *Mackenzie v. Hodgkin*, 126 Cal. 591, 59 Pac. 36; *White v. Patton*, 87 Cal. 151, 25 Pac. 270; *Hibernia Sav. & L. Soc. v. Fella*, 54 Cal. 598 (service required on co-defendant). *Tex.*—*Robinson v. Collier*, 53 Tex. Civ. App. 285, 115 S. W. 915. *Utah.*—Comp. Laws, 1907, §2974. *Wash.*—*Powell v. Nolan*, 27 Wash. 318, 333, 67 Pac. 712, 68 Pac. 389. *Wis.*—*St.*, 1898, §2656a.

In California service of a cross-complaint may be made on the attorney for the plaintiff in the original action (*Wood v. Johnston*, 8 Cal. App. 258, 96 Pac. 508), and such service starts the running of the time for pleading to the cross-complaint (*Ritter v. Braash*, 11 Cal. App. 258, 104 Pac. 592).

The Utah statute "does not require the cross-complaint to be served within one year from the time of the filing of the complaint. It may be filed at the same time with the answer, or, by permission of the court, it may be filed at a subsequent date," no time for its service being fixed by statute. *Culmer v. Caine*, 22 Utah 216, 228, 61 Pac. 1008.

When the statute fails to fix the time for service it should be served within a reasonable time. *Culmer v. Caine*, 22 Utah 216, 61 Pac. 1008.

In an action to foreclose a mechanic's lien, "where judgment is demanded by a defendant lienor and the facts constituting his cause of action are not set out in the complaint, it is proper to set the same up in his answer in the nature of a cross-complaint; and we do not think, where there had been a personal service of the summons in the original case, service of a summons on the plaintiff or on the co-defendant is necessary. *Treiber v. Shafer*, 18 Iowa 29; *Bevier v. Kahn*,

111 Ind. 200, 12 N. E. 169; *Cockle Separator Mfg. Co. v. Clark*, 23 Neb. 702, 37 N. W. 628. But the cross-complaint, although set up in the answer, is in the nature of an original action; and, as the person whose property is affected by the lien is entitled to service of a copy of the complaint, so, too, he is entitled to the service of a cross-complaint; for it is through the allegations of the complaint or cross-complaint that he is informed of the nature and character of the demand against him and that it will be adjudicated, not only so far as it affects the plaintiff's claim, but also so far as it affects the defendant owners; and it is on the facts pleaded in the complaint or cross-complaint only that the court can pronounce judgment in case of default." *Powell v. Nolan*, 27 Wash. 318, 333, 67 Pac. 712, 68 Pac. 389.

Person Named as Party.—Service of a cross-complaint must be made on a person named both in the complaint and in the cross-complaint as a defendant, although it does not specifically appear what interest he claims in the premises. *Houghton v. Tibbets*, 126 Cal. 57, 58 Pac. 318.

Failure To Serve Harmless.—Failure to serve the cross-complaint on the plaintiff is a harmless irregularity where all the matters of substance charged in the cross-complaint were pleaded "in defendant's answer which was served on the plaintiff, so that the latter met in the prosecution of his own action every issue which would have been tendered to him had he been served also with the cross-complaint." *Mackenzie v. Hodgkin*, 126 Cal. 591, 59 Pac. 36, 77 Am. St. Rep. 209.

Service on Defendants in Default. Service of a cross-complaint must be made on defendants who were in default on the original complaint. *Hibernia Sav. & L. Soc. v. Clarke*, 110 Cal. 27, 42 Pac. 425; *White v. Patton*, 87 Cal. 151, 25 Pac. 270.

appear.⁴⁸ And when one is made a party to the action on his own application and files a cross-complaint, process must issue and be served on the original parties to the action unless their appearance be voluntarily entered.⁴⁹

Service of process has also been required on co-defendants when cross-complaint is filed,⁵⁰ though it has been held unnecessary to have service on the defendant who is the plaintiff in the original action.⁵¹ And there is authority that no summons need be served on parties to the original action who have been duly served with summons therein and of whose persons the court had acquired jurisdiction.⁵²

XII. PLEADING TO CROSS-COMPLAINT.—The parties on whom such cross-complaint is served may demur or answer thereto as to the original complaint.⁵³

48. *Alpers v. Bliss*, 145 Cal. 565, 79 Pac. 171; *Kruegel v. Bolanz*, 100 Tex. 572, 102 S. W. 110; *Harris v. Schlinke*, 95 Tex. 88, 65 S. W. 172; *Mayhew & Co. v. Harrell*, 57 Tex. Civ. App. 509, 122 S. W. 957.

Filing a demurrer to the cross-complaint is a sufficient appearance. *Willman v. Friedman*, 4 Idaho 209, 299, 38 Pac. 937.

49. *Luttrell v. Reynolds*, 63 Ark. 254, 37 S. W. 1051.

"The defendant to such cross-complaint may be actually or constructively summoned, and defense thereto shall be made in the time and manner prescribed in regard to the original complaint, and with the same rights of obtaining provisional remedies applicable to the case." *Kirby's Ark. Dig.*, ch. 125, §6088, subd. 2.

50. *Pillow v. Sentelle*, 49 Ark. 430, 5 S. W. 783; *Ringo v. Woodruff*, 43 Ark. 469, 497; *Mayhew & Co. v. Harrell*, 57 Tex. Civ. App. 509, 122 S. W. 957.

51. *Pillow v. Sentelle*, 49 Ark. 430, 5 S. W. 783; *Ringo v. Woodruff*, 43 Ark. 469, 497.

52. Cal.—*Rodgers v. Parker*, 136 Cal. 313, 68 Pac. 975; *White v. Patton*, 87 Cal. 151, 25 Pac. 270. Kan.—*Lawson v. Rush*, 80 Kan. 262, 101 Pac. 1009. Ohio.—*Brown v. Kuhn*, 40 Ohio St. 468. Wash.—*Powell v. Nolan*, 27 Wash. 318, 333, 67 Pac. 712, 68 Pac. 389.

In *Powell v. Nolan*, *supra*, the court said, "assuming that the service of the summons in the original action was actually made, and thereby James Nolan was in court, we think he was entitled to be served with a copy of the

cross-complaint of the Holland-Horr Mill Company, or a summons notifying him it would be filed, and that no judgment on any demand of a defendant in a cross-complaint could be lawfully entered against him until he was so served and given the usual time to plead."

Service on Minor Defendants.—When the guardian *ad litem* who was appointed in the original action appears and answers the cross-complaint, it was not necessary that the minor defendants should have been served with process. *Pillow v. Sentille*, 49 Ark. 430, 5 S. W. 783.

When Summons Must Issue.—If any of the parties affected by the cross-complaint have not appeared in the action, a summons upon the cross-complaint must be issued and served upon them in the same manner as in the commencement of the original action. California Code Civ. Proc., §442. See also the title "Cross-Bills," XI.

Service of Summons on Original Defendants.—Where parties defendant in the cross-complaint were defendants in the original case and were all served with summons therein, it was not necessary that a summons issue on the filing of the cross-complaint, service of the cross-complaint on such parties being sufficient. *Culmer v. Caine*, 22 Utah 216, 228, 61 Pac. 1008.

53. Cal.—Code Civ. Proc., §442; *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630. Utah.—*Culmer v. Caine*, 22 Utah 216, 61 Pac. 1008. Wis.—St., 1898, §2656a.

Failure To Controvert Allegation in Cross-Complaint.—The allegations of a cross-complaint not controverted by an-

Motion To Strike.—A cross-complaint that is merely irregular is not subject to a motion to strike, where the movant had after the making of the motion consented to the filing of the cross-complaint.⁵⁴

Waiver by Joining Issue.—Joining of issue on a cross-complaint in which there was no fundamental defect waives all errors as to its sufficiency.⁵⁵

XIII. AMENDMENT OF CROSS-COMPLAINT.—It is permissible to amend a cross-complaint.⁵⁶ And where a demurrer to a cross-complaint is sustained and leave given to amend, but no amended cross-complaint is served, the cross-complaint may be rejected as mere surplusage.⁵⁷

XIV. SUPPLEMENTAL CROSS-COMPLAINT.—A cross-complaint which failed to state a cause of action cannot be aided by a supplemental cross-complaint in which it is sought to set up facts arising subsequent to the commencement of the action.⁵⁸

answer are taken as confessed (*Rudy v. Austin*, 56 Ark. 73, 19 S. W. 111), but where there is a failure to answer the cross-complaint and the parties go to trial and the defendant who filed the cross-complaint fails to ask for judgment for such failure, it will be regarded as waived (*Pembroke v. Logan*, 71 Ark. 364, 74 S. W. 297). In Wisconsin if no answer or demurrer to the cross-bill be served or no objection taken to its sufficiency, the party against whom relief is demanded shall be deemed to have denied the allegations relied on for affirmative relief. St., 1898, §2656a.

Defect of Parties.—A demurrer to a cross-bill alleging defect of parties must specifically point out the defect. *Cookery v. Duncan*, 87 Ind. 332.

When Demurrer Overruled.—If a demurrer to the cross-complaint be overruled, permission to answer over should be granted. *Campbell v. Savage*, 33 Ark. 678.

Overruling Demurrer.—The proper judgment on overruling a demurrer is *respondeat ouster*. *Campbell v. Savage*, 33 Ark. 678. See also the title "**Cross-Bills**," XVII.

Objections to Sufficiency.—The Wisconsin statute provides that the party against whom relief is demanded in the cross-complaint may answer or demur thereto, or "may object thereto at the trial for insufficiency." The court or judge may make such orders for the service of pleadings as shall be just. St., 1898, §2656a.

Where there is no cross-complaint, a paper filed by plaintiff styled "an an-

swer to defendant's complaint" must be ignored. *Carroll v. Girard Fire Ins. Co.*, 72 Cal. 297, 13 Pac. 863.

A paper which is merely a repetition of the answer is not a cross-complaint and does not require an answer. *Banning v. Banning*, 80 Cal. 271, 22 Pac. 210, 13 Am. St. Rep. 156. See also the title, "**Cross-Bills**," XII, XIII, XIV.

Demurrer Instead of Motion To Strike.—When a demurrer to a cross-petition is sustained, the fact that it would have been better practice to have moved to strike is immaterial, where the right conclusion was reached. *Mattingly v. Eversole* (Ky.), 113 S. W. 447.

54. *Fritts v. Kirchdorfer*, 136 Ky. 643, 124 S. W. 882.

55. *Smith v. King of Arizona M. & M. Co.*, 9 Ariz. 228, 80 Pac. 357, citing *Coburn v. Cedar Val. L. & C. Co.*, 138 U. S. 221, 11 Sup. Ct. 258, 34 L. ed. 876; *Kelsey v. Hobby*, 16 Pet. (U. S.) 269, 10 L. ed. 961.

Objection to Cross-Complaint.—It is too late to present for the first time to the appellate court objections that the cross-complaint was filed too late and did not come within the provisions of the statute. *Riverside Heights, etc. Co. v. Riverside Trust Co.*, 148 Cal. 457, 469, 83 Pac. 1003.

56. *Culmer v. Caine*, 22 Utah 216, 61 Pac. 1008.

57. *Vance v. Smith*, 124 Cal. 219, 56 Pac. 1031. See also the title "**Cross-Bills**," XV.

58. *Lewis v. Fox*, 122 Cal. 244, 54 Pac. 823.

XV. HEARING.—The issues raised by the cross-complaint must first be disposed of.⁵⁹

XVI. DISMISSAL OF ACTION AFTER FILING CROSS-COMPLAINT.—After the filing of a cross-complaint entitling defendant to affirmative relief, the original action cannot be dismissed without the consent of the cross-complainant,⁶⁰ nor will a nonsuit prevent the trial of the issues arising upon a cross-complaint.⁶¹

Where a court having authority to do so strikes a cross-complaint from the files, the plaintiff in the absence of a pleading asking affirmative relief, may at any time dismiss his action.⁶²

Dismissal of Cross-Complaint by Cross-Complainant.—Where the answer to the cross-complaint seeks affirmative relief, the cross-complainant cannot dismiss the cross-complaint over the objection of the plaintiff in the original action.⁶³

XVII. ENTRY OF JUDGMENT.—In California judgment by default on failure to answer may be entered on a cross-complaint served on the attorney for the original plaintiff, a written acknowledgment of service by him being sufficient proof of due service.⁶⁴

XVIII. APPEAL.—A. FROM ORDER OF DISMISSAL.—An order dismissing a cross-complaint is reviewable on appeal from the final judgment.⁶⁵

B. PRESUMPTIONS ON APPEAL FROM JUDGMENT.—1. **Sufficiency of Evidence.**—On an appeal from a judgment for the defendant

59. *Haggin v. Raymond*, 67 Cal. 302, 7 Pac. 721; *Whittier v. Stege*, 61 Cal. 238 (these were both actions in ejectment). And see *Carroll v. Bowne*, 55 Ore. 316, 106 Pac. 331; and the title "Cross-Bills," XV.

In Arkansas it is provided that the filing of the cross-complaint shall not delay the trial and decision of the original action "when a judgment can be rendered therein that will not prejudice the rights of the parties to the cross-complaint." Kirby's Dig. §6088, subd. 3.

60. *Rodgers v. Parker*, 136 Cal. 313, 68 Pac. 975; *Islais & S. W. Co. v. Allen*, 132 Cal. 432, 64 Pac. 713; *Mott v. Mott*, 82 Cal. 413, 22 Pac. 1140.

Effect of Amended Complaint on Cross-Complaint.—An amended complaint does not supersede all other pleadings in the case, and does not affect a cross-complaint nor the issues raised thereon, and the dismissal of the amended complaint on demurrer will not cause the fall of the cross-complaint. *Mott v. Mott*, 82 Cal. 413, 22 Pac. 1140, distinguishing *Thompson v. Johnson*, 60 Cal. 292.

61. *Smith v. King of Arizona M. & M. Co.*, 9 Ariz. 228, 80 Pac. 357 (vol-

untary nonsuit); *Warner v. Darrow*, 91 Cal. 309, 27 Pac. 737.

62. *Alpers v. Bliss*, 145 Cal. 565, 79 Pac. 171.

A cross-complaint will not ordinarily be stricken out when plaintiff's purpose in striking same is that he might thereupon dismiss his action. *Islais & Salinas Water Co. v. Allen*, 132 Cal. 432, 64 Pac. 713.

When Cross-Complaint Falls With Complaint.—In an action for the enforcement of a lien upon real estate, the cross-complaint is a mere dependency of the original complaint, and where the court has no jurisdiction of the action it falls with the original. *Southern Pac. R. Co. v. Pixley*, 103 Cal. 118, 37 Pac. 194.

63. *Rodgers v. Parker*, 136 Cal. 313, 68 Pac. 975. See also the title "Cross-Bills," XVI.

64. *Wood v. Johnston*, 8 Cal. App. 258, 96 Pac. 508.

65. In California.—On an appeal from a final judgment, an order striking out a cross-complaint may be reviewed, and such order is deemed excepted to under the provisions of §647 of the Code of Civ. Proc. *Alpers v. Bliss*, 145 Cal. 565, 79 Pac. 171.

rendered on the cross-complaint where the record does not contain the evidence, and there is nothing before the court to show that any objection or exception was made to any of the evidence, it will be presumed that sufficient evidence was introduced to justify the findings and the judgment.⁶⁶

2. Variance. — An omission in a cross-complaint that would have been fatal on special demurrer, but which was supplied without objection at the trial is cured by verdict, and an objection that there is a variance between the pleading and the proof cannot be maintained on appeal.⁶⁷

<p>66. <i>Abner-Doble Co. v. Keystone Consol. Min. Co.</i>, 145 Cal. 490, 78 Pac. 1050. And see the title "Appeals."</p>	<p>67. <i>Abner-Doble Co. v. Keystone Consol. Min. Co.</i>, 145 Cal. 490, 78 Pac. 1050.</p>
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CROSS DEMAND. — See **Set-Off** and **Counterclaim**; **Recoupment**.

CROSSINGS. — See **Negligence**; **Railroads**.

Vol. VI

CRUELTY TO ANIMALS

By H. W. WILLIAMS,
Of the California Bar.

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CROSS-REFERENCES:

Animals; Warrants.
Indictment and Information;

Scope of Article.— This article is limited strictly to matters of procedure pertaining to statutory enactments designed to prevent cruelty to animals as a distinct offense; it does not include either civil actions or criminal prosecutions where the gravamen of the wrong or offense is the injury done the animal or property, nor injuries done the person of the owner, nor acts offensive to the public as constituting a nuisance.¹

I. CRIMINAL PROSECUTIONS.—A. COMMON LAW AND STATUTORY PROVISIONS.—At common law cruelty to animals was not indictable unless it partook of the nature of a trespass or of a nuisance.²

1. See the titles "Assault and Battery;" "Malicious Mischief;" "Nuisance;" "Trespass."

2. Ark.—Grise *v.* State, 37 Ark.
456. Colo.—Walters *v.* People, 23 Colo.
33, 46 Pac. 112. N. Y.—People *v.*

Most of the states, however, have now enacted laws making such cruelty of itself an offense as being against public morals.³ These statutes are to be reasonably construed with a view to making them effective.⁴

B. JURISDICTION.—By the statute in most states the jurisdiction over the offense is given to that particular court having jurisdiction over minor offenses.⁵ A court of equity has no jurisdiction.⁶

Brunell, 48 How. Pr. 435. *Ohio*.—Beamer v. State, 21 Ohio C. C. 440.

Cruelty to animals by the owner thereof was not punishable at common law unless done in such a manner as to amount to a nuisance or something in the nature of a nuisance. *State v. Smith*, 21 Tex. 748. See also *Benson v. State*, 1 Tex. App. 6.

"The common law does not punish cruelty to animals except in so far as it affects the right of property of individuals." *Branch v. State*, 41 Tex. 622. See also *State v. Bruner*, 111 Ind. 98, 12 N. E. 103.

"If cruelty to animals was a criminal offense at common law, which some writers deny, it was superseded so entirely in England by statutes as to pass out of existence." *State v. Prater*, 130 Mo. App. 348, 109 S. W. 1047.

Cruelty done to an animal in a public place is indictable at common law as a nuisance. *United States v. Jackson*, 4 Cranch C. C. 483, 26 Fed. Cas. No. 15,453; *United States v. Logan*, 2 Cranch C. C. 259, 26 Fed. Cas. No. 15,624.

3. "It is of common knowledge that within the past few years, as incident to the progress of civilization, and as the direct outgrowth of that tender solicitude for the brute creation which keeps pace with man's increased knowledge of their life and habits, laws, such as the one under consideration have been created by the various states having the common object of protecting these dumb creatures from ill treatment. Their aim is not only to protect these animals, but to conserve public morals, both of which are undoubtedly proper subjects of legislation." *Waters v. People*, 23 Colo. 33, 46 Pac. 112. See also *People v. Brunell*, 48 How. Pr. (N. Y.) 435.

Such statutes are constitutional as being a valid exercise of the police power. *Beamer v. State*, 21 Ohio C. C. 440.

Delegation of Power To Punish.—The legislature may delegate to municipal corporations the power to prosecute under city ordinances. *Porter v. Vinzant*, 49 Fla. 213, 38 So. 607.

4. In construing a statute against "needlessly killing," the court says "such acts are to be construed to give them, if possible, some beneficent effect, without running into such absurdities as would, in the end, make them dead letters. A literal construction of them would have that effect. Society, for instance, could not long tolerate a system of laws, which might drag to the criminal bar, every lady who might impale a butterfly, or every man who might drown a litter of kittens, to answer there, and show that the act was needful." *Grise v. State*, 37 Ark. 456.

5. In *New York* the court of special sessions has exclusive jurisdiction. The proceedings cannot be by indictment unless a certificate has been procured from a county judge or judge of the supreme court that it is reasonable to prosecute by indictment. *People v. Davy*, 32 N. Y. Supp. 106. See also *Code Civ. Proc.* §§56, 57. Compare *People v. Knatt*, 156 N. Y. 302, 50 N. E. 835.

In *North Carolina*.—The original jurisdiction is in the court of a justice of the peace. The superior court has no jurisdiction. *State v. Bossee*, 145 N. C. 579, 59 S. E. 875. See also *State v. Neal*, 120 N. C. 613, 27 S. E. 81.

6. An agent for the society for the prevention of cruelty to animals having threatened parties with summary arrest under the statute, they sought to enjoin the society. "The only question for contestation was whether, as a matter of fact, they were guilty or innocent of such violation; and the determination of that question could not, by such an action as this, be drawn to a court of equity." *Davis v. American Soc.*, 75 N. Y. 362.

C. FORMER CONVICTION AS BAR. — A plea in bar of a former conviction will not be sustained by proof of conviction for other acts of cruelty during the progress of the same undertaking.⁷

D. INDICTMENT, INFORMATION AND COMPLAINT. — FORMAL REQUISITES. — The indictment need not be endorsed with the prosecutor's name.⁸

Misjoinder. — A count for cruelty to animals may be joined with one for malicious mischief,⁹ but must be a separate and distinct count.¹⁰

The prosecution may elect whether to take out separate summons or only one where acts are done to different animals at the same time.¹¹

Duplicity. — A complaint is bad for duplicity which charges jointly acts prohibited by separate clauses of the statute.¹² But merely charging in the several ways mentioned in one clause is not objectionable.¹³

An indictment is not bad as charging more than one offense where the objectionable fact can be treated as surplusage.¹⁴

Repugnancy. — Where all the acts complained of might naturally be done at the same time a complaint is not repugnant which charges the acts in several ways.¹⁵

Charging as Continuing Offense. — Where the nature of the acts charged

7. Defendant was a contractor and was convicted of cruel treatment of a certain brown gelding mule and plead such conviction in bar to a prosecution for cruelty to a certain brown mare mule. The acts occurred on the same day, both animals being used in the same work but driven by different drivers. *Wood v. State*, 10 Ohio C. C. (N. S.) 371.

8. The statutory requirement as to indorsement applies only where there has been a trespass against the person or property of another. *State v. Goss*, 74 Mo. 592.

9. An indictment is not demurrable which charges in separate counts an offense under §5093 of the code which is directed against cruelty to animals and §5091 of the code which is directed against malicious mischief. *Swanson v. State*, 120 Ala. 376, 25 So. 213.

10. It is not sufficient to merely separate them by a comma. *Porter v. State*, 48 Tex. Crim. 125, 86 S. W. 767.

11. Defendant was charged with cruelty to five different animals at one time. It was held that one summons was all that was necessary though five separate summons might have been issued. *Rex v. Cable*, L. R. (1906) 1 K. B. 719.

12. A complaint is bad for duplicity which charges an offense under one

clause of the statute directed against cruel acts done to the animal, and another clause directed against omissions to provide the animal with proper food, drink and shelter. *State v. Haskell*, 76 Me. 399.

13. A complaint that defendant "unlawfully and cruelly did beat and torture a certain horse of the property of him the said" complainant and another person, does not charge two offenses. *Com. v. Lufkin*, 7 Allen (Mass.) 579.

14. An indictment that defendant "did unlawfully and wilfully and cruelly, beat, shoot, torture and otherwise ill-treat" is not fatally defective as charging more than one distinct offense. The shooting and otherwise ill-treating is mere surplusage. If the intention was to charge defendant with the shooting it should have been done in a separate count charging him with torturing by shooting. *State v. Gould*, 26 W. Va. 258.

15. A complaint that defendant did "cruelly and unlawfully torment, torture, maim, beat, wound, and deprive of necessary sustenance" is not repugnant as alleging that the offense was committed in inconsistent ways. "It is not unnatural or inconsistent to say that all of the acts thus alleged were done to the horse at the same time." *State v. Haskell*, 76 Me. 399.

permits, the indictment may charge the same as a continuing offense.¹⁶

Following Language of Statute.—Generally speaking, it is sufficient to follow the language of the statute in charging the offense.¹⁷ But this rule, of course, is subject to the exception that the words of the statute must be definite and certain.¹⁸ It is not necessary to lay the charge

16. The offense of overworking animals and of neglecting to properly care for them is of a continuing nature and may be alleged as having been on a certain day and certain other days immediately following. *State v. Bosworth*, 54 Conn. 1, 4 Atl. 248. See also *State v. Cook*, 75 Conn. 267, 53 Atl. 589.

17. **Ark.**—*State v. Greenless*, 41 Ark. 353. **Md.**—*State v. Faulkenham*, 73 Md. 463, 21 Atl. 370. **Mass.**—*Com. v. Thornton*, 113 Mass. 457. **Minn.**—*State v. Comfort*, 22 Minn. 271. **Mo.**—*State v. Goss*, 74 Mo. 592; *State v. Prater*, 130 Mo. App. 348, 109 S. W. 1047; *State v. Haley*, 52 Mo. App. 520; *State v. Hackfath*, 20 Mo. App. 614. **Tex.**—*Benson v. State*, 1 Tex. App. 6.

A count that defendant "was guilty of cruelty to a certain animal, to wit, a pony horse, by then and there unlawfully causing the death of said animal by then and there failing to provide the said animal with proper shelter" does not charge defendant either with "cruelly killing" or "with unnecessarily failing to provide . . . with proper food, drink and shelter." *Ferrias v. People*, 71 Ill. App. 559.

"We do not think it was necessary to describe the injury. The statute does not do so, and ordinarily it is sufficient to follow the language of the statute. This is so unless some sufficient reason exists for greater particularity." *State v. Giles*, 125 Ind. 124, 25 N. E. 159.

Charging in the language of the statute "did then and there cruelly drive" a horse is sufficient without a further allegation that defendant knew the horse to be unfit for labor at the time. *Com. v. Porter*, 164 Mass. 576, 42 N. E. 97.

The added words "and cruelly" are immaterial and may be treated as surplusage, the language of the statute being "unnecessarily fail to provide." *Com. v. Edmands*, 162 Mass. 517, 39 N. E. 183. To same effect, *Com. v. Flannigan*, 137 Mass. 560.

"Wilfully and maliciously and cruel-

ly maim, wound, beat and torture to death eight pigs" is a substantial following of the statute which reads "wilfully and maliciously or cruelly maim, beat or torture any horse, ox or other cattle." *State v. Pruett*, 61 Mo. App. 156.

"Did unlawfully and wilfully overdrive, torture, torment, cruelly beat and needlessly mutilate a certain cow, the property of, etc., by beating said cow and twisting off her tail," sufficiently alleges the offense denounced by the statute. *State v. Allison*, 90 N. C. 733.

An indictment that the defendant did "knowingly, wilfully and needlessly act in a cruel manner towards a certain fowl, to wit, a chicken, by killing said chicken, the said chicken being a useful fowl, etc., this (rejecting refinement. The Code, §1183) is an intelligible charge that the defendant was guilty of cruelty to the useful fowl by needlessly and wilfully killing it." *State v. Neal*, 120 N. C. 613, 27 S. E. 81.

18. North Carolina Code, §2483 (Rev. 1905, §3299) provides as follows: "If any person shall wilfully overdrive, overload, wound, injure, torture, torment, deprive of necessary sustenance, or cruelly beat, or needlessly mutilate or kill, or cause to procure to be overdriven, overloaded, wounded, injured, tormented, tortured or deprived of necessary sustenance, or to be cruelly beaten, needlessly mutilated or killed as aforesaid, any useful beast, fowl or animal, etc." In *State v. Watkins*, 101 N. C. 702, 8 S. E. 346, the court says: "In the statute recited above the words 'beat,' 'cruelly beat,' 'wound' and 'kill' of themselves respectively, taken in the proper connection, imply sufficiently the act forbidden and the offense charged. . . . The words of the statute mentioned, 'overloaded,' 'injured,' 'tortured,' 'and tormented,' do not imply or describe the acts charged to have been done with certainty; they each imply a variety of acts that may or may

in the very language of the statute;¹⁹ equivalent words will do.

Manner of Inflicting the Injury. — It has been said in a general way that the mode, manner and means used to accomplish the crime need not be averred.²⁰ And doubtless this is true where stating the offense in the words of the statute would be sufficient under the ordinary rules of criminal pleading,²¹ but where the statute itself uses general terms it is of course necessary to particularize.²²

not constitute the offense or parts of it. The acts should be so specified and charged as to show that they mean what the statute intends by overdriving, injury, torture and torment."

"Overdriving," "overloading," "depriving of necessary maintenance," "needlessly mutilating," "needlessly killing" are sufficiently descriptive words. "Torturing" or "tormenting" are not. *State v. Gould*, 26 W. Va. 258.

So it is sufficient to use the statutory word "maim," for though that is more correctly applied to human beings it also has the meaning "to cripple." *Turman v. State*, 4 Tex. App. 586.

So "did cruelly beat" is a sufficient allegation without further certainty as to the meaning of either words. It was contended that "beat" "may refer to a race or some other act of contest," and that additional words besides "cruelly" should be used to show that the act was wilful and not accidental. *Com. v. McClellan*, 101 Mass. 34.

An indictment sufficiently follows the statute which charges defendant with "shooting" a cow, the statutory word being "wounded." "Shooting necessarily includes wounding." *State v. Butts*, 92 N. C. 784, following *State v. Lonon*, 22 Mass. 449, wherein it is said: "In criminal cases the definition of wound is an injury to the person by which the skin is broken."

19. It is enough to use language of equivalent import. So it is enough to allege in a complaint that the offense was "by wilfully and unlawfully cruelly beating" without alleging malice. *Ex parte Mauch*, 134 Cal. 500, 66 Pac. 734.

But of course all the elements of the offense must be charged. So where the statute forbids acts being done maliciously or needlessly, the complaint must contain either a direct averment or a statement of facts from which it can be inferred that the act was ma-

liciously or needlessly done. *Warner v. Percy*, 14 Hun (N. Y.) 337.

20. "The means and instruments made use of to accomplish it are not matters of pleading but of proof." *State v. Falkenham*, 73 Md. 463, 21 Atl. 370.

The mode or manner of the beating, wounding and torturing, or the means used, need not be averred. *State v. Goss*, 74 Mo. 592.

21. An indictment charging that defendant "did unlawfully and needlessly kill" is sufficient under a statute forbidding "needlessly killing" without further specification as to the means by which the killing was accomplished such as would be required in an indictment for murder. *State v. Greenlees*, 41 Ark. 353.

"If the offence charged be overdriving, overloading or depriving of necessary sustenance, or needlessly mutilating or needlessly killing, it would be sufficient in an indictment to use the words of the statute, without a particular statement of facts and circumstances." *State v. Gould*, 26 W. Va. 258.

22. "The term 'mutilation' as used in the statute is general; the indictment or information based upon that statute must show the kind and character of the mutilation." *Avery v. People*, 11 Ill. App. 332.

"In charging the offense of torturing or mutilating an animal, the method of torture or mutilation as well as the effect produced ought to be stated." *State v. Bruner*, 111 Ind. 98, 12 N. E. 103. See also *State v. Giles*, 125 Ind. 124, 25 N. E. 159.

A charge in an affidavit that the offense consisted in "turpentine and burning, in a cruel and wanton manner," while not an apt and full description of the offense, fairly infers that turpentine was put on the animal thereby causing it to be burned in a cruel and wanton manner. *State v. Bruner*, 111 Ind. 98, 12 N. E. 103.

Description of the Animal.—Great particularity of description is not required.²³ It is sufficient to so describe that defendant will know with certainty of what he is accused.²⁴

Value of Animal.—The value of the animal need not be stated.²⁵

Ownership of Animal.—It is unnecessary to allege that the animal is the property of any person,²⁶ or to give the owner's name.²⁷ But if owner's name be given it must be proved as alleged.²⁸

Custody and Control.—Under statutes directed against persons having the "custody and control" of animals, an averment thereof in some form is necessary.²⁹ A mere statement that defendant is the owner

In *State v. Pugh*, 15 Mo. 509, wherein the particular act charged was tying brush and boards on the tail of a mare, the court said further allegations showing how that constituted "torture" should have been made. See also *State v. Haley*, 52 Mo. App. 520.

The words "torture, torment and act in a cruel manner" are not alone sufficient. They should be aided by charging acts that show what is meant. If the charge contained in the proper connection one or more of the words, "beat, wound, shoot, kill," and the like, the indictment would be sufficient. *State v. Watkins*, 101 N. C. 702, 8 S. E. 346.

"If the offense be torturing or tormenting . . . it should more particularly describe the acts which constitute the torturing or which constitute the tormenting as the case may be." *State v. Gould*, 26 W. Va. 258.

23. "It is not necessary to describe the horse particularly for the sake of distinguishing it from other horses." *Com. v. McClellan*, 101 Mass. 34. To same effect, see *Com. v. Whitman*, 118 Mass. 458.

Description of the animal injured as "a certain horse, a dumb animal under the statute," is sufficient. The color need not be stated. *Benson v. State*, 1 Tex. App. 6.

"Cruelly beating a certain beast called a mule" is sufficient. It is not necessary to allege that it is a "domestic animal." "We would be bound to take notice judicially that in this State a mule is a domestic animal, and that there are no wild mules in this State." *State v. Gould*, 26 W. Va. 258.

24. A description of the animal as "one red sandy-colored barrow, marked crop off the left ear and split, and unberbit in the right" is sufficient.

The court says both defendant and his counsel "seem to have understood that the word 'barrow' indicated an animal of the hog family" and that the balance of the description was even more particular than necessary. *State v. Greenlees*, 41 Ark. 353.

25. *State v. Greenlees*, 41 Ark. 353; *Grise v. State*, 37 Ark. 456; *State v. Gould*, 26 W. Va. 258.

26. *Com. v. Whitman*, 118 Mass. 458; *Com. v. McClellan*, 101 Mass. 34.

27. *State v. Brocker*, 32 Tex. 611, *overruling State v. Smith*, 21 Tex. 748. See also: *Ark.*—*State v. Greenlees*, 41 Ark. 353; *Grise v. State*, 37 Ark. 456. *Tex.*—*Darnell v. State*, 6 Tex. App. 482; *Turman v. State*, 4 Tex. App. 586; *Benson v. State*, 1 Tex. App. 6. *Va.* *State v. Gould*, 26 W. Va. 258.

28. *State v. Bruner*, 111 Ind. 98, 12 N. E. 103; *Collier v. State*, 4 Tex. App. 12; *Rose v. State*, 1 Tex. App. 400.

29. The words "the charge and custody" are a necessary averment in a complaint under a statute directed against one having the "charge or custody" of an animal. *State v. Haskell*, 76 Me. 399.

Under a statute directed against one "having the charge or custody" of an animal, it is sufficient to allege in the complaint that defendant had the "custody and control." Being disjunctively placed in the statute they need not be conjunctively averred and must not be disjunctively averred. Therefore the statute word "custody" sufficiently charges defendant's control. *State v. Clark*, 86 Me. 194, 29 Atl. 984.

Treated as Surplusage.—The words "having the control and custody of" may be treated as surplusage under that part of the statute which has to do with such treatment generally. *Com. v. Whitman*, 118 Mass. 458.

is not sufficient.³⁰ But it is not necessary to define in the complaint the exact nature of defendant's custody.³¹

The same particularity as is required of indictments is not required in affidavits.³²

E. INSTRUCTIONS. — Considerable particularity is required in defining the terms of the statutes to the jury.³³ But of course the at-

30. The indictment must charge that the defendant had the charge or custody of the animal. It is not sufficient to charge him merely with being the owner. It cannot be presumed merely because he is the owner that he has the charge and custody. *State v. Spink*, 19 R. I. 353, 36 Atl. 91.

31. Where the statute reads "having the charge or custody thereof as owner or otherwise" it is not necessary to define in the complaint the nature of defendant's custody as "owner or otherwise." *State v. Clark*, 86 Me. 194, 29 Atl. 984.

32. An affidavit charging that defendant "did confine a cow in a lot or other inclosure" in substance is an averment that he "had charge or custody of the animal either as owner or otherwise" within §6232 of the code relating to cruelty to animals. *Christian v. State (Ala.)*, 54 So. 1001.

33. An instruction on the words "wilful" and "wanton" as used in the statute should be given, so that the jury may understand the term is broader than the ordinary meaning of "wilful," which is intentional as opposed to accidental, whereas the statute contemplates an act done without legal excuse. *Thomas v. State*, 14 Tex. App. 200.

The defendant is entitled to have the meaning of the statutory terms impressed upon the jury. Under this rule an instruction "Needlessly means without necessity, or unnecessarily, as where one kills a domesticated animal of another, either in mere wantonness or to satisfy a depraved disposition, or for sport or pastime or to gratify one's anger," is not sufficiently instructive to warrant refusal of further instructions in substance that the act must be "wanton and cruel, not the result of necessity or reasonable cause;" and that the statute "meant a killing in mere idle wantonness, without being in any sense whatever beneficial or useful to defendant." *Grise v. State*, 37 Ark. 456.

Instructions as to "needlessly" are not sufficiently explicit which state that it is "without necessity or unnecessarily causing it to be done," and which further instruct that the circumstances of defendant having set a trap may be looked to "in connection with all the evidence in the case to determine whether the injury to the animal was needlessly caused or not." There should have been further instructions as to defendant's rights to protect his property from marauding animals as that if it was necessary to set traps to accomplish this and the animal so marauding was caught and mutilated thereby it would not be needless torture or mutilation within the statute. *Hodge v. State*, 11 Lea (Tenn.) 528.

An instruction that if "in the proper exercise of his own judgment he thought he was not overdriving the horse, he must be acquitted" is a sufficient instruction that defendant could not be convicted unless upon proof that he knowingly and intentionally overdrove. The words mean the honest exercise of his judgment as distinguished from mere recklessness of consequences or wilful cruelty. *Com. v. Wood*, 111 Mass. 408.

Defendant requested an instruction in effect that if the beating was inflicted for the purpose of correcting a vicious habit of the horse no offense was committed, though the beating was more severe than was necessary for that purpose. The court instructed in effect that the jury should not consider whether defendant's method of training horses by beating was good or bad or better or worse than some other method, for if the beating was for the single purpose of breaking the animal of a vicious habit defendant committed no crime so long as he did not go beyond his own rule, yet if he went further and the beating was aggravated from malice or passion, such excess should be considered. This instruction was not misleading and substantially

tention of the jury must not be particularly directed to an immaterial matter,³⁴ and instructions need not be given on matters not in the case.³⁵

F. BURDEN OF PROOF.—In prosecutions wherein the cruel killing of an animal is involved the burden is on the prosecution to show not only the fact of the killing, but that it was done in the manner inhibited by the statute.³⁶

G. QUESTION FOR JURY.—The wilfulness with which the act was done is one of fact for the jury.³⁷

H. PUNISHMENT.—In the absence of any statutory right, a requirement that defendant give bonds to keep the peace in addition to punishment by fine or imprisonment is improper.³⁸

followed defendant's request. *State v. Avery*, 44 N. H. 392.

Form of general charge covering an indictment averring in several counts that defendant had "over-driven," "over-loaded," and "tortured and tormented" certain horses. See *People v. Brunell*, 48 How. Pr. (N. Y.) 435.

34. "The attention of the jury was pointedly directed to defendant's want of authority to do anything whatever to the horse." This may have lead the jury to believe that the cruel treatment contemplated by the statute is in some manner affected by the fact of ownership. *Com. v. Lufkin*, 7 Allen (Mass.) 579.

35. Where there is no aspect of the evidence tending to show an accidental killing, the court need not charge on wilful intent. *State v. Neal*, 120 N. C. 613, 27 S. E. 81.

Harmless Error.—A wrongful instruction on the question of justification is harmless where there is no evidence tending to show that defendant was justified in doing as he did. *State v. Neal*, 120 N. C. 613, 27 S. E. 81.

36. The burden is on the prosecution to prove that the killing was "knowingly, wilfully and needlessly" done. "It was not incumbent on the defendant to prove justification. It is not like the killing of a human being which if done with a deadly weapon raises a presumption of malice." *State v. Neal*, 120 N. C. 613, 27 S. E. 81.

The burden is on the state to prove not only the fact of the killing but that it was wilfully and wantonly done. *Thomas v. State*, 14 Tex. App. 200.

In a prosecution for "needlessly killing" an animal the burden is on the state to prove not only the killing but that it was done under such circumstances as unexplained would authorize the jury to believe that it was needless in the sense of the statute. *Grise v. State*, 37 Ark. 456.

37. Defendant who was chief of police knocked down with a rock a horse running wild on the street and in such a manner as to be an apparent menace to persons on the street. The trial court instructed the jury to bring in a verdict of guilty. *State v. Isley*, 119 N. C. 862, 26 S. E. 35.

A request to charge is properly refused which amounts to asking that the jury be instructed that as a matter of course the defendant if intoxicated could not have the wilful and malicious intent essential to the commission of the offense. *State v. Avery*, 44 N. H. 392.

38. The attempt was to inflict this under a supposed common law right to impose such bonds in all cases of misdemeanor. After an elaborate review of the cases the court concluded that the right was at best doubtful in any case, but that a misdemeanor of this kind was not such as would warrant its being done even at common law. *State v. Gould*, 26 W. Va. 258.

To Whom Fine Is Payable.—In some states the fine or part thereof is payable to the Society for the Prevention of Cruelty to Animals. As illustrative of this, see *American Society for the Prevention of Cruelty to Animals v. City of Gloverville*, 78 Hun 40, 29 N. Y. Supp. 257. And see the title "Fines."

II. STATUTORY ACTION FOR PENALTY.³⁹ — A. NATURE OF REMEDY. — In New Jersey, there is a statutory action for the recovery of a penalty by societies for the prevention of cruelty to animals⁴⁰ which is penal in its nature but not criminal.⁴¹

B. JURISDICTION. — The action is triable by a justice of the peace⁴² except where such justice's jurisdiction is limited by the general statutes relating to the jurisdiction of the district court.⁴³

C. RIGHT TO JURY TRIAL. — Defendant is entitled to a trial by jury.⁴⁴

D. AFFIDAVIT. — An affidavit of the violation of the statute is an essential prerequisite to the issuing of process.⁴⁵

E. COMPLAINT. — The complaint is to be treated as a state of demand setting out the plaintiff's cause of action.⁴⁶

The complaint should follow the statute *in haec verba*, or clearly equivalent words must be used.⁴⁷

F. FIXING PENALTY. — The amount of the penalty is to be fixed by the judge.⁴⁸

G. APPELLATE PROCEDURE. — Proceedings for review of justices'

39. Actions for penalties for malicious mischief, by owner of animal, see the title "Malicious Mischief."

40. New Jersey Comp. St. (1910), pp. 59, 60, provide that any person guilty of cruelty to animals "shall forfeit and pay such sum, not to exceed one hundred dollars, together with costs, as the court shall determine, to be sued for and recovered in an action of debt, with costs of suit, by any person or persons in the name of the New Jersey society for the prevention of cruelty to animals, before any justice of the peace, district court or police magistrate in the county or city where the defendant resides, or where the offense or offenses were committed." See *New Jersey Soc. v. Rosen* (N. J.), 31 Atl. 496.

41. The statute is penal in its nature and must be strictly construed. *Roeber v. Society*, 47 N. J. L. 237.

Though penal it is not criminal but civil in its nature. *Pennsylvania R. Co. v. New Jersey Soc.*, 39 N. J. L. 400.

42. *Pennsylvania R. Co. v. New Jersey Soc.*, 39 N. J. L. 400. And see statute, *supra*.

43. The jurisdiction given by this statute is, as to a justice of Atlantic City, taken away by the district court

act providing that no justice of the peace shall have jurisdiction over any cause or proceeding cognizable before a district court when the defendant resides within any city where a district court is established. *New Jersey Soc. v. Compton*, 71 N. J. L. 86, 53 Atl. 110.

44. *New Jersey Soc. v. Atkinson*, 76 N. J. L. 286, 69 Atl. 976; *New Jersey Soc. v. Wilbur*, 76 N. J. L. 266, 69 Atl. 1010; *New Jersey Soc. v. Rosen* (N. J.), 31 Atl. 496.

45. *Roeber v. Society*, 47 N. J. L. 237. See also N. J. Comp. St. (1910) p. 60.

46. *Roeber v. Society*, 47 N. J. L. 237.

47. Statute says "any persons who shall by their agents, servants, employes or otherwise, cause or procure to be tortured, tormented or cruelly beaten." It is not sufficient to allege merely that the defendant "did by his agent and employe cruelly torture, etc." *Roeber v. Society*, 47 N. J. L. 237.

48. It is a mere formal error for the court to assess damages at a certain sum instead of determining the amount of the penalty and rendering judgment therefor with costs. *New Jersey Soc. v. Atkinson*, 76 N. J. L. 286, 69 Atl. 976.

or magistrates' judgments are by appeal, not by certiorari,⁴⁹ the proceedings thereupon being in the nature of an appeal from the courts for the trial of small causes.⁵⁰

49. *Pennsylvania R. Co. v. New Jersey Soc.*, 39 N. J. L. 400. See also N. J. Comp. St. (1910) p. 62.

50. So questions regarding the sufficiency of the complaint and the accompanying affidavit go to the jurisdiction and may be raised for the first

time on appeal. *Roerber v. Society*, 7 N. J. L. 237.

So the aggrieved party is entitled to relief both as to matter of law and matter of fact. *Pennsylvania R. Co. v. New Jersey Soc.*, 39 N. J. L. 400.

CURTESY

By the Editorial Staff.

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- B. *For Partition*, 324
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II. ACTIONS BY TENANT BY CURTESY INITIATE, 325

III. ACTIONS AGAINST TENANT BY CURTESY, 326

I. ACTIONS BY TENANT BY CURTESY.¹—A. **TO RECOVER POSSESSION.**—The right of a surviving husband to maintain an action for the recovery of land to which he is entitled as tenant by curtesy, follows, from the rule of law giving him this estate.² An

1. Definition.—In 1 Coke Litt. 29, ch. 4, §35, it is said: "Tenant by curtesy of England is, where a man taketh a wife seised in fee simple, or in fee-tail general, or seised as heir in-tail special, and hath issue by the same wife, male or female, born alive, albeit the issue after dieth or liveth, yet, if the wife dies, the husband shall hold the land during his life, by the laws of England." And see 2 Bl. Com. 126; 4 Kent's Com. 28; Steph. Com. 246, and the following cases: **U. S.**—*Mercer v. Selden*, 1 How. 37, 11 L. ed. 38; *Stoddard v. Gibbs*, 23 Fed. Cas. No. 13,468; *Barr v. Galloway*, 2 Fed. Cas. No. 1,037. **Ala.**—*Carrington v. Richardson*, 79 Ala. 101; *Hunter v. Whitworth*, 9 Ala. 965; *Smoot v. Le-catt*, 1 Stew. 590. **Ark.**—*McDaniel v. Grace*, 15 Ark. 465. **Del.**—*Moore v. Darby*, 6 Del. Ch. 193, 18 Atl. 763. **Ill.**—*McNeer v. McNeer*, 142 Ill. 388, 32 N. E. 681. **Ind.**—*Luntz v. Greve*, 102 Ind. 173, 26 N. E. 128. **Miss.**—*Redus v. Hayden*, 43 Miss. 614; *Ryan v. Freeman*, 36 Miss. 175; *Day v. Cochran*, 24 Miss. 261. **Mo.**—*Register v. Elder*, 231 Mo. 321, 132 S. W. 699; *Donovan v. Griffith*, 215 Mo. 149, 114 S. W. 621. **Neb.**—*Forbes v. Sweezy*, 8 Neb. 520. **N. Y.**—*Billings v. Baker*, 28

Barb. 343. **Ohio.**—*Canby v. Porter*, 12 Ohio 80, holding that the husband's estate by curtesy, after issue born alive,³ is a freehold estate during the joint lives of himself and wife. **Pa.** *McMasters v. Negley*, 152 Pa. 303, 25 Atl. 641. **S. C.**—*Withers v. Jenkins*, 14 S. C. 597. **Va.**—*Breeding v. Davis*, 77 Va. 639, 46 Am. Rep. 740, where the statutory changes of the common law rules are discussed. **W. Va.**—*Winkler v. Winkler's Exrs.*, 18 W. Va. 455. **Wis.**—*Westcott v. Miller*, 42 Wis. 454.

An estate by curtesy does not exist in California, Georgia, Illinois, Indiana, Kansas, Louisiana, Michigan and Texas.

In some states, however, a dower right of the husband is recognized as a substitute for curtesy. See the title "**Dower, Writ of.**"

2. *Hays v. Lemoine*, 156 Ala. 465, 47 So. 97; *Hall v. Hall*, 32 Ohio St. 184.

A conveyance from husband to wife does not create any presumption of an intention to preclude his rights of curtesy, such estate being created by operation of law. *Depue v. Miller*, 65 W. Va. 120, 64 S. E. 740, 23 L. R. A. (N. S.) 775.

action of ejectment,³ or trespass, to try title,⁴ is appropriate, to enable a tenant by curtesy to recover the estate to which he is entitled;⁵ and the writ of right cannot be resorted to for such purpose, even where recognized for other purposes.⁶

A tenant by curtesy, having an undivided half-interest in property, is a proper party plaintiff in an action of ejectment to recover possession of the land.⁷

B. FOR PARTITION.—A tenant by curtesy may sue for partition of an undivided share in property,⁸ but not where he is a tenant by

Burden of Proof.—In an action to recover land, where defendant claimed a life estate by curtesy, the land having been devised to her, subject to a life estate, the burden of proof was on defendant, to show facts by which he was entitled to curtesy, namely, that the life tenant died before his wife. *Maupin v. Maupin's Guardian*, 33 Ky. L. Rep. 658, 110 S. W. 840.

Marriage Settlement.—The question whether a marriage settlement is intended to exclude the husband from his right to curtesy, may be submitted to the jury, to be construed in the light of the other circumstances and conditions surrounding the parties at the time of marriage. *Mason v. Deese*, 30 Ga. 308.

3. *Hays v. Lemoine*, 156 Ala. 465, 47 So. 97; *Lecatt v. Merchants Ins. Co.*, 16 Ala. 177, 50 Am. Dec. 169; *Rochon v. Lecatt*, 1 Stew. (Ala.) 609; *McMasters v. Negley*, 152 Pa. 303, 25 Atl. 641.

Desertion.—Where the husband's right to curtesy is forfeited by his wilful desertion of her, in an action at law to recover an estate by the curtesy, proof of desertion throws the burden of proof on him, to show that he had reasonable cause for deserting her. *Bealor v. Hahn*, 132 Pa. 242, 19 Atl. 74; *Hahn v. Bealor*, 117 Pa. 169, 11 Atl. 776.

Province of Jury.—In an action of ejectment by a husband, to recover an estate by the curtesy, where it is claimed that his right was forfeited, by reason of his wilful desertion of her, it is the province of the jury to determine whether the desertion was wilful. *Hart v. McGrew* (Pa.), 11 Atl. 617.

4. *Lecatt v. Merchants Ins. Co.*, 16 Ala. 177, 50 Am. Dec. 169; *Rochon v. Lecatt*, 1 Stew. (Ala.) 609; *Smoot & Nicholson v. Lecatt*, 1 Stew. (Ala.) 590.

5. In an action to recover possession of property, claimed as tenant by curtesy, the court says in *Doe v. Collins*, 2 Houst. (Del.) 128: "To entitle a plaintiff to recover in an action like this, as tenant by the curtesy for the term of his life, on the death of his wife, of her real estate, it is incumbent upon him to prove to the satisfaction of the jury, first, that he was lawfully married to her; secondly, that his wife was seised, or possessed of an estate of inheritance in the lands in question during their marriage, and, in the next place, that he had issue, or a child, or children, born alive, by her, capable of succeeding to, or inheriting that land or a portion of it, as her heir, or heirs at law, upon her death, and lastly, her death; and if he has failed in any one of these particulars to establish it to the satisfaction of the jury, he is not entitled to such an estate in the lands, and cannot recover in the action."

6. *Lecatt v. Merchants Ins. Co.*, 16 Ala. 177, 50 Am. Dec. 169.

Where a writ of right had been brought by husband and wife, and latter died while the action was pending, the husband cannot proceed with the action and recovery by virtue of his rights to curtesy. *Ryder v. Robinson*, 2 Me. 127.

7. *Moore v. Ivers*, 83 Mo. 29.

8. *Sill v. Sill*, 185 Ill. 594, 57 N. E. 812. See also *Tilton v. Vail*, 53 Hun 324, 6 N. Y. Supp. 146, holding that a tenant, by curtesy of an undivided share in property, may sue for partition under the statute providing for partition of land held by two or more persons as joint tenant, or tenants in common; for the tenant by curtesy in such case is a tenant in common, with the other owners.

Where lands subject to curtesy are sold in partition proceedings, the interest of the proceeds belong to the

the curtesy of the whole estate, for in such case his possession is exclusive, and is not a tenant in common.⁹

C. FOR DAMAGES. — A tenant by the curtesy has sufficient interest in the property, independent of the owners of the fee, to maintain any appropriate action in law or equity to redress an injury to his right of possession, or occupation of the premises,¹⁰ and in such action the owners of the fee are not necessary parties.¹¹ However, the right of a tenant by the curtesy is limited to the occupation and possession, and such rights as are incident thereto, and he cannot, therefore, maintain an action to redress an injury to the inheritance.¹² He may also bring an action against a co-tenant for an accounting of the rents, issues and profits of the property, where the use and enjoyment has been wrongfully denied by such co-tenant.¹³

D. TO REMOVE A CLOUD ON THE TITLE. — A tenant by the curtesy may maintain a bill in equity to set aside a deed which constitutes a cloud upon his title.¹⁴

II. ACTIONS BY TENANT BY CURTESY INITIATE. — Since, at common law, a tenant by the curtesy initiate is seised of a freehold estate in his own right,¹⁵ he may maintain an action to recover possession, or to redress an injury to the possession,¹⁶ without even making

tenant by curtesy, during life, and an action will lie for an accounting of the same. *Jacques v. Ennis*, 25 N. J. Eq. 402.

Assignment.—Action will lie to assign and allot to the husband, the estate to which he is entitled by his dower right. *Gogan v. Burdick*, 182 Ill. 126, 55 N. E. 126.

9. *Tilton v. Vail*, 53 Hun 324, 6 N. Y. Supp. 146; *Reed v. Reed*, 46 Hun 212, *affirmed*, 107 N. Y. Supp. 545.

10. *Costello v. Grand Trunk R. Co.*, 70 N. H. 403, 47 Atl. 265, where an action was brought by a tenant by curtesy to compel a railroad to replace a crossing, and to recover damages for the obstruction and removal of the crossing.

11. *Costello v. Grand Trunk R. Co.*, 70 N. H. 403, 47 Atl. 265.

12. *Matthews v. Bennett*, 20 N. H. 21.

13. *Muldowney v. Morris & Essex R. Co.*, 42 Hun 444. This case was decided under the principle that tenants in common are accountable to each other for rents and profits.

14. *Coit v. Grey*, 25 Hun (N. Y.) 444.

To Perpetuate Testimony.—Such tenant may bring a bill in equity to perpetuate testimony, his interest being sufficient to entitle him to protection. *Hall v. Stout*, 4 Del. Ch. 269.

15. **Ark.**—*Lloyd v. Planters' Mut. Ins. Assn.*, 80 Ark. 486, 97 S. W. 658, curtesy initiate at common law is an insurable interest in real property. **Conn.**—*New York, etc. R. Co. v. Russell*, 83 Conn. 581, 78 Atl. 324. **Ill.** *Bozarth v. Largent*, 128 Ill. 95, 21 N. E. 218. **Mo.**—*Fugate v. Pierce*, 49 Mo. 441; *Ro Bards v. Murphy*, 64 Mo. App. 90; *State v. Maeklin*, 41 Mo. App. 335. **N. H.**—*Foster v. Marshall*, 22 N. H. 491. **N. C.**—*Williams v. Lanier*, 44 N. C. 30. **Ohio.**—*Canby v. Porter*, 12 Ohio 80.

See *McNeer v. McNeer*, 142 Ill. 388, 32 N. E. 681, on the status of the estate by curtesy initiate in Illinois; also *Hill v. Nash*, 73 Miss. 849, 19 So. 707, holding such estate abolished by Code of 1880.

16. *Ro Bards v. Murphy*, 64 Mo. App. 90 (action for damages for breaking a pane of glass); *Billings v. Baker*, 28 Barb. (N. Y.) 343.

In many of the states, the estate by curtesy "initiate" has been abolished by statute. **Ark.**—*Lloyd v. Planters' Mut. Ins. Assn.*, 80 Ark. 486, 97 S. W. 658; *Neely v. Lancaster*, 47 Ark. 175. **Del.**—*Moore v. Darby*, 6 Del. Ch. 193, 18 Atl. 768. **N. Y.**—*Billings v. Baker*, 28 Barb. 343. **Ohio.**—*Hershizer v. Florence*, 39 Ohio St. 516. **Va.**—*Alexander v. Alexander*, 85 Va. 335, 7 S. E. 335.

In North Carolina, under the statute,

his wife a party;¹⁷ but, to redress an injury to the inheritance, the wife is a necessary party.¹⁸

III. ACTIONS AGAINST TENANT BY CURTESY.— Any appropriate action will lie against a tenant by the curtesy for injuries to the inheritance, as the rights of such tenant are confined to those which are incident to a life estate.¹⁹ An action of ejectment will also lie to oust such tenant from wrongfully withholding the property.²⁰

A suit in equity will lie to subject the estate to the payment of a judgment against the tenant; and persons entitled to the reversion are not proper parties to such action.²¹

the husband has an interest, but no *estate*, in the land, until the death of his wife. *Cecil v. Smith*, 81 N. C. 285; *Manning v. Manning*, 79 N. C. 293, 28 Am. Rep. 324. The husband cannot, therefore, in his name alone, maintain an action for recovery of the land, but the wife may maintain such action, either by joining her husband, or by suing alone. *Walker v. Long*, 109 N. C. 510, 14 S. E. 299. But see *Burns v. McGregor*, 90 N. C. 222, holding that in an action by a wife to recover possession of the land, the husband is a necessary party plaintiff, and if he refuses to join in the action he may be made a defendant.

17. *Ro Bards v. Murphy*, 64 Mo. App. 90; *Wilson v. Arentz*, 70 N. C. 670; *Williams v. Lanier*, 44 N. C. 30.

But see *Dyer v. Wittler*, 14 Mo. App. 52, holding that seisin of husband and wife is joint, and during coverture he is only seised by right of his wife; therefore they must sue jointly to recover possession.

In such action "the correct way of pleading the title is to allege seisin in fee in the husband and wife, in the right of the wife." *Westcott v. Miller*, *supra*, citing 16 Pick. (Mass.) 161, 1 Chit. (11th Am. ed.) 84; *Took v.*

Glascock, 1 Saund. 250, 85 Eng. Reprint 298.

In *Wisconsin* it is held that the right to curtesy does not entitle the husband to bring ejectment to recover his wife's lands during her life, but both husband and wife are proper plaintiffs in such action. *Westcott v. Miller*, 42 Wis. 454, citing *Stroebe v. Fehl*, 22 Wis. 338.

18. *Wilson v. Arentz*, 70 N. C. 670; *Williams v. Lanier*, 44 N. C. 30.

19. *Phelan v. Boylan*, 25 Wis. 679, where an action of waste was held to lie for non-payment of taxes.

20. Where land is held by a tenant by the curtesy, persons desiring title from his deceased wife cannot bring ejectment during his life. *Miller v. Bledsoe*, 61 Mo. 96, *affirmed*, *Miller v. Early*, 64 Mo. 478.

Where the wife's right was an equitable estate only, the husband could have only an equitable estate of curtesy (if any), and a purchaser of the husband's estate, at an execution sale, could only obtain an equitable right, and therefore could not maintain ejectment to oust the husband. *Carrington v. Richardson*, 79 Ala. 101.

21. *Uhler v. Adams*, 1 App. Cas. (D. C.) 392.

CUSTOMS AND USAGES

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I. INTRODUCTION.—GENERAL CUSTOM OR USAGE.—A general custom or usage is a mode of action which has by its universality and antiquity, acquired the force and effect of law, uniformly applicable to all persons under like circumstances and conditions.¹ A custom is binding only when it is of such universal practice as to justify the conclusion that it became, by implication, a part

1. *Milroy v. Chicago*, M. & St. P. R. Co., 98 Iowa 188, 67 N. W. 276; *Wilcox v. Wood*, 9 Wend. (N. Y.) 346. And see, **Ark.**—*City Elect. St. R. Co. v. First Nat. Ex. Bank*, 62 Ark. 33, 34 S. W. 89, 31 L. R. A. 535. **Ill.**—*Jenkins*, 174 Ill. 398, 51 N. E. 811, 62 L. R. A. 922. **Md.**—*Baltimore, etc. Co. v. Pickett*, 78 Md. 375, 28 Atl. 279, 22 L. R. A. 690. For matters of evidence see the title “**Customs and Usages**” in 3 ENCYCLOPEDIA OF EVIDENCE.

of the contract,² and does not contravene public policy or positive law.³

Particular Custom or Usage.—A particular custom or usage is such as prevails in some county, city, town, parish, or place, with respect to all persons similarly engaged.⁴

Distinctions.—Technically speaking, there is a wide distinction between a usage of trade and a common-law custom,⁵ but in nearly all of the decisions the words "custom" and "usage" are used synonymously.

2. *Maddox v. Washburn-Crosby Milling Co.*, 135 Ga. 539, 69 S. E. 821.

"A custom to be obligatory must be ancient, so that the memory cannot reach back to its beginning; it must accord with law, and have continued without interruption; it must be certain, reasonable, have been peaceably acquiesced in, consistent, compulsory, not left to the option of men to use or not. But a custom contrary to the public good, or injurious only to the multitude and beneficial only to some particular persons, is repugnant to the law of reason, and consequently void, and the usage of no class of persons can be sustained in opposition to established principles of law." *Somerby v. Tappan*, Wright (Ohio) 570.

"The words and phrases employed in a tariff approved by the Interstate Commerce Commission seem to be subject to the same rules of construction as when used in legislative acts. If a custom or usage is approved, and the tariff provision is so uncertain, doubtful, ambiguous, or indefinite as to call for construction and interpretation, the same shall be made in the light of such custom or usage." *Chicago, etc. R. Co. v. Dodson*, 25 Okla. 822, 107 Pac. 921.

"It is clear that such a custom or usage is in derogation of the contract at common law. It is in derogation of the common-law right of the defendant, and strips it of a benefit of which it possessed at common-law. It interpolates itself into the contract, and therefore the custom, usage, or practice must be strictly proved; the evidence adduced to prove it must be clear; it must be strictly construed; and great care should be exercised in allowing a custom, usage, or practice to change contracts either expressly entered into or implied at common law."

Runyan v. Central R. Co., 64 N. J. L. 67, 44 Atl. 985.

3. **U. S.**—*United States v. Kerr*, 196 Fed. 503. **Ala.**—*East Birmingham Land Co. v. Dennis*, 85 Ala. 565, 5 So. 317, 2 L. R. A. 836. **Ill.**—*McCurdy v. Alaska & Chicago Com. Co.*, 102 Ill. App. 120. **Md.**—*Baltimore First Nat. Bank v. Taliaferro*, 72 Md. 164, 19 Atl. 364. **Mass.**—*Little v. Phipps*, 208 Mass. 331, 94 N. E. 260, 34 L. R. A. (N. S.) 1046. **Pa.**—*Holmes v. Johnson*, 42 Pa. 159. **Tex.**—*Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75.

Void in such case though widely adopted. *East Birmingham Land Co. v. Dennis*, 85 Ala. 565, 5 So. 317, 2 L. R. A. 836; *Columbus & H. Coal & I. Co. v. Tucker*, 48 Ohio St. 41, 26 N. E. 630, 12 L. R. A. 577.

4. *Bodfish v. Fox*, 23 Me. 90, 39 Am. Dec. 611.

5. "Usage is a repetition of acts, and is distinguished from a custom in that usage is a fact, while custom is a law. There may be usage without custom, but there can be no custom without usage to accompany or precede it. Usage consists in the repetition of acts, and custom arises out of this repetition." *Buchanan, J.*, in *American Lead Pencil Co. v. Nashville, C. & St. L. R. Co.* (Tenn.), 134 S. W. 613.

"The word 'custom' is sometimes used synonymously with 'usage,' meaning a course of dealing which derives its legal force from assent, express or implied; again, as something which by long usage or judicial sanction has acquired the force of law, and is binding without regard to the question of assent." *Wilmington City R. Co. v. White*, 6 Penne. (Del.) 363, 66 Atl. 1009; *Stimmel v. Brown*, 7 Houst. (Del.) 219, 30 Atl. 996.

II. REQUIREMENT OF PLEADING.—A. GENERAL CUSTOMS OR USAGES.—A general custom may be proved though it is not pleaded.⁶

Judicial Notice.—A general custom or usage is, in fact, a part of the existing law, and will be judicially noticed without being either proved or pleaded.⁷

To Explain or Interpret Contracts.—Proof of custom or usage is not admissible under the general issue to defeat a contract or to vary its express terms.⁸ But where a custom is relied upon simply as evi-

6. **Del.**—*Templeman v. Biddle*, 1 Har. 522; *Wilmington City R. Co. v. White*, 6 Penne. 363, 66 Atl. 1009. **Ia.** *Thayer v. Coal Co.*, 121 Iowa 121, 96 N. W. 718. **Mich.**—*Fish v. Crawford Mfg. Co.*, 120 Mich. 500, 79 N. W. 793. **Pa.**—*Stultz v. Dickey*, 5 Binn. 285, 6 Am. Dec. 411. **Wis.**—*O'Brien Lumb. Co. v. Wilkinson*, 123 Wis. 272, 101 N. W. 1050; *Hewitt v. John Week Lumb. Co.*, 77 Wis. 548, 46 N. W. 822.

In an action by a broker against his principal for commission, it is not necessary for him to allege that the principal was acquainted with the existence of a custom upon which the action is based, for the principal is presumed to deal with the broker with reference to the customs of brokers, whether in fact known to him or not. *Whitehouse v. Moore*, 13 Abb. Pr. (N. Y.) 142.

7. *Templeman v. Biddle*, 1 Harr. (Del.) 522.

Judicial notice will be taken "of the fact that it is the custom of electric railway companies operating their cars in the public streets to equip them with fenders or some similar device, and that their object is the protection of the public engaged in ordinary business or travel upon the streets." *Love v. Detroit, J. & C. R. Co.* (Mich.), 135 N. W. 963.

A court will not take judicial cognizance of rules adopted by a board of brokers, such rules not being in accord with the general rules or usages of trade and commerce, unless they are of a character that would be recognized without their adoption by any particular board or association. The party relying upon such rules must plead them specially. Such are, in effect, special terms of the contract with reference to which they are used. *Goldsmith v. Sawyer*, 46 Cal. 209.

Such general usage or custom is presumed to have entered into a contract affected thereby, and to bind the parties thereto. *O'Brien Lumb. Co. v. Wilkinson*, 123 Wis. 272, 101 N. W. 1050.

8. **Ia.**—*Smyth v. Ward*, 46 Iowa 339; *Windland v. Deeds*, 44 Iowa 98; *Wanless v. McCandless*, 38 Iowa 20. **N. Y.** *Miller v. Insurance Co. of North America*, 1 Abb. (N. C.) 470. **N. C.** *Hughes v. Knott*, 138 N. C. 105, 50 S. E. 586. **Ohio.**—*Lowe v. Lehman*, 15 Ohio St. 179. **Pa.**—*Girard Life Ins. etc. Co. v. Mutual Life Ins. Co.*, 13 Phila. 90. **Tex.**—*Patton v. Texas & Pac. R. Co.* (Tex. Civ. App.), 137 S. W. 721; *Johnson v. Buchanan*, 54 Tex. Civ. App. 328, 116 S. W. 875; *Anderson v. Rogge* (Tex. Civ. App.), 28 S. W. 106. **Wash.**—*Ryder-Gouger Co. v. Garretson*, 53 Wash. 71, 101 Pac. 498, 132 Am. St. Rep. 1053. **W. Va.**—*Connolly v. Bruner*, 48 W. Va. 71, 35 S. E. 927.

In the absence of an averment in the pleadings "of a usage or custom of the cotton trade by which a bale of cotton is taken to mean 500 . . . or other number of pounds, and in respect to which the parties may be held to have contracted," such usage or custom cannot be relied upon. *Elmore, Quillion & Co. v. Parish Bros.*, 170 Ala. 499, 54 So. 203.

Under a code declaring that "the custom of any business or trade shall be binding only when it is of such universal practice as to justify the conclusion that it became by implication a part of the contract," such custom is admissible, "not as ordinary parol evidence, but as law—entering into the contract just as any other law does." The existence of such a custom, however, is a question for the jury. *Branch, Sons & Co. v. Palmēř*, 65 Ga. 210.

But "a person entering into a con-

dence of some other fact in issue,⁹ or upon the question of a duty, growing out of the custom,¹⁰ it need not be pleaded.

That a custom may be introduced as an affirmative defense, or for the purpose of recoupment, it must be specially pleaded.¹¹ Without some averment that the words made use of have a meaning different from their ordinary signification, it cannot be assumed that an undertaking was broader than its express terms,¹² and where a local custom is relied upon as forming a part of the contract upon which the action is based, it must be pleaded in the petition and not in the reply in order to be of avail.¹³

In Negligence Cases. — In negligence cases evidence of custom is admitted under the general issue.¹⁴

tract in the ordinary course of business is presumed to have done so in reference to any existing general usage or custom relating to such business;" and "such general custom and technical meaning of words may be proved without being specially pleaded." *Steidtmann v. Joseph Lay Co.*, 234 Ill. 84, 84 N. E. 640.

"If to this general rule there be any exception, the party relying thereon, and desiring to offer evidence of custom or usage to effect the interpretation of a contract, must plead it." *Weaver, J. Farmers & Merchants Bank v. Wood Bros. & Co.*, 143 Iowa 635, 118 N. W. 282, 120 N. W. 625.

In an action on a policy of marine insurance, the plea alleged a breach of a clause in the policy which prohibited the vessel from sailing in the Gulf of Campeachy. There was a replication, that by custom at Saint John, where the policy was issued, "prohibited" meant that the policy would not become void unless the loss occurred in the said gulf. This was held bad as contradicting the plain language of the contract, and as being a departure. *Troop v. The Union Ins. Co.*, 32 N. Bruns. 135, *citing* *Blackett v. Royal Exchange Assur. Co.*, 2 C. & J. 242.

9. *Sherwood v. Home Sav. Bank*, 131 Iowa 528, 109 N. W. 9.

In an action to recover damages for a failure to furnish the agreed quantity of logs under a contract for sawing, the mill-owner may recover (in addition to the difference between the contract price for the sawing and the actual cost of doing the work) the value of the slabs to which, by a general custom of mill-owners on the Wisconsin River, he would have been entitled; and such custom may be proved

without having been pleaded. *Hewitt v. John Week Lumb. Co.*, 77 Wis. 548, 46 N. W. 822.

10. *Thayer v. Smoky Hollow Coal Co.*, 121 Iowa 121, 96 N. W. 718.

11. *McCurdy v. Alaska & Chicago Com. Co.*, 102 Ill. App. 120; *Dommerich v. Garfunkel*, 32 Misc. 740, 65 N. Y. Supp. 564.

12. *Lindley v. First Nat. Bank of Waterloo*, 76 Iowa 629, 41 N. W. 381, 2 L. R. A. 709.

A general understanding and practice must amount to a custom, if set up to explain a written agreement, and must be pleaded as such. *Society, etc. v. Haight*, 1 N. J. Eq. 393.

13. *Sherwood v. Home Savings Bank*, 131 Iowa 528, 109 N. W. 9. This rule proceeds upon the ground that a plaintiff will not be permitted to plead in a reply matters which are material only to the cause of action alleged in his petition. Much less will he be permitted to recover on a distinct cause of action, which is only in his reply. *Marder v. Wright*, 70 Iowa 42, 29 N. W. 799.

14. Such evidence is admitted not on the theory that a breach of custom is negligence *per se*, or observance of custom necessarily conclusive that there was no negligence. It is admitted as evidence of negligence, or of due care, as the case may be; and it is no more necessary to plead it than any other purely evidentiary facts. *Elmer v. Mutual S. S. Co.*, 114 Minn. 257, 130 N. W. 1104.

The existence of an alleged usage, custom or practice on the part of a defendant street railway company of stopping its cars and permitting the uninterrupted passage of a funeral procession, is admissible in order that a

To Prove Title.—Where a party to an action relies upon customs or rules to establish a title to land, such customs or rules may be introduced in evidence although not specially pleaded.¹⁵

B. PARTICULAR CUSTOMS OR USAGES.—In some jurisdictions it has been held that a custom in its proper sense, even though local, need not ordinarily be pleaded,¹⁶ but ordinarily usage as an ultimate fact must be pleaded and proven as any other fact material to the case.¹⁷

A local custom or usage, or a custom or usage applicable to a special or particular business, may not, as a general rule, be made the basis of recovery in an action, unless such custom or usage is pleaded by the party relying on it.¹⁸

jury may determine from all the circumstances of the case, whether the plaintiff was at the time of the accident, in the exercise of due care and caution, and need not be pleaded. *Wilmington City R. Co. v. White*, 6 Penne. (Del.) 363, 66 Atl. 1009.

15. *Colman v. Clements*, 23 Cal. 245. This was an action of ejectment, where the complaint alleged in general terms ownership of disputed mining claims. Held, that an averment setting forth the rules, regulations and customs of the mining district in which the claims were located was not necessary in order that evidence of such rules, regulations and customs might be introduced in support of such alleged ownership.

But in a similar action, an answer averring that the plaintiff had lost whatever right he had by a failure to comply with the rules, regulations and customs of a mining district, without setting forth such rules, regulations and customs, was held insufficient as being too loose and vague to serve any purpose of pleading. "The general allegation of forfeiture is a legal conclusion upon which no issue can be taken. The facts must be stated so as to enable the court to see whether the forfeiture did accrue." *Dutch Flat Water Co. v. Mooney*, 12 Cal. 534.

16. *Breen v. Moran*, 51 Minn. 525, 53 N. W. 755; *Lowe v. Lehman*, 15 Ohio St. 179; *Carolina Nat. Bank v. Wallace*, 13 S. C. 347, 36 Am. Rep. 694.

It is not necessary to aver in a declaration a special custom or usage by banks in a particular county to demand payment on the day following the last day of grace in order that such fact may be given in evidence.

Coyle v. Gozzler, 2 Cranch C. C. 625, 6 Fed. Cas. No. 3,312.

In an action of assumpsit for work and labor in inspecting lumber, it was claimed that by a local custom the seller of lumber to Chicago or Milwaukee purchasers paid the entire inspection charges. It was contended that it was error to submit the question of the existence of the custom to the jury, for two reasons: "First, that the custom was not declared upon; and, second, that the evidence did not show a custom." The court held that it was not necessary to declare specially upon the custom, and that there was sufficient evidence of such custom to warrant its weight being determined by the jury. *Fish v. Crawford Mfg. Co.*, 120 Mich. 500, 79 N. W. 793.

17. Whether a white man becomes the "head of a family" by marriage with a woman who was a member of an "Indian nation," so as to entitle him to land under a treaty provision, must depend upon the usages and customs of the Indians with reference to their marital rights, and these usages and customs, at least in so far as state courts are concerned, will be regarded as facts. The court cannot take judicial notice of local customs and usages. *Turner v. Fish*, 28 Miss. 306.

18. *Cal.*—*Goldsmith v. Sawyer*, 46 Cal. 209. *Del.*—*Wilmington City R. Co. v. White*, 6 Penne. 363, 66 Atl. 1009; *Templeman v. Biddle*, 1 Harr. 522. *Fla.*—*Pittsburg Steel Co. v. Streety*, 55 So. 67. *Iowa.*—*Lindley v. First Nat. Bank*, 76 Iowa 629, 41 N. W. 381, 2 L. R. A. 709, and note. *Mo.*—*Hayden v. Grillo's Admr.*, 42 Mo. App. 1. *Neb.*—*First Nat. Bank v. Farmers' & Merchants' Bank*, 56 Neb. 149, 76 N. W. 430. *Okla.*—*Smith v. Stew-*

III. METHOD OF PLEADING.—A. IN GENERAL.—The rules as to stating customs are the same in declarations as in pleas, except that greater strictness is required in pleas.¹⁹

B. SUFFICIENCY OF AVERMENT.—Whenever it is sought to set up a usage or custom in conflict with general principles, the averments must bring the case clearly within the rule that such custom or usage should be well defined, in general use at the place by those engaged in the business to which it is applicable, and of such long standing as to raise a reasonable presumption that it was known to the contracting parties; it should be uniform, and so well settled that persons in the trade must be considered as contracting with reference to it.²⁰ It must

art, 116 Pac. 182. **Pa.**—*Stultz v. Dickey*, 5 Binn. 285, 6 Am. Dec. 411.

“Where the necessities of the particular line of commerce render a particular custom or usage so indispensable as to commend itself to enforce itself upon all those engaged in that line of commerce,” such custom is allowed upon the same “principle which allows other extraneous facts to be proven, in view of which parties have entered into contract, and by the aid of which their intentions are ascertained. . . . But such particular custom or usage in order to be invoked and proved by a party to such a contract must be specially pleaded, evidence thereof not being admissible under the general issue.” *Mobile Fruit & Trading Co. v. Judy & Son*, 91 Ill. App. 82.

Before a local or particular custom as a basis of recovery can be proven, it must be pleaded by the party relying on it, so that it may be put in issue. *Harnett v. Holdredge*, 5 Neb. (Unof.) 114, 97 N. W. 443.

“Ordinarily evidence of the usage of a trade is only admitted to explain a contract,” or “to show that certain phrases introduced into a contract have an established meaning in the trade to which the contract relates.” In such instances the custom or usage need not be pleaded. But where the contract is clear and explicit, and its terms exclude any construction or interpretation, or extension, an averment of custom, or other excuse, for non-compliance with the terms thereof, must be alleged in the pleadings. *Girard Life Ins., etc. Co. v. Mutual Life Ins. Co.*, 13 Phila. (Pa.) 90.

A custom among the commissioners’ courts of the several counties of a state of delegating specific duties, when

such duties are of a nature to preclude delegating, is unreasonable and not obligatory, and if such usage could exist to an extent sufficient to constitute a contract with one of them, it should be alleged and proved that the custom was known to other courts of the same character. *Gano v. Palo Pinto County*, 71 Tex. 99, 8 S. W. 634.

Evidence of a custom as to whether or not an insurance agent should advance the money for the return of an unearned premium, in the event of a cancellation, where it occurs that the agent has no funds in his hands belonging to the company issuing the policy, is inadmissible where no such custom has been pleaded. *Norwood v. Alamo Fire Ins. Co.*, 13 Tex. Civ. App. 475, 35 S. W. 717.

19. *Leggat v. Sands’ Ale Brew. Co.*, 60 Ill. 158.

20. **Cal.**—*Dutch Flat Water Co. v. Mooney*, 12 Cal. 534. **Ind.**—*Wallace v. Morgan*, 23 Ind. 399. **Mass.**—*Hight v. Bacon*, 126 Mass. 10, 30 Am. Rep. 639. **N. Y.**—*Poland v. Hollander*, 62 Misc. 523, 115 N. Y. Supp. 1042. **Va.** *Jackson’s Admx. v. Henderson*, 3 Leigh 196.

The maintenance of a party wall by adjacent owners will not establish such a custom or usage as may be sufficiently pleaded by an averment that it has been “constantly and uniformly recognized and abided by in said city in similar cases.” *Antomarchi’s Executor v. Russell*, 63 Ala. 356, 35 Am. Rep. 40.

In an action based upon the revocation of a contract between the publisher of a newspaper and a carrier thereof, it was alleged in the petition that a well-established custom had existed for more than fifteen years under

be averred that the contract was made with reference to the particular custom pleaded.²¹

Where a local custom is pleaded to which there is an exception, an averment of the custom without stating the exception is insufficient.²²

C. AMENDMENTS.—The introduction under the general issue at the first trial of a cause, of evidence of knowledge of and acquiescence in a custom on the part of a plaintiff, the plaintiff not having objected thereto, will admit of an amendment of pleadings by defendant, setting up the matter specially, upon return of the case to appellate court.²³

IV. QUESTIONS OF LAW AND FACT.—A. EXISTENCE OF CUSTOM OR USAGE.—Where the evidence in an action is unequivocal and uncontradicted as to the existence of a usage or custom, it is within the province of the court to hold, as a matter of law, that such a custom exists.²⁴ Where the existence of a custom is in dispute, the jury must determine it.²⁵

which it was understood between the parties to the contract that the carrier should have the exclusive right, for an indefinite period of time, to sell and deliver the newspaper to the subscribers thereof upon his route, etc. Held, that the allegations of the petition did not "disclose that the mere course of contracting alluded to possessed those elements of certainty, generality, fixedness and uniformity which are essential to constitute such a custom," and that the allegation of the petition did not "meet the requirements of the rule, supported by reason and the great weight of authority, that if a particular or local custom is relied upon, it must be pleaded, . . . and pleaded so explicitly that it will appear not only that such local or particular custom existed, but that both parties had knowledge of it at the time the contract was made, and, in addition, contracted with reference to it." *Staroske v. Pulitzer Pub. Co.*, 235 Mo. 67, 138 S. W. 36.

21. *Hendricks v. Middlebrooks Co.*, 118 Ga. 131, 44 S. E. 835; *Pullan v. Cochran*, 6 Ohio Dec. (Reprint) 1070, 10 Am. L. Rep. 184.

22. *Griffin v. Blandford*, 1 Cowp. 62, 98 Eng. Reprint 968. This was an action of replevin. There was an averment of a custom, without a statement of an exception thereto, which was proved.

23. *Governor v. Withers*, 5 Gratt. (Va.) 24, 50 Am. Dec. 95.

Where it appears that before attempting to inject into a case the

element of local custom, the defendants had remodeled their answer three different times, and the last time was several months after an affirmation of an order of the trial court holding, on demurrer, that neither the first, second nor third counterclaim stated a cause of action in favor of defendant, it is not an abuse of discretion to refuse to allow a counterclaim to be amended so as to allege such local custom. *John O'Brien Lumb. Co. v. Wilkinson*, 123 Wis. 272, 101 N. W. 1050.

24. *Del.*—*Mears v. Waples*, 4 Houst. 62. *Ga.*—*Lauchheimer & Sons v. Jacobs*, 126 Ga. 261, 55 S. E. 55. *Ohio.* *Nolte v. Hill*, 7 Ohio Dec. (Reprint) 297, 2 Cin. L. Bul. 86.

Proof of usage involves questions both of law and fact. It is a question of law what is sufficient usage to bind the parties, that is to say, for how long a time, at what places, and with what degree of uniformity it must have been observed. If the facts be disputed, then they become a matter for the jury, but being undisputed a given state of facts being found, it becomes a question of law for the court to determine whether such a usage as claimed existed, and its binding force upon the parties. *Runyan v. Central R. Co.*, 64 N. J. L. 67, 44 Atl. 985, 48 L. R. A. 744.

25. *U. S.*—*McLanahan v. Universal Ins. Co.*, 1 Pet. 170, 7 L. ed. 98; *New Roads, etc. Co. v. Kline*, 154 Fed. 296, 83 C. C. A. 1. *Ala.*—*Henderson-Boyd Lumb. Co. v. Cook*, 149 Ala. 226, 42 So. 838; *Haas v. Hudmon*, 83 Ala. 174, 3

The averment of a custom or usage in an answer and counterclaim will, upon demurrer, be taken to be true.²⁶ A demurrer will also be sustained where the terms of the contract preclude the proof of a particular custom.²⁷

B. VALIDITY.—The validity or invalidity of a custom or usage is a question of law for the determination of the court.²⁸

C. REASONABLENESS.—It is for the court to determine whether a custom or usage, if proved to exist, is reasonable and operative upon the rights of the parties.²⁹

D. APPLICABILITY TO CONTRACT AND INTENTION OF PARTIES.—Whether a particular custom or usage pleaded by a party to a contract in an action thereon is applicable thereto, is a question of law for the court;³⁰ but whether the parties to the contract acted with reference to the custom or usage pleaded is to be determined by the jury.³¹

So. 302. **Del.**—Mears *v.* Waples, 3 Houst. 581. **Fla.**—Sullivan *v.* Jernigan, 21 Fla. 264. **Ga.**—Branch Sons & Co. *v.* Palmer, 65 Ga. 210. **Ill.**—Chicago Packing, etc. Co. *v.* Tilton, 87 Ill. 548. **Ind.**—Hitesman *v.* State, 48 Ind. 473. **Ia.**—Hiehorn *v.* Bradley, 117 Iowa 130, 90 N. W. 592; Milroy *v.* Chicago, etc. R. Co., 98 Iowa 188, 67 N. W. 276. **Me.**—Bodfish *v.* Fox, 23 Me. 90. **Md.**—Burroughs *v.* Langley, 10 Md. 248; Powell *v.* Bradlee, 9 Gill & J. 220. **Mass.**—Barrie *v.* Quinby, 206 Mass. 259, 92 N. E. 451; Goldsmith *v.* Mannheim, 109 Mass. 187; Berkshire Woollen Co. *v.* Proctor, 7 Cush. 417; Mussey *v.* Eagle Bank, 9 Metc. 306. **Mich.**—Fish *v.* Crawford Mfg. Co., 120 Mich. 500, 79 N. W. 793. **Mo.**—Hill *v.* Morris, 21 Mo. App. 256. **N. H.**—Foye *v.* Leighton, 22 N. H. 71. **N. J.**—Runyan *v.* Central R. Co., 64 N. J. L. 67, 44 Atl. 985. **N. Y.**—Dickinson *v.* Poughkeepsie, 75 N. Y. 65; Dawson *v.* Kittle, 4 Hill 107; Scott *v.* Brown, 29 Misc. 320, 60 N. Y. Supp. 511. **N. C.**—Bank of New Hanover *v.* Williams, 79 N. C. 129. **Ohio.**—Nolte *v.* Hill, 7 Ohio Dec. (Reprint) 297, 2 Cin. L. Bul. 86; Boyce *v.* Steamboat Empress, 1 Ohio Dec. (Reprint) 173, 3 West L. J. 174. **Pa.**—Girard L. Ins., etc. Co. *v.* Mutual L. Ins. Co., 13 Phila. 90. **S. C.**—Carolina Nat. Bank *v.* Wallace, 13 S. C. 347. **Va.**—Burton *v.* Seifert & Co., 103 Va. 338, 61 S. E. 933; Oriental Lumb. Co. *v.* Blades Lumb. Co., 103 Va. 730, 50 S. E. 270; Hansbrough *v.* Neal, 94 Va. 722, 27 S. E. 593. **Wis.**—Steamboat Sultana *v.* Chapman, 5 Wis. 454. **Eng.**—Neilson *v.* Harford, 8 Mees. &

W. 806, 11 L. J. Ex. 20; Hutcheson *v.* Bowker, 5 Mees. & W. 535, 9 L. J. Ex. 24.

But the conclusion may be reached that the proof of the usage is not such that under the rules of law the question of its existence can be submitted to the jury. Runyan *v.* Central R. Co., 64 N. J. L. 67, 44 Atl. 985, 48 L. R. A. 744.

26. Lillard *v.* Kentucky Distilleries & W. H. Co., 134 Fed. 168, 67 C. C. A. 74.

27. Haas *v.* Hudmon, 83 Ala. 174, 3 So. 302.

28. **Fla.**—Sullivan *v.* Jernigan, 21 Fla. 264. **Ill.**—Chicago Packing & Prov. Co. *v.* Tilton, 87 Ill. 547. **Me.**—Randall *v.* Smith, 63 Me. 105. **Mass.**—Mussey *v.* Eagle Bank, 9 Metc. 306.

29. **Me.**—Codman *v.* Armstrong, 28 Me. 91; Bodfish *v.* Fox, 23 Me. 90, 39 Am. Dec. 611. **Mich.**—Bourke *v.* James, 4 Mich. 336. **Eng.**—Tyson *v.* Smith, 9 Ad. & El. 406, 1 P. & D. 307, W. W. & D. 749, 36 E. C. L. 163.

30. Nolte *v.* Hill, 7 Ohio Dec. (Reprint) 297, 2 Cin. L. Bul. 86.

31. Powell *v.* Bradlee, 9 Gill & J. (Md.) 220. And see Burton *v.* Seifert, 108 Va. 338, 61 S. E. 933.

But where one of the contracting parties is not identified with the trade, business or local circle to which such custom is applicable, his acceptance thereof must be established. M'Lanahan *v.* Universal Ins. Co., 1 Pet. (U. S.) 170, 7 L. ed. 98.

In an action brought against a railroad company to recover for additional

It is for the court to determine to what extent, if any, the custom or usage relied upon shall modify or control the contract involved.³²

V. INSTRUCTIONS.—**A. IN GENERAL.**—An instruction should not assume the existence of a rule and custom, not proved or admitted of record;³³ but if, taking all the evidence relied upon to establish the custom or usage to be true, it is not, in the judgment of the court, sufficient in law to establish the custom or usage contended for, it becomes the duty of the court so to instruct the jury.³⁴

B. SUFFICIENCY OF INSTRUCTION.—When, in the trial of an action, it becomes material to establish knowledge of a general custom or usage by the party to be charged, the instructions by the court should include the necessity of proving the alleged custom or usage; that if upon all the evidence the jury be satisfied that such custom or usage existed, then from its long continuance and the extent to which such custom or usage had prevailed they would be warranted in finding that it was known to the party chargeable, and formed a part of the agreement.³⁵ But the exclusion of evidence to establish a local

items of work, necessary to be performed before the actual work provided for by contract could be undertaken, the sufficiency of a custom to charge for such items at actual cost, plus ten per cent, is a question of fact for the jury. *Henderson-Boyd Lumb. Co. v. Cook*, 149 Ala. 226, 42 So. 838; *Bodfish v. Fox*, 23 Me. 90, 39 Am. Dec. 611.

"Courts, in administering commercial law, have the power, and it is proper to submit to a jury as a question of fact, as well what is the meaning of commercial terms, as what was the established commercial usage in respect of a certain course of dealing." *Bank of New Hanover v. Williams*, 79 N. C. 129.

32. *Milroy v. Chicago, etc. R. Co.*, 98 Iowa 188, 67 N. W. 276; *Neilson v. Harford*, 8 Mees. & W. 806, 11 L. J. Ex. 20; *Hutcheson v. Bowker*, 5 Mees. & W. (Eng.) 535, 9 L. J. Ex. 24.

33. *London Guarantee, etc. Co. v. Mississippi Cent. R. Co.*, 97 Miss. 165, 52 So. 787.

Hitesman v. State, 48 Ind. 473, was an indictment for perjury. The court instructed the jury that they must find "beyond a reasonable doubt, that the defendant was sworn before giving the evidence on which he is charged with having committed perjury; but it being the uniform rule and custom in the courts to administer oaths to witnesses before they testify, you will be justified in finding that the defend-

ant was sworn on less evidence than would be necessary to establish a fact of a different character, not occurring according to any fixed rule or custom." This was erroneous. See also *Milroy v. Chicago, etc. R. Co.*, 98 Iowa 188, 67 N. W. 276.

An instruction is erroneous if it assumes a general usage or custom, instead of leaving the fact as to whether there was a custom or usage generally known and established, and so well settled and so uniformly acted upon as to raise a fair presumption that it was known to both contracting parties, and that they contracted with reference to it; to be determined by the jury from the evidence. *Wilson v. Bauman*, 80 Ill. 493.

34. *Mears v. Waples*, 4 Houst. (Del.) 62.

35. *Tower Co. v. Southern Pac. Co.*, 184 Mass. 472, 69 N. E. 348.

When, from admitted and proved facts, it is not clear what work may be done in furtherance of "good agricultural usage," it is an erroneous instruction to charge one with any wrong in plowing land and making drains in the particular manner done, provided the jury believed from the evidence that such plowing and making of drains were for the purpose of agriculture only, and in the usual and customary mode followed by farmers in raising crops. *Knoll v. Mayer*, 13 Ill. App. 203.

custom or usage, in the absence of its having been pleaded, is not error.³⁶

C. CURING ERRONEOUS RULING.—A ruling excluding as immaterial evidence offered to prove a custom, if erroneous, is cured by a charge to the jury recognizing a general custom of the character sought to be proved, under limitations as favorable to the party complaining of the ruling as he was entitled to.³⁷

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| 36. <i>Smith v. Stewart</i> (Okla.), 116
Pac. 182. | | 37. <i>Clark v. Cox</i> , 32 Mich. 204. |
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CUSTOMS DUTIES

By H. W. WILLIAMS,
Of the California Bar.

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CROSS-REFERENCES:

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Extradition;	Recognizances;
Food Laws;	Search Warrants;
Internal Revenue;	Warrants;
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I. PROCEDURE BEFORE BOARD OF GENERAL APPRAISERS. — A. JURISDICTION AND STATUS OF THE BOARD. — 1. **The Board as a Court.** — The board of general appraisers is an independent tribunal and is not a subordinate division of the treasury department.¹ While in a strict sense it may not be a court, its proceedings are to some extent at least given the weight of court proceedings.²

2. **Jurisdiction and Powers.** — The supreme court has taken a liberal view of the board's jurisdiction, and has not limited its powers to questions strictly of "rate and amounts of duties."³ It has generally all the powers of a circuit court of the United States so far as

1. *Stone v. Whitridge, White & Co.*, 129 Fed. 33, 64 C. C. A. 47.

The board is, in a sense, an essential part of the customs house machinery. *United States v. Shea, Smith & Co.*, 114 Fed. 38, 51 C. C. A. 664.

2. "Although the board of general appraisers may not be a court, yet the proceedings to review its determination are pointed out by the statute, and they must be substantially followed and obeyed." *United States v. Lies*, 170 U. S. 628, 18 Sup. Ct. 780, 42 L. ed. 1170.

Its reports are to be treated sub-

stantially as those of a master in chancery or inferior court. *In re Van Blankensteyn*, 56 Fed. 474.

The court in *Marine v. Lyon*, 65 Fed. 992, 13 C. C. A. 268, commenting on the clause (in §12, Act July 10, 1890) "shall examine and decide the case thus submitted," says: "Judicial power is thus conferred, and the phraseology implies a court."

3. *United States v. Brown, Durrell & Co.*, 127 Fed. 793, 62 C. C. A. 473, citing *Lawder v. Stone*, 187 U. S. 281, 23 Sup. Ct. 79, 47 L. ed. 178.

applicable to customs matters.⁴ The board has power to determine the validity of the protest,⁵ but cannot determine the question whether or not, in fact, an article has been imported.⁶ Nor can it review the collector's action in adopting the value of foreign coins at the estimate made in the proclamation of the secretary of the treasury.⁷

B. APPEAL FROM APPRAISEMENT. — 1. Right to Appeal and How Taken. — The decision of the general appraiser as to the value of imported merchandise is conclusive unless the collector appeals therefrom within ten days.⁸ This right is exclusive in the collector and the secretary of the treasury has no power to order a re-appraisement.⁹

4. As to customs duties the board's jurisdiction is the same as that of the circuit court before the board's creation. *United States v. J. G. Johnson & Co.*, 145 Fed. 1018.

"They shall have and possess all the powers of a circuit court of the United States in preserving order, compelling the attendance of witnesses, and the production of evidence, and in punishing for contempt." Act of Congress, July 10, 1890, §12 as amended by Act of Congress, August 5, 1909. See also Act of Congress, July 10, 1890, §14, as amended by Act of Congress, May 27, 1908.

May establish from time to time such rules of evidence, practice and procedure not inconsistent with the statutes as may be deemed necessary. Act of Congress, July 10, 1890, §12, as amended by Act of Congress, Aug. 5, 1909. See also Act of Congress, July 10, 1890, § 14, as amended by Act of Congress Aug. 5, 1909.

Where a protest duly filed has been lost, may allow copies thereof to be filed. *Marine v. Lyon*, 65 Fed. 992, 13 C. C. A. 268, where the papers had been lost through the carelessness of their custodian.

5. *United States v. Brown, Durrell & Co.*, 127 Fed. 793, 62 C. C. A. 473. See also *United States v. Salambier*, 170 U. S. 621, 18 Sup. Ct. 771, 42 L. ed. 1167.

6. *Goetze v. United States*, 182 U. S. 221, 21 Sup. Ct. 742, 45 L. ed. 1065.

Their jurisdiction is limited "to the construction of the law and the facts respecting the classification." *In re Fassett*, 142 U. S. 479, 12 Sup. Ct. 295, 35 L. ed. 1087.

The rule applies equally whether the question be as to the article being importable or as to the country from which it was brought being foreign.

DeLima v. Bidwell, 182 U. S. 1, 21 Sup. Ct. 743, 45 L. ed. 1041.

7. *United States v. Klingenberg*, 153 U. S. 93, 14 Sup. Ct. 790, 38 L. ed. 647.

Estimate Final.—"The pure-metal estimate by the director of the mint, as a fact found, is final, and the collector's action in conformity with such finding is not subject to judicial review, either under the old law, where the importer brought suit against the collector in the circuit court to recover the excess of duties paid, or under the customs administrative act of 1890, where an appeal is taken from the collector's decision to the board of general appraisers." *United States v. Beebe*, 117 Fed. 670.

But if the secretary has acted beyond the scope of his authority and contrary to law, the issue is simply one of law involving the power of the director of the mint under the statute. *United States v. Beebe*, 117 Fed. 670.

8. Act of Congress, July 10, 1890, §13, as amended by Act of Congress, Aug. 5, 1909.

Right of collector to have re-appraisement after liquidation of duties doubted. *Beard v. Porter*, 124 U. S. 437, 8 Sup. Ct. 556, 31 L. ed. 492, under the old practice.

"Whenever dutiable value of merchandise subject to appraisement is involved and no question of criminality or fraudulent illegality arises prior to appraisement, the appraisement is to be conducted according to section 13 of the customs administrative act, and not according to section 3074, Revised Statutes." 23 Op. Att.-Gen. 377.

9. The collector acts in a judicial capacity and cannot be ordered by the secretary to have such re-appraisement made. *United States v. Loeb*, 99 Fed. 723.

The importer, owner, consignee or agent of the merchandise may also appeal by giving notice of dissatisfaction, in writing, to the collector within five days after such decision.¹⁰

Papers Transmitted. — In either case the collector transmits to the board of general appraisers the invoice and all the papers appertaining thereto.¹¹

2. Hearing. — The board proceeds "by all reasonable ways and means in their power" to ascertain and determine the dutiable value.¹²

Discretion of Board. — It is discretionary with the board to have such hearings open and in the presence of the importer and his attorney and an authorized representative of the government,¹³ or to permit the examination and cross-examination of witnesses.¹⁴

3. Conclusiveness of Decision. — The board's decision as to "dutiable value" is conclusive,¹⁵ as is its decision on questions of weight.¹⁶

C. APPEAL FROM RATE AND AMOUNT. — **1. Taking the Appeal.** To take an appeal from the decision of the collector as to the amount and rate of duties, the owner, importer, consignee or agent of the merchandise must give a notice or "protest" to the collector,¹⁷ and thereupon the duties are paid if the merchandise is entered for consumption, and the collector transmits the invoices with all papers and exhibits to the board of general appraisers.¹⁸

A protest filed by a stranger is of no validity.¹⁹

10. Act of Congress, July 10, 1890, §13, as amended by Act of Congress, Aug. 5, 1909.

Where the importer was not dissatisfied with the appraisement of the value of the goods *per se*, he was not obliged to ask for a re-appraisement under Rev. St., §2930, but could proceed against the collector for return of duties. *Oberteuffer v. Robertson*, 116 U. S. 499, 6 Sup. Ct. 462, 29 L. ed. 706. See also *Robertson v. Bradbury*, 132 U. S. 491, 10 Sup. Ct. 158, 33 L. ed. 405.

In the case last cited the importer was held not to be bound to ask for an appraisement under Rev. St., §2926, where the customs officials told him he must enter at the valuation named in his invoice although he pointed out imperfections therein.

The importer is not bound to give the notice where the government attempted to make a new appraisal. The appraisal having been regularly made and accepted by the importer, the appraiser recalled the invoices and attempted to make a new appraisal claiming the right to correct clerical errors in the invoice. *United States v. Morewood & Co.*, 94 Fed. 639.

11. Act of Congress, July 10, 1890,

§13, as amended by Act of Congress, Aug. 5, 1909.

12. To that end it is given "both judicial and inquisitorial functions." Act of Congress, July 10, 1890, §13, as amended by Act of Congress, Aug. 5, 1909.

13. Act of Congress, July 10, 1890, §13, as amended by Act of Congress, Aug. 5, 1909. See also *In re Muser*, 49 Fed. 831; *In re Megroz*, 49 Fed. 828.

14. Act of Congress, July 10, 1890, §13, as amended by Act of Congress, Aug. 5, 1909.

15. Act of Congress, July 10, 1890, §13, as amended by Act of Congress, Aug. 5, 1909; *Passavant v. United States*, 148 U. S. 214, 13 Sup. Ct. 572, 38 L. ed. 426. See also *United States v. Passavant*, 169 U. S. 16, 18 Sup. Ct. 219, 42 L. ed. 644.

16. *Foster v. Voecke*, 60 Fed. 745.

17. Act of Congress, July 10, 1890, §14, as amended by Acts of Congress, May 27, 1908, and Aug. 5, 1909.

18. Act of Congress, July 10, 1890, §14, as amended by Acts of Congress, May 27, 1908, and Aug. 5, 1909.

19. In *Abegg v. United States*, 71 Fed. 960, the merchandise was shown by the invoice to belong to one Robertson. The protest was filed by

Whether the collector has any authority to do anything but forward the protest to the board has been questioned.²⁰

2. Time To File Protest. — The protest must be filed within fifteen days after such ascertainment and liquidation of duties,²¹ "but not before."²² It may be filed, however, before payment of the duties.²³

The time begins to run when the liquidation is made.²⁴

Not Waived or Extended. — The time of filing is jurisdictional, and cannot be waived by the collector,²⁵ or extended by allowance of an amendment.²⁶ Nor is it extended by re-liquidation after a successful appeal to the board.²⁷

But if a notice is left in time at the usual place, the mere fact that it is not found and stamped as received until after the statutory time does not affect its validity.²⁸

3. Service of Protest. — It is sufficient to serve the protest on a

"Abegg and Rusch," without any intimation that they acted for Robertson in any capacity whatever. The court says the statute seems to draw a distinction between "agent of the merchandise" and "agent of the importer or consignee." But there was no proof of any agency.

20. "It is hard to see what authority the collector has to modify his liquidation after receipt of the protest, or, indeed, what he can do with the protest, except forward it immediately to the board of general appraisers. But undoubtedly the practice has always permitted re-liquidation by the collector after the protest is received." *Lothrop v. United States*, 164 Fed. 99.

21. Act of Congress, July 10, 1890, §14, as amended by Acts of Congress, May 27, 1908, and Aug. 5, 1909.

22. Act of Congress, July 10, 1890, §14, as amended by Acts of Congress, May 27, 1908, and Aug. 5, 1909.

If filed before, it must be disregarded. *In re Bailey*, 112 Fed. 413.

Under the former practice, protests were filed with the collectors covering importations of a like character expected to be received in the future. See *Schell's Exr. v. Fauche*, 138 U. S. 562, 11 Sup. Ct. 376, 34 L. ed. 1040; *Davies v. Miller*, 130 U. S. 284, 9 Sup. Ct. 560, 32 L. ed. 932.

23. *Lothrop v. United States*, 164 Fed. 99.

24. The claim of the government "is in the nature of a proceeding *in rem*, of every step in which the claimant, owner or importer is presumed to have notice." Therefore, the collector

need give no notice of liquidation. (The statute involved, Act, June 30, 1864, §14, is similar). *Westray v. United States*, 18 Wall. (U. S.) 322, 21 L. ed. 763.

25. The collector accepted the protest after the statutory time and, it was claimed, with the consent of the department. *In re Guggenheim Smelting Co.*, 112 Fed. 517, 50 C. C. A. 374.

26. The protest is not amendable after the ten days have elapsed, since that would be equivalent to making a new protest after the statutory time. *In re Sherman*, 49 Fed. 224.

27. In *Stern v. United States*, 77 Fed. 607, the importers having appealed to the board, a re-liquidation was ordered. Being dissatisfied with the re-liquidation, the importers lodged a second protest. The court says that in so far as such protest might be intended to cover matters not considered on the former appeal, it was too late. If intended to cover the same matters, the importers are concluded by their failure to appeal from the board's decision.

28. In *Frankenburg v. United States*, 77 Fed. 606, it appeared that the practice of the particular office was to have the notice left with a particular clerk or on his desk. The importer so left it, but after business hours of the next to last day. The office was closed on the last day by direction of the secretary of the treasury, it being election day, but not a legal holiday. The clerk found it on his desk when he returned the following day, and stamped it as filed that day.

clerk of the collector by leaving it on his desk, such being the practice of the office.²⁹

4. Sufficiency of Protest.—The protest must set forth distinctly and specifically, and in respect to each entry or payment, the reasons for objecting thereto.³⁰

Liberal Construction.—Protests are to be construed liberally,³¹ certainty to a common intent being all that is required.³² But the importer must state his claim with such reasonable clearness and certainty as to acquaint the collector with the real ground of his complaint,³³ and a blanket form of protest must not be adopted.³⁴

It is sufficient to protest against the rate assessed and to clearly point out the provisions under which it is claimed the goods are dutiable;³⁵

29. *Frankenburg v. United States*, 77 Fed. 606.

30. Act of Congress, June 10, 1890, §14, as amended by Act of Congress, Aug. 5, 1909.

31. *Lichtenstein & Co. v. United States*, 19 Treas. Dec. 1217 (T. D. 31, 105).

Nice precision and strict rules of construction are not to be exacted. *Converse v. Burgess*, 18 How. (U. S.) 413, 15 L. ed. 455.

Mere brevity no objection. *Schell's Exrs. v. Fauche*, 138 U. S. 562, 11 Sup. Ct. 376, 34 L. ed. 1040.

32. That in Act of Congress, June 10, 1890, the word "reasons" is substituted for the word "grounds" in §2931 of the Revised Statutes does not indicate a purpose to require a more specific protest. *Carter v. United States*, 19 Treas. Dec. 1116 (T. D. 31,033), *disapproving* *Hygienic Wood Wool*, 11 Treas. Dec. 632, G. A. 6360 (T. D. 27,328).

A protest is sufficient if it shows fairly that the objection afterwards made at the trial was in the mind of the party, and was brought to the knowledge of the collector. *Arthur v. Morgan*, 112 U. S. 495, 5 Sup. Ct. 241, 28 L. ed. 825. See also *Heinze v. Arthur's Exrs.*, 144 U. S. 28, 12 Sup. Ct. 604, 36 L. ed. 333.

33. **A protest is misleading** rather than informing which attempts to throw on the collector and the courts the burden of distinguishing real claims from possible claims. *Lichtenstein & Co. v. United States*, 19 Treas. Dec. 1217 (T. D. 31,105). See also *Davies v. Arthur*, 96 U. S. 148, 24 L. ed. 758; *Curtis' Admr. v. Fiedler*, 2 Black (U. S.) 461, 17 L. ed. 273.

Illustration.—"We claim that the said goods are properly dutiable under the provisions of paragraph 137 of the tariff act of July 24, 1897," was declared insufficient, the paragraph being a long one containing many subdivisions, specifying many different articles and providing numerous different rates. *Boker & Co. v. United States*, 140 Fed. 115.

Sufficient.—But in *Lothrop v. United States*, 164 Fed. 99, a protest under the same section, 137, was upheld where the importer stated that his protest was against an *ad valorem* duty because wire in certain fish hooks assessed "cost less than four cents per pound," thus bringing them within a clear exception.

34. **A protest is not sufficient** which complains of the assessing of duty "at 30 per cent. *ad valorem* or 60 per cent. *ad valorem*, or other rate or rates, on braids, plaids, laces, hats, or other articles composed wholly or in part of horsehair or of imitation or artificial horsehair, silk, straw, cotton, chip, grass, or other substance covered by entries below named." *Lichtenstein & Co. v. United States*, 19 Treas. Dec. 1217 (T. D. 31,105).

35. "We think that where the importer protests against the rate assessed and at the same time points out provisions under which he claims the article to be dutiable with sufficient clearness so that the collector may by mere computation or examination of the goods determine their classification, he has complied with the statute in all essential respects." *Carter v. United States*, 19 Treas. Dec. 1116 (T. D. 31,033), *distinguishing* *Boker v. United States*, 140 Fed. 115.

but it is not necessary to point out the exact section under which classification is claimed, provided the collector is not misled.³⁶

Protests may be in the alternative and point out more than one provision of the tariff act under which it is claimed that the importation is dutiable.³⁷

Description of Sample.—A protest is sufficient which refers to the sample without further specifically describing it.³⁸

5. Conclusiveness of Protest.—The protest is conclusive on the party filing same to the extent that he cannot claim a certain classification therein and afterward claim a different classification.³⁹

6. Decision of Board.—The decision of the board may be limited to those items concerning which the importer introduces testimony.⁴⁰

D. REHEARINGS.—By statute the board of general appraisers can grant a rehearing.⁴¹

If the rehearing be applied for after an appeal has been taken, but before the record is actually transmitted, the board will request permission to retain the record and continue the rehearing proceedings.⁴²

36. There were but two possible paragraphs which could have been named and the duty was the same under either. *United States v. Salambier*, 170 U. S. 621, 18 Sup. Ct. 771, 42 L. ed. 1167.

This rule has been extended to a case where the importer named the wrong section of the statute. The board is presumed to know the law when the rate of duty claimed is pointed out. The importer does not indicate his impression as to what section governs at his peril. *United States v. Shea, Smith & Co.*, 114 Fed. 38, 51 C. C. A. 664, *distinguishing* *Herrman v. Robertson*, 152 U. S. 521, 14 Sup. Ct. 686, 38 L. ed. 538, as arising under the law previous to the creation of the board. See also *In re Claffin*, 113 Fed. 944, *distinguishing In re Sherman*, 49 Fed. 224; *In re Austin*, 47 Fed. 873.

Even claiming under a repealed statute is not fatal where the later act is in identical language. *Shaw v. United States*, 122 Fed. 443, 53 C. C. A. 425.

37. Especially where the classification is doubtful. *Koechl v. United States*, 91 Fed. 110, 33 C. C. A. 363.

That the importer called harmonicas "musical instruments" did not prevent his claiming a classification as "toys." *Blumenthal v. United States*, 72 Fed. 48. See also *Legg v. Helden*, 37 Fed. 861.

38. It will be presumed that the collector had the sample before him. *Hensel, Buckmann & Lorbacher v. United States*, 160 Fed. 219.

39. *In re Sherman*, 49 Fed. 224; *In re Austin*, 47 Fed. 873.

The same rule applied under the old practice where suits were brought directly against the collector. See *Davies v. Arthur*, 96 U. S. 148, 24 L. ed. 758.

40. Where the importers fail to introduce evidence as to certain items mentioned in their protest, the board is justified in assuming they have abandoned their contention as to those items and may limit its decision accordingly. *J. S. Plummer & Co. v. United States*, 166 Fed. 730, 92 C. C. A. 420.

41. "The board of three general appraisers, or a majority of them, who decided the case may upon motion of either party made within thirty days next after their decision, grant a rehearing or retrial of said case when, in their opinion the ends of justice may require it." Act of Congress, July 10, 1890, §12, as amended by Act of Congress, Aug. 5, 1909. See also, Act of Congress, July 10, 1890, §14, as amended by Act of Congress, May 27, 1908.

On such rehearing no member can sit who previously heard the case. The board of general appraisers consists of nine members, but they sit in boards of three members each. Act of Congress, July 10, 1890, §12, as amended by Act of Congress, Aug. 5, 1909.

42. *Matter of Gallagher and Ascher*, 18 Treas. Dec. 286 (T. D. 30,110), following by analogy the rule laid down in *Roemer v. Simon*, 91 U. S. 149, 23

II. COURT OF CUSTOMS APPEALS AND PROCEDURE THEREIN.

A. JURISDICTION AND GENERAL POWERS.—The court of customs appeals is a court of record, having limited appellate jurisdiction over matters arising under the customs laws,⁴³ but within these limitations its jurisdiction is exclusive,⁴⁴ except as to certain cases pending in the United States supreme court and circuit court of appeals when the court of customs appeals was organized.⁴⁵

The court has power to prescribe the form and style of its seal,⁴⁶ the form of its writs and processes,⁴⁷ to establish rules and regulations for the conduct of its business and to render its decision uniform,⁴⁸ and has a broad general power to do whatever is conformable to law that may be necessary to the exercise of its jurisdiction.⁴⁹

B. TRANSFER OF PENDING CASES.—Immediately upon the organization of the court of customs appeals, cases within its jurisdiction, pending and not submitted for decision in any of the United States circuit courts of appeal, or United States circuit, territorial or district courts, "shall with the record and samples therein, be certified by said courts to said court of customs appeals for further proceedings."⁵⁰

C. MATTERS REVIEWABLE.—An appeal lies to the court of customs appeals whenever any of the parties are "dissatisfied with the decision

L. ed. 267; *Cimiotti, etc., Co. v. American, etc., Co.*, 99 Fed. 1003.

43. Act of Congress, March 3, 1911, §§194, 195; Act of Congress, Aug. 5, 1909, §29.

44. Act of Congress, March 3, 1911, §195, Act of Congress, Aug. 5, 1909, §29.

"After the organization of said court, no appeal shall be taken or allowed from any board of United States general appraisers to any other court, and no appellate jurisdiction shall thereafter be exercised or allowed by any other courts in cases decided by said board of United States general appraisers; but all appeals allowed by law from such board of general appraisers shall be subject to review only in the court of customs appeals hereby established, according to the provisions of this chapter." Act of Congress, Mch. 3, 1911, §196; Act of Congress, Aug. 5, 1909, §29.

45. "Provided, That nothing in this chapter shall be deemed to deprive the supreme court of the United States of jurisdiction to hear and determine all customs cases which have heretofore been certified to said court from the United States circuit courts of appeal on applications for writs of *certiorari* or otherwise, nor to review by writ of *certiorari* any customs case heretofore decided or now pending and hereafter

decided by any circuit court of appeals, provided application for said writ be made within six months after August fifth, nineteen hundred and nine." Act of Congress, Mch. 3, 1911, §196; Act of Congress, Aug. 5, 1909, §29.

46. Act of Congress, Mch. 3, 1911, §194; Act of Congress, Aug. 5, 1909, §29.

47. Act of Congress, Mch. 3, 1911, §194; Act of Congress, Aug. 5, 1909, §29.

48. Act of Congress, Mch. 3, 1911, §194; Act of Congress, Aug. 5, 1909, §29. For a copy of the rules, see 19 Treas. Dec. 527 (T. D. 30633).

49. Act of Congress, Mch. 3, 1911, §194; Act of Congress, Aug. 5, 1909, §29.

The circuit court did not have power to issue commissions to take testimony in a foreign country in so-called "Appraiser's Appeals." *Bartram v. United States*, 106 Fed. 878.

50. Act of Congress, Mch. 3, 1911, §197; Act of Congress, Aug. 5, 1909, §29. "Provided, That where orders for the taking of further testimony before a referee have been made in any of such cases the taking of such testimony shall be completed before such certification."

No fees are required on such transmission. Rule 13, 19 Treas. Dec. 527 (T. D. 30,633).

of the Board of General Appraisers as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification."⁵¹

The statute in terms adds to the former law a right of appeal when the party is dissatisfied "with any other appealable decision of said board,"⁵² and further recites that the court shall have exclusive appellate jurisdiction to review "final decisions by a board of general appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise, and the rate of duty imposed thereon under such classification and the fees and charges

51. Act of Congress, Mch. 3, 1911, §198; Act of Congress, Aug. 5, 1909, §29. See also, Rule 4, 19 Treas. Dec. 527 (T. D. 30,633).

Under Act of Congress, June 10, 1890 (the language of which is similar), the broad general rule was laid down in *United States v. Klingenberg*, 153 U. S. 93, 14 Sup. Ct. 790, 38 L. ed. 647, that the right of review of the circuit court was co-extensive with the right to appeal to the board of appraisers from the decision of the collector, except as to the question of dutiable value.

52. Act of Congress, Mch. 3, 1911, §198; Act of Congress, Aug. 5, 1909, §29.

Rules Under Former Statute.—Question as to whether the article has, in fact, been imported is not appealable. *DeLima v. Bidwell*, 182 U. S. 1, 21 Sup. Ct. 743, 45 L. ed. 1041; *In re Fassett*, 142 U. S. 479, 12 Sup. Ct. 295, 35 L. ed. 1087.

Decision as to dutiable value is not appealable. *United States v. Passavant*, 169 U. S. 16, 18 Sup. Ct. 219, 42 L. ed. 644; *United States v. Klingenberg*, 153 U. S. 93, 14 Sup. Ct. 790, 38 L. ed. 647; *Passavant v. United States*, 148 U. S. 214, 13 Sup. Ct. 572, 38 L. ed. 426. This rule is not changed by the fact that the complaint is as to the appraiser's method of ascertaining the value. The mere fact that he did not follow the treasury department rules would not make the matter appealable as being a question of law. *Mayer, Ebeling & Co. v. United States*, 140 Fed. 334. But if the appraiser or collector proceeded upon a wrong principle of law or has transcended his powers, an appeal lies. *United States v. Passavant*, 169 U. S. 16, 18 Sup. Ct. 219, 42 L. ed. 644; *Muser v. Magone*, 155 U. S. 240, 15 Sup. Ct. 77, 39 L. ed. 135; *Robertson v. Frank Bros. Co.*, 132 U.

S. 17, 10 Sup. Ct. 5, 33 L. ed. 236; *United States v. Beebe*, 117 Fed. 670.

Questions of weight are not appealable. *Foster v. Voeke*, 60 Fed. 745.

Questions of sufficiency of the protest are appealable. *United States v. Brown, Durrell & Co.*, 127 Fed. 793, 62 C. C. A. 473. See also, *United States v. Salambier*, 170 U. S. 621, 18 Sup. Ct. 771, 42 L. ed. 1167.

The right of review by the circuit court is not limited and confined to the two subjects of classification and the rate of duty. If the collector, under an improper construction of the law, imposes an excessive amount of duties, the importer may appeal from the decision of the board sustaining the collector. *United States v. Klingenberg*, 153 U. S. 93, 14 Sup. Ct. 790, 38 L. ed. 647.

Waiver of Right Under Former Statute.—Where the importer dismisses his appeal, the government cannot have a reversal as to part of the board's order, it having failed to take an appeal. *United States v. Lies*, 170 U. S. 628, 18 Sup. Ct. 780, 42 L. ed. 1170.

A default before the board was held waived by the government after partial hearing of appeal. *In re F. W. Myers & Co.*, 123 Fed. 952.

Where importers only give evidence before the board as to part of the matters mentioned in the protest, they will be deemed to have waived their rights as to other matters and cannot for the first time, on the appeal, be heard in reference thereto. *J. S. Plummer v. United States*, 166 Fed. 730, 92 C. C. A. 420.

Where importer claimed under alternative sections of the statute and prevailed as to one only, he is not bound to abandon the other ground on his appeal. *Koechl v. United States*, 91 Fed. 110, 33 C. C. A. 363.

connected therewith, and all appealable questions as to the jurisdiction of said board and all appealable questions as to the laws and regulations governing the collection of the customs revenues.⁵³

The court of customs appeals has power to review questions of fact.⁵⁴

D. PLACE OF HOLDING COURT. — The court of customs appeals holds its sessions in the several districts at such places as the court designates from time to time.⁵⁵

E. TIME FOR HOLDING COURT. — The court is always open for the transaction of business,⁵⁶ and convenes each day during its sessions at 10:30 A. M.⁵⁷

Monday is motion day and motions must be presented at the opening of court on that day.⁵⁸

F. QUORUM. — Any three members of the court constitute a quorum.⁵⁹

G. APPEARANCE BY ATTORNEY. — The court has by rule decreed that parties may be represented before it by attorney,⁶⁰ and any attorney entitled to appear in the United States courts or in the court of last resort of any state or territory, may be admitted on recommendation or motion,⁶¹ and after taking, subscribing and filing an oath of office.⁶²

H. FORM OF PROCESS.⁶³ — The court under its power to prescribe the form of its processes,⁶⁴ has prescribed that they shall follow the

53. Act of Congress, Mch. 3, 1911, §195; Act of Congress, Aug. 5, 1909, §29. | §188; Act of Congress, Aug. 5, 1909, §29.

54. United States v. Reibe (No. 35), 19 Treas. Dec. 783 (T. D. 30,776). | 60. Rule 2, 19 Treas. Dec. 527 (T. D. 30,633).

The circuit court had this power under the former act. United States v. W. N. Proctor Co., 145 Fed. 126, 76 C. C. A. 96.

55. Act of Congress, Mch. 3, 1911, §189; Act of Congress, Aug. 5, 1909, §29.

Under the former practice the circuit court for the district in which the port where entry was made and not that of the district where the board of appraisers met had jurisdiction. *In re Wyman*, 45 Fed. 469.

The office of the clerk is at Washington, D. C. Act. Mch. 3, 1911, §191; Act of Congress, Aug. 5, 1909, §29.

56. Act of Congress, Mch. 3, 1911, §189; Act of Congress, Aug. 5, 1909, §29. Rule 10, 19 Treas. Dec. 527 (T. D. 30,633).

57. Rule 9, 19 Treas. Dec. 527 (T. D. 30,633).

58. Rule 9, 19 Treas. Dec. 527 (T. D. 30,633).

59. Act of Congress, Mch. 3, 1911,

61. "Upon filing a recommendation of any justice of the supreme court of the United States, United States circuit or district judge, or a judge of the court of last resort of the state or territory in which said attorney may reside at the time of his application for admission to this court, or upon motion by an attorney of this court." Rule 2, 19 Treas. Dec. 527 (T. D. 30,633).

The clerk cannot act as attorney. Rule 1, 19 Treas. Dec. 527 (T. D. 30,633).

62. "I ———, do solemnly swear (or affirm), that I will demean myself, as an attorney and counselor of this court, uprightly and according to law, and that I will support the Constitution of the United States." Rule 2, 19 Treas. Dec. 527 (T. D. 30,633).

The fee for admission is one dollar. Rule 13, 19 Treas. Dec. 627 (T. D. 30,633).

63. See *infra*, II, M.

64. Act of Congress, Mch. 3, 1911,

form and style in use in the United States supreme court.⁶⁵

I. FORM OF WRITS.—Under its authority to prescribe the form of its writs,⁶⁶ the court has ordained that all writs shall be in the name of the presiding judge, shall be signed by the clerk, and shall have the seal attached.⁶⁷

J. TIME FOR APPEAL.—The time for appeal is limited to sixty days, with an additional thirty days for cases arising in Alaska or the insular possessions.⁶⁸

K. PARTIES TO APPEAL.—By ruling of the secretary of the treasury appeals on behalf of the government must be made in the name of the secretary,⁶⁹ but the statute by its terms gives the "collector" the right of appeal.⁷⁰

L. "STATEMENT" OR ASSIGNMENT OF ERRORS.—A party wishing to apply for a review must file in the office of the clerk of the court of customs appeal "a concise statement of errors of law and fact, complained of,"⁷¹ and must serve a copy thereof "on the collector, or on

\$194; Act of Congress, Aug. 5, 1909, §29.

65. Rule 3, 19 Treas. Dec. 527 (T. D. 30,633).

66. Act of Congress, Mch. 3, 1911, §194; Act of Congress, Aug. 5, 1909, §29.

67. Rule 3, 19 Treas. Dec. 527 (T. D. 30,633).

Rule 10, 19 Treas. Dec. 527 (T. D. 30,633), permits attestation by the clerk or his assistant and in the name of the next judge in order of precedence, if the office of presiding judge be vacant.

68. "Within sixty days next after the entry of such decree or judgment, and not afterwards. . . . Provided, That in Alaska and the insular and other outside possessions of the United States, ninety days shall be allowed for making such application." Act of Congress, Mch. 3, 1911, §198; Act of Congress, Aug. 5, 1909, §29. See Rule 4, 19 Treas. Dec. 527 (T. D. 30,633).

Taking appeal within statutory time was jurisdictional under the former statute. A delay of one day was held fatal, the time being "30 days" and not "one month." *Carriere & Son v. United States*, 163 Fed. 1009.

This applies to cases decided before the date of organization of the court as well as to cases thereafter decided. But the status of cases in which the limitation of thirty days, under the former statute, had expired was not involved. *United States v. Marsching*, 19 Treas. Dec. 772 (T. D. 30,771).

The statute also contains a saving

clause giving one year's time in which to appeal cases submitted and not decided, or decided and not appealed, in the circuit and district courts of the United States or the territorial courts. "Provided, further, That all customs cases decided by a circuit or district court of the United States or a court of a territory of the United States prior to said date above mentioned (August 5, 1909) and which have not been removed from said courts by appeal or writ of error, and all such cases theretofore submitted for decision in said courts and remaining undecided may be reviewed on appeal at the instance of either party by the United States court of customs appeals, provided such appeal be taken within one year from the date of the entry of the order, judgment or decree sought to be reviewed." Act of Congress, Mch. 3, 1911, §196. See also, Act of Congress, Aug. 5, 1909, §29.

69. 19 Treas. Dec. 651 (T. D. 30,701).

70. Act of Congress, Mch. 3, 1911, §198; Act of Congress, Aug. 5, 1909, §29.

Under a statute having an exactly similar clause, it was held the collector might appeal without asking permission of the secretary. *In re Wise, Collector*, 73 Fed. 183. But see *United States v. Hopewell*, 51 Fed. 798, 2 C. C. A. 510.

71. Act of Congress, Mch. 3, 1911, §198; Act of Congress, Aug. 5, 1909, §29; Rule 5, 19 Treas. Dec. 527 (T. D. 30,633).

Waiver of right by failure to appeal (under former statute), see *United*

the importer, owner, consignee, or agent, as the case may be."⁷²

The rules as to the sufficiency of the assignments of error are practically the same in substance as on appeal from an inferior to a superior federal court.⁷³

M. MANDATE.—Upon the filing of the application for review the court must immediately order the board of general appraisers to transmit to said court the record and evidence taken by them together with the certified statement of the facts involved in the case and their decision thereon.⁷⁴

N. RETURN OF WRITS.—All writs are made returnable fifteen days from the date thereof, but the time may be extended on application to the court or to a judge thereof at chambers, and on good cause shown.⁷⁵

O. RECORDS AND BRIEFS.—Within twenty days from the filing of the return, unless further time be given by the court or a judge, the appellant must print the record and his brief,⁷⁶ file fifteen copies thereof,⁷⁷ and serve a copy of each upon the appellee or his counsel.⁷⁸

States v. Lies, 170 U. S. 628, 18 Sup. Ct. 780, 42 L. ed. 1170.

72. Act of Congress, Mch. 3, 1911, §198; Act of Congress, Aug. 5, 1909, §29; Rule 5, 19 Treas. Dec. 527 (T. D. 30,633). Such service may be "either by mail or by delivering the same personally to the party to be served or to his attorney, who shall have regularly appeared before said board of general appraisers on or before the date of such application. Such service, in case of mailing shall be by depositing in the post office a copy of such statement, in a sealed envelope, plainly addressed to the party or attorney to be served, at his place of business or residence, with postage thereon fully prepaid."

73. So held under former statute in identical terms on appeal from the board to the circuit court. *United States v. Brown, Durrell & Co.*, 127 Fed. 793, 62 C. C. A. 473.

Where the objection is to the sufficiency of the protest, there must be specific reference thereto. *United States v. Hempstead*, 180 Fed. 956; *United States v. J. Lowenthal & Co.*, 175 Fed. 777, 99 C. C. A. 349.

74. Act of Congress, Mch. 3, 1911, §198; Act of Congress, Aug. 5, 1909, §29.

This order is called the "mandate" (Rule 3, 19 Treas. Dec. 527 [T. D. 30,633]), and directs the board in terms to transmit the proceedings with a certified statement of the facts involved and their decision together with all

samples and exhibits used by them (Rule 6, 19 Treas. Dec. 527 [T. D. 30,633]), and issues "as of course" on receipt of the application for appeal (Rule 10, 19 Treas. Dec. 527 [T. D. 30,633]).

Under the former practice the board must certify its decisions as to the questions of fact raised by the importer's protest. *In re Sternbach*, 44 Fed. 413. See also, *In re Blumstein*, 45 Fed. 236.

75. Rule 3, 19 Treas. Dec. (T. D. 30,633).

76. Rule 8, 19 Treas. Dec. 527 (T. D. 30,633). "All records and briefs printed for the use of this court shall be in small pica type, twenty-four picas to the line, twenty-five lines to a page, leaded with four-to-pica leads. The record shall have a suitable cover containing the title of the court and cause, and shall be properly indexed and printed under the direction of the clerk of the court. The size of the pages of the records and briefs shall be nine and one-quarter inches by six and one-quarter inches."

"Amount sufficient to cover the cost of printing the record must be deposited with the clerk." Rule 13, 19 Treas. Dec. 527 (T. D. 30,633).

Under the former practice the record must contain all the evidence. *In re Van Blankensteyn*, 56 Fed. 474.

77. Rule 8, 19 Treas. Dec. 527 (T. D. 30,633).

78. "Service of briefs shall be in the manner prescribed in rule 5 for

The appellee must, within ten days thereafter, furnish a like number of copies of his brief and serve a copy in like manner on appellant or his attorney.⁷⁹

P. AMENDMENTS. — The court may "in furtherance of justice," permit amendment to processes or proceedings.⁸⁰

Q. CALENDAR AND HEARING. — All records transmitted to the court for determination are put on the calendar by the clerk in the order in which they are received.⁸¹

Cases stand for hearing and submission in their order as filed without notice,⁸² but the hearing may be postponed for good cause shown.⁸³

Oral arguments of counsel are limited to one hour on a side.⁸⁴

R. DECISION OR ORDER. — The court may affirm, modify, or reverse the decision or order of the board, or may remand the case with such orders as may to it seem proper,⁸⁵ the concurrence of three members being necessary to a decision.⁸⁶

service of the statement." Rule 8, 19 Treas. Dec. 527 (T. D. 30,633). See *supra*, II, L.

79. Rule 8, 19 Treas. Dec. 527 (T. D. 30,633).

80. Rule 11, 19 Treas. Dec. 527 (T. D. 30,633).

81. Act of Congress, Mch. 3, 1911, §199; Act of Congress, Aug. 5, 1909, §29; Rule 7, 19 Treas. Dec. 527 (T. D. 30,633).

The calendar must be called and all cases submitted at least once in sixty days. Act of Congress, Mch. 3, 1911, §199. "Provided, That such calendar need not be called during the month of July and August of any year."

82. Rule 7, 19 Treas. Dec. 527 (T. D. 30,633).

"At the next hearing day after the expiration of said thirty days (allowed for filing and serving records and briefs) said cause shall stand for hearing in its order without further notice unless otherwise ordered." Rule 8, 19 Treas. Dec. 527.

Court "will continue its sessions until all cases on its calendar in readiness for hearing are disposed of." Rule 9, 19 Treas. Dec. 527 (T. D. 30,633).

Formerly it was the practice to take further testimony on *ex parte* orders (Act of Congress, July 10, 1890, §15), and the appeals became largely in the nature of trials *de novo*. This became very unsatisfactory (see *United States v. Hempstead & Son*, 159 Fed. 290), and the practice was forbidden (Act of Congress, May 27, 1908). See also, *Beer v. United States*, 181 Fed. 402.

The present act makes no provision respecting such *ex parte* orders.

83. Act of Congress, Mch. 3, 1911, §199; Act of Congress, Aug. 5, 1909, §29; Rule 7, 19 Treas. Dec. 527 (T. D. 30,633).

84. Rule 14, 19 Treas. Dec. 527 (T. D. 30,633), unless extended in the discretion of the court.

Two counsel only on a side will be heard, except by special order of the court. Rule 14, 19 Treas. Dec. 527 (T. D. 30,633).

85. Act of Congress, Mch. 3, 1911, §194; Act of Congress, Aug. 5, 1909, §29.

Under the Former Statute. — The duty of the circuit court was not limited to giving a mere certificate, but its duty was "to hear, decide and adjudge." *United States v. Davis*, 54 Fed. 147, 4 C. C. A. 251.

Where the importer concedes the position of the government, the proper judgment is an affirmance, not a dismissal. *United States v. Lies*, 170 U. S. 628, 18 Sup. Ct. 780, 42 L. ed. 1170. See also, *In re Crowley*, 50 Fed. 465.

When the circuit court has passed upon the matter and rendered its decision, its jurisdiction ceases. Hence, it could not direct the payment of attorneys' fees to the attorneys of the successful importer notwithstanding the importer's agreement to turn over part of the duties recovered. *United States v. Calogera*, 183 Fed. 909.

86. Act of Congress, Mch. 3, 1911, §188; Act of Congress, Aug. 5, 1909, §29.

In passing on questions of fact the court will not disturb the findings of the board unless such finding is clearly contrary to the weight of the evidence.⁸⁷

Mandate. — On its final decision the court issues a mandate to the board of general appraisers for such further proceedings as shall be proper to take.⁸⁸

S. FINALITY OF DECISION. — The determination of the court of customs appeals is final.⁸⁹

T. COSTS AND FEES. — Costs and fees are fixed and established by the court of customs appeals subject to the approval of the supreme court of the United States,⁹⁰ and must be paid in advance.⁹¹

Where the United States is appellant no fees shall be required.⁹²

III. ACTION TO RECOVER DRAWBACK. — JURISDICTION.

The court of claims has jurisdiction of an action to recover a drawback,⁹³ notwithstanding the customs officials and the secretary of the treasury have failed to take action thereon.⁹⁴

87. *United States v. Reibe* (No. 35), 19 Treas. Dec. 783 (T. D. 30,776), quoting with approval as a "fair and correct statement of the rule which should govern us." In *In re Van Blankensteyn*, 56 Fed. 474, where the court says: "The circuit court should not undertake to disturb the findings of the board upon doubtful questions of fact, and especially as to questions of fact which turn upon the intelligence and credibility of witnesses who have been produced before the board. But when the finding of fact is wholly without evidence, to support it, or when it is clearly contrary to the weight of evidence, it is the duty of the circuit court to disregard it." See also, *In re Wise*, 73 Fed. 183; *In re Bing*, 66 Fed. 727; *In re White*, 53 Fed. 787.

Presumption is in favor of regularity before the board. *Schoellkopf, Hartford & MacLagan v. United States*, 147 Fed. 855.

88. Rule 12, 19 Treas. Dec. 527 (T. D. 30,633).

89. Act of Congress, Mch. 3, 1911, §198; Act of Congress, Aug. 5, 1909, §29.

Under the former practice the case could be carried up to the circuit court of appeals whose decision was final. *Anglo-California Bank v. United States*, 175 U. S. 37, 20 Sup. Ct. 19, 44 L. ed. 64; *United States v. Hopewell*, 51 Fed. 798, 2 C. C. A. 510; *Louisville Public Warehouse Co. v. Collector of Customs*, 49 Fed. 561, 1 C. C. A. 371.

The statute expressly provides for an appeal, and the circuit court of appeals cannot review the action of the

board upon a writ of error. *United States v. Diamond Match Co.*, 115 Fed. 288, 53 C. C. A. 90.

Constitutional Questions. — The secretary of the treasury in prescribing regulations and thus giving practical construction to statutes cannot be said to be exercising legislative power confided solely to congress; hence, no constitutional question arises entitling the parties to an appeal to the supreme court. *American Sugar Ref. Co. v. United States*, 211 U. S. 155, 29 Sup. Ct. 89, 53 L. ed. 129.

90. But must not exceed those charged in the supreme court. Act of Congress, Mch. 3, 1911, §191; Act of Congress, Aug. 5, 1909, §29; Rule 13, 19 Treas. Dec. 527 (T. D. 30,633).

91. Rule 13, 19 Treas. Dec. 527 (T. D. 30,633).

92. Rule 13, 19 Treas. Dec. 527 (T. D. 30,633).

There was some conflict under the former statute as to whether costs could be awarded against the government and in favor of the importer where his appeal was successful. *United States v. Davis*, 54 Fed. 147, 4 C. C. A. 251; *In re Chase*, 50 Fed. 695.

93. *Durant v. United States*, 28 Ct. Cl. 356.

94. The importer was entitled under the statute to a certain drawback but the government contended that it was first necessary a certain "drawback certificate" issue. The court of claims dismissed for want of jurisdiction, seeming to think it could not do anything till the customs officials acted.

IV. RECOVERY BACK OF DUTIES OR PENALTIES. — A. PROCEEDING AGAINST GOVERNMENT IN COURT OF CLAIMS. — 1. Right of Action. — The importer may proceed in the court of claims to recover duties illegally exacted,⁹⁵ or to recover a fine for smuggling where the goods were not subject to duty.⁹⁶

2. Jurisdiction. — The circuit court sitting as such court of claims has jurisdiction as the case arises under the revenue laws.⁹⁷

3. Notice or Protest. — The statutory notice or protest prescribed by the customs acts need not be given.⁹⁸

B. ACTIONS AGAINST COLLECTOR.⁹⁹ — 1. Form of Remedy. — Assumpsit is the proper remedy where a collector under color of the revenue laws has collected duties illegally,¹ but where the only question is as to rate and amount of duty, the remedy given by the customs administrative act is exclusive.²

The supreme court says: "The officers of customs including the secretary" are not "a special tribunal. . . . Their function is purely ministerial." *Campbell v. United States*, 107 U. S. 407, 2 Sup. Ct. 759, 27 L. ed. 592.

95. That he also has a remedy against the collector in assumpsit does not take away his right. *Dooley v. United States*, 182 U. S. 222, 21 Sup. Ct. 762, 45 L. ed. 1074.

96. *Basso v. United States*, 40 Ct. Cl. 202.

97. *Dooley v. United States*, 182 U. S. 222, 21 Sup. Ct. 762, 45 L. ed. 1074, *distinguishing* *Nichols v. United States*, 7 Wall. (U. S.) 122, 19 L. ed. 125, on the ground that the Act, February 26, 1845, 5 St. 727, ch. 22, in force at the time that decision was rendered gave a special right of action directly against the collector which special remedy is no longer available. See also, *De Lima v. Bidwell*, 182 U. S. 1, 21 Sup. Ct. 743, 45 L. ed. 1041.

It is not within the exception of the statute limiting its jurisdiction to actions for damages "not sounding in tort." *Dooley v. United States*, 182 U. S. 222, 21 Sup. Ct. 762, 45 L. ed. 1074; *Warner, Barnes & Co. v. United States*, 40 Ct. Cl. 1.

98. The question was as to whether the goods were imported at all. The petition showed a sufficient excuse for not lodging a formal protest to establish involuntary payment. *Heinszen v. United States*, 42 Ct. Cl. 58.

99. See the title "Assumpsit."

1. The importer is not bound to refuse to enter the goods, permit them to be seized and bring an action of

replevin. Assuming that replevin would lie the importer may waive the tort and proceed in assumpsit. *De Lima v. Bidwell*, 182 U. S. 1, 21 Sup. Ct. 743, 45 L. ed. 1041.

For right to bring replevin, see the title "Replevin."

At common law and under the former statutes *indebitatus assumpsit* was the proper remedy against the collector. *Saltonstall v. Birtwell*, 164 U. S. 54, 17 Sup. Ct. 19, 41 L. ed. 348. See also, *State Tonnage Tax Cases*, 12 Wall. (U. S.) 204, 20 L. ed. 370.

Not Injunction. — *Andreae v. Redfield*, 93 U. S. 225, 25 L. ed. 158.

Notice or Protest. — Some notice or protest must be filed with the collector to show the payment is not voluntary. See *Elliott v. Swartwout*, 10 Pet. (U. S.) 137, 9 L. ed. 373; *Dewell v. Mix*, 116 Fed. 664.

As to sufficiency of such notice to base right of appeal, see *supra*, I, B and C.

2. *Dooley v. United States*, 182 U. S. 222, 21 Sup. Ct. 762, 45 L. ed. 1074; *De Lima v. Bidwell*, 182 U. S. 1, 21 Sup. Ct. 743, 45 L. ed. 1041; *Schoenfeld v. Hendricks*, 152 U. S. 691, 14 Sup. Ct. 754, 38 L. ed. 601. See Act of Congress, July 10, 1890, §24, as amended by Act of Congress, Aug. 5, 1909.

For history of right of action against collector as affected by the statutes, see *Saltonstall v. Birtwell*, 164 U. S. 54, 17 Sup. Ct. 19, 41 L. ed. 348; *Barney v. Watson*, 92 U. S. 449, 23 L. ed. 730.

Injunction To Restrain Collector. — Since the payment of a refund is one of the functions of the treasury department and the collector of the port is

2. Jurisdiction.—Such action is properly brought in the circuit court regardless of the amount involved.³

V. SEIZURES, SUMMARY PROCEDURE, AND ACTIONS ON BONDS.⁴—A. CUSTODY OF PROPERTY SEIZED.—All property seized remains in the custody of the collector or other principal officer of the district where the seizure is made,⁵ until “adjudication by the proper tribunal or other disposition by law.”⁶

B. SUMMARY PROCEEDING FOR RELIEF OF CLAIMANT.—The statute provides a summary remedy for relief on petition of a person claiming to be interested in property seized.⁷ The facts appearing on the hear-

not the proper person to make such payment, injunction will not lie by the consignor against the collector to restrain payment to the consignee. *Joannidis v. Loeb*, 191 Fed. 93.

Procedure Under the Former Statutory Remedy.—Time of bringing action being specified the statute of limitations of the state wherein the right of action arose does not apply. *Arnson v. Murphy*, 109 U. S. 238, 3 Sup. Ct. 184, 27 L. ed. 920. See also, *Beard v. Porter*, 124 U. S. 437, 8 Sup. Ct. 556, 31 L. ed. 492.

A proceeding against the collector under the old procedure could not be maintained pending the decision of the proceeding *in rem* for a forfeiture. “It would be a good plea in abatement as was decided by this court more than half a century ago.” *Averill v. Smith*, 17 Wall. (U. S.) 82, 21 L. ed. 613. See *Gelston v. Hoyt*, 3 Wheat. (U. S.) 246, 4 L. ed. 381; *Slocum v. Mayberry*, 2 Wheat. (U. S.) 1, 4 L. ed. 169. See also, *McGuire v. Winslow*, 26 Fed. 304.

Burden of proof is on the importer. *Arthur v. Unkart*, 96 U. S. 118, 24 L. ed. 768.

Sufficiency of pleadings, see *Beard v. Porter*, 124 U. S. 437, 8 Sup. Ct. 556, 31 L. ed. 492.

On recovery execution could issue unless the court certified that the collector had probable cause or acted under official directions. *Andreae v. Redfield*, 98 U. S. 225, 25 L. ed. 158.

3. United States Rev. St., §629, subd. 4, giving the circuit courts jurisdiction of suits “arising under any act providing for a revenue from imports,” irrespective of the amount involved, must “be construed in connection with §643 which provides for the removal from state courts to circuit courts of the United States of suits against rev-

enue officers ‘on account of any act done under color of his office, or of any such (revenue) law or on account of any right, title or authority claimed by such officer or other person under such law.’” *Downes v. Bidwell*, 182 U. S. 244, 21 Sup. Ct. 770, 45 L. ed. 1088.

4. See the titles “Search Warrants,” “Warrant of Attorney.”

Obstructing seizures, hindering officers in discharge of their duty and refusing to aid them, see the title “Obstructing Justice.”

5. Rev. St., §3086.

“The property is held in custody of the collector as keeper.” *The G. G. King*, 16 Fed. 921.

Liability for Loss.—See *Schmalz v. United States*, 4 Ct. Cl. 142; 5 Ct. Cl. 294.

6. Rev. St., §3086.

“The final judgment of the court, deciding upon the disposition of the property, determines the collector’s custody of it, and if a disposition extends beyond simple custody, it must be the marshal who must carry it into effect.” *The G. G. King*, 16 Fed. 921. See also, *Ex parte Hoyt*, 13 Pet. (U. S.) 279, 10 L. ed. 161.

7. The property must be of more than one thousand dollars value. The judge “shall if the case in his judgment requires, proceed to inquire, in a summary manner, into the circumstances of the case, at such reasonable time as may be fixed by him.” Notice is given to the district attorney and collector (Act of Congress, June 22, 1874, §17 (13 St. at L. 189)).

The hearing may be referred by the judge to a United States commissioner. Act of Congress, June 22, 1874, §18 (18 St. at L. 186).

Not applicable to a tonnage tax case, though the same grew out of the col-

ing together with the petition are transmitted to the secretary who has power to order proceedings for forfeiture to be discontinued or forfeiture to be remitted.⁸

C. SUMMARY PROCEDURE WHERE GOODS ARE OF LESS THAN FIVE HUNDRED DOLLARS VALUE. — Where goods seized are of less than five hundred dollars value, the statute provides for a published notice to claimants to come in and assert their claims.⁹ Such claimants by giving bond to pay the costs and expenses of the proceedings in case of condemnation may have the matter tried in the ordinary mode prescribed by law,¹⁰ but if no such claim is filed or bond given, the goods are sold at public auction after further published notice,¹¹ the time of such notice being reduced if the goods are of a perishable nature and this is certified by the appraisers.¹² And within three months thereafter any person claiming to be interested may apply to the secretary of the treasury for a remission of the forfeiture and restoration of the proceeds.¹³

Proceedings under these provisions are in the nature of a proceeding *in rem*.¹⁴

D. SUMMARY SALE OF GOODS REMAINING IN WAREHOUSE. — The statutes provide for a summary sale of goods deposited in the public or bonded warehouse which are not withdrawn within three years, or

lection of duty at a wrong port. *In re Laidlaw*, 42 Fed. 401.

8. Act of Congress, June 22, 1874, §18 (18 St. at L. 186).

This procedure is proper where it is desired to obtain a remission of additional duties for undervaluation. 20 Op. Att.-Gen. 660.

9. The notice is to be published once a week for three successive weeks, and describes the articles, tells the time, cause and place of seizure and requires the filing of a claim within twenty days. Rev. St., §§3075, 3076.

The appraisement should be under Act of Congress, July 10, 1890, §13 (Act of Congress, Aug. 5, 1909, §28). See 23 Op. Att.-Gen. 377.

10. Rev. St., §3076.

In *Cotzhausen v. Nazro*, 107 U. S. 215, 2 Sup. Ct. 503, 27 L. ed. 540, the court suggests a claimant might proceed under the statute if "impatient of the delay" of the customs officials to institute regular proceedings after a seizure.

If the provision of the statute is followed the summary proceeding is stopped. If the importer does not choose to follow this section he is left to his remedy to seek redress at the hands of the secretary of the treasury.

Connay v. Stannard, 17 Wall. (U. S.) 398, 21 L. ed. 649. See *infra*.

11. The notice is published in like manner as the notice of seizure and must give "not less than fifteen days' notice of sale." Rev. St., §3077.

Such sale is equivalent to a sale under a judicial decree of condemnation. *McGuire v. Winslow*, 26 Fed. 304.

12. Such notice shall be for such length of time as the collector may think reasonable, "but not less than one week." Rev. St., §3080.

The effect of §3080 is to combine the notices of seizure and sale. Claimants are not entitled to twenty days' notice of seizure and fifteen days' notice of sale. The words "as hereinbefore provided" refer merely to the method of making the claim. Any other construction would make this section inoperative. *Connay v. Stannard*, 17 Wall. (U. S.) 398, 21 L. ed. 649.

13. Rev. St., §3078.

If no such application be made the secretary causes the proceeds to be distributed as on condemnation and sale in pursuance of a decree of court. Rev. St., §3079.

14. After a final determination therein trover could not be brought against the customs official. *McGuire v. Winslow*, 26 Fed. 304.

on which duties are not paid within one year after such are deposited.¹⁵

E. ACTIONS ON BONDS.¹⁶ — In a complaint in an action on a bond to secure duties it is not sufficient to annex the bond and allege generally that the terms and conditions have not been complied with.¹⁷

VI. ACTION TO ENFORCE FORFEITURE.¹⁸ — A. NATURE OF PROCEEDING. — The proceeding to enforce a forfeiture is a civil cause,¹⁹ though to a certain extent it is criminal in its nature.²⁰ And although it has the ordinary characteristics of a proceeding *in rem*,²¹ it is also directed against the person.²²

B. NECESSITY FOR PRIOR CRIMINAL PROSECUTION. — It is not necessary to prosecute criminal proceedings first.²³

15. Such goods "shall be regarded as abandoned to the government." Rev. St., §2971. See also, §§2972-2975.

Sale of goods in public warehouse because of depreciation in value. See Rev. St., §2976.

"Abandonment" does not mean abandonment of title by the importer, but means "vesting absolute authority and power in the government . . . to sell and dispose of the same for the purpose of collecting duties, charges and expenses." *Anglo-California Bank v. Secretary of Treasury*, 76 Fed. 742, 22 C. C. A. 527. See also, *Buxbaum v. United States*, 80 Fed. 885, 26 C. C. A. 216.

The time has been construed to include the time the goods were on ship-board. *Hartman v. Oliver*, 125 U. S. 525, 8 Sup. Ct. 958, 31 L. ed. 813.

16. Bail pending trial, see the title "Recognizances."

17. There must be "allegations that there were duties on the goods, what they were and to what amount they remain unpaid." *United States v. Duys*, 112 Fed. 875. The court bases its decision on Rev. St., §961, and *cites United States v. Curtajar*, 67 Fed. 530, 14 C. C. A. 515; *United States v. De Visser*, 10 Fed. 642. But see *United States v. Dieckerhoff*, 202 U. S. 302, 26 Sup. Ct. 604, 50 L. ed. 1041, where it is held that notwithstanding that section the obligation of a customs bond is absolute and in the nature of a penalty rather than a question of damages.

18. Remission of Fine. — See the titles "Fines;" "Forfeitures;" "Pardon;" "Penalties."

19. *Friedenstein v. United States*, 125 U. S. 224, 8 Sup. Ct. 838, 31 L.

ed. 736; *United States v. Cheeseborough*, 176 Fed. 778.

20. *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. ed. 746.

So a general judgment will be upheld if one count of the information is good. *Clifton v. United States*, 4 How. (U. S.) 242, 11 L. ed. 957; *Locke v. United States*, 7 Cranch (U. S.) 339, 3 L. ed. 364.

Though the object of the statute forfeiting the value of merchandise is no doubt partly remedial, and for the indemnity of the government, it is also largely penal. The partial purpose of indemnity does not change the essential nature or character of the action. *United States v. Riley*, 88 Fed. 480; *United States v. De Groat*, 30 Fed. 764.

It is not a criminal prosecution in the sense that the accused is entitled to be confronted with the witnesses against him. *United States v. Zucker*, 161 U. S. 475, 16 Sup. Ct. 641, 40 L. ed. 777. See also, *United States v. A Lot of Jewelry*, 59 Fed. 684.

21. *Friedenstein v. United States*, 125 U. S. 224, 8 Sup. Ct. 838, 31 L. ed. 736.

22. It is "in effect a proceeding against the owner of the property as well as against the goods." Therefore, the court refused to compel defendants to testify against themselves. *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. ed. 746. See also, *United States v. Riley*, 104 Fed. 275.

23. The forfeiture of the goods accrues to the United States on the commission or omission of the acts specified in the statutes. It is not necessary to first convict some one of the crime of smuggling. *Origet v. United States*, 125 U. S. 240, 8 Sup. Ct. 846, 31 L. ed. 743.

C. PRIOR CRIMINAL PROSECUTION AS A BAR.—An acquittal in a criminal prosecution brought for the illegal entry of goods bars an action for the forfeiture of the same goods based on the same state of facts.²⁴

D. LIMITATION OF ACTION.—The limitation is three years where the action is for a forfeiture for undervaluation,²⁵ and is one year where articles have been fairly entered and no actual intent to defraud appears.²⁶

Intent.—The tolling of the statute for “concealment” has reference to some active intent on the part of some one to secrete the property.²⁷

E. ABATEMENT AND REVIVAL.—The action for forfeiture abates with defendant’s death and cannot be revived against his executor.²⁸

F. JURISDICTION.—The proceedings should be brought on the law side of the court,²⁹ and if improperly brought in admiralty should be dismissed for want of jurisdiction.³⁰

G. VENUE.—The proceedings must be brought in the district in which the goods are found.³¹

H. SUMMONS.—The summons should, in form, conform to the processes in use in the state courts of the same jurisdiction.³²

I. THE INFORMATION AND SUBSEQUENT PLEADINGS.—It is not necessary to draw the information with the particularity required of

24. *United States v. Zucker*, 161 U. S. 475, 16 Sup. Ct. 641, 40 L. ed. 777; *United States v. Rosenthal*, 174 Fed. 652, 98 C. C. A. 406. See also, *Coffey v. United States*, 116 U. S. 436, 6 Sup. Ct. 437, 29 L. ed. 684; 23 Op. Att.-Gen. 63, cited with approval in *United States v. Cheeseborough*, 176 Fed. 778.

Where a husband and wife were both indicted and the husband was acquitted and *nolle prosequi* entered against the wife the action would lie against her. *United States v. A Lot of Precious Stones and Jewelry*, 134 Fed. 61, 68 C. C. A. 1.

25. *United States v. Wittemann*, 152 Fed. 377, 81 C. C. A. 503.

26. There had been a full opportunity for the officials to inspect and the goods were, in fact, entitled to free entry, but certain formalities had not been followed. *United States v. One Oil Painting*, 31 Fed. 881.

27. Mere lack of information on the part of the customs officials is not sufficient. *United States v. Stradivarius Violin*, 188 Fed. 542; *United States v. One Dark Bay Horse*, 130 Fed. 240.

28. It is not taken out of the general rule as to abatement of penal actions simply because the estate may have benefited by the non-payment of duties. The administrator may be liable for the duties saved, but that is not in-

volved in the action. *United States v. Riley*, 104 Fed. 275.

The statutes of the various states as to abatement do not govern. *United States v. De Groat*, 30 Fed. 764.

29. *United States v. 150 Head of Cattle and 52 Calves*, 3 Ariz. 134, 77 Pac. 489. See also, *The Sarah Hazard*, 8 Wheat. (U. S.) 391, 5 L. ed. 644.

30. Seizure originally alleged to have been made on board a ship in navigable waters and proceedings started in admiralty. On its appearing seizure was, in fact, on land, all proceedings should have stopped for want of jurisdiction. *The Sarah Hazard*, Claimant, 8 Wheat. (U. S.) 390, 5 L. ed. 644.

31. That the collector was from another district and carried the goods there for the purpose of identification, does not affect the rule. *United States v. Larkin*, 153 Fed. 113, 82 C. C. A. 247.

32. The action being brought in New York, the provisions of the New York Code of Procedure should be followed, and the summons endorsed with the statute under which the forfeiture is claimed. But in this particular case the failure so to do was held to be waived. *United States v. Riley*, 88 Fed. 480.

criminal pleadings,³³ but it must be clearly shown upon what the government bases its claim.³⁴ It need not specifically allege an intent to defraud even when the statute required the jury to find whether such intent existed.³⁵

The reply must not be ambiguous or deal in negatives pregnant.³⁶

J. INTERVENTION.—The owner of a patent-right may intervene where the property libeled for forfeiture for undervaluation has been seized as the property of persons whom the owner claims are infringers.³⁷

K. BURDEN OF PROOF.³⁸—Under the “Customs Administrative Act” the burden of proof is on the claimant “provided probable cause is shown for such prosecution.”³⁹

“Probable cause” within the statute “imports circumstances which create suspicion.”⁴⁰

L. INSTRUCTIONS.—Instructions must not let in extraneous considerations.⁴¹

M. VERDICT.—A finding that “goods were brought in with intent to defraud the United States” is sufficient.⁴²

33. *United States v. A Lot of Jewelry*, 59 Fed. 684.

34. If it is merely inferential that an illegal act has been committed, the exceptions will be sustained. *United States v. 646 Half Boxes of Figs*, 164 Fed. 778.

35. *Friedenstein v. United States*, 125 U. S. 224, 8 Sup. Ct. 838, 31 L. ed. 736.

The court refused to follow *United States v. Ninety Demijohns of Rum*, 4 Woods 637, 8 Fed. 485, which held that the intent was of the gist of the action, and so must be pleaded. Justices Field and Harlan dissented, preferring the rule in 4 Woods, *supra*.

The section of the statute involved has now been repealed, and the cases uniformly hold that no intent is necessary to constitute the offense. (See *United States v. Harts*, 131 Fed. 886), though want of intent may be a defense. See *United States v. Seventy-five Bales of Tobacco*, 147 Fed. 127, 77 C. C. A. 353. See also, *Cotzhausen v. Nazoo*, 107 U. S. 215, 2 Sup. Ct. 503, 27 L. ed. 540; *United States v. A Lot of Jewelry*, 59 Fed. 684.

36. *United States v. Larkin*, 153 Fed. 113, 82 C. C. A. 247.

37. The owner of the patent-right sought to get possession to destroy the goods as infringing articles under the patent laws. *United States v. One Case Chemical Compound*, 81 Fed. 373.

38. **Presumption for Failure To Pro-**

duce Evidence.—See, 9 *ENCYCLOPÆDIA OF EVIDENCE*, p. 958, *et seq.*

39. Act of Congress, July 10, 1890, §21, re-enacted Aug. 5, 1909, §20. This statute “is a reproduction of the old statute of 1789.” *United States v. A Lot of Jewelry*, 59 Fed. 684.

This rule has “always been regarded as a permanent feature of our revenue system.” *Cliquot’s Champayne*, 3 Wall. (U. S.) 114, 18 L. ed. 116.

On seizure for entry by false denomination, the burden would be on claimant to show that he made the entry to receive the benefit of certain drawbacks and so come within certain exceptions of the customs regulations. *Barlow v. United States*, 7 Pet. (U. S.) 404, 8 L. ed. 728.

40. *United States v. A Lot of Jewelry*, 59 Fed. 684. See also, *Averill v. Smith*, 17 Wall. (U. S.) 82, 21 L. ed. 613.

41. An instruction on behalf of claimant was to the effect that if their verdict was in claimant’s favor, the government would have a lien upon the goods and could recover the lawful duty. This “could have served no other purpose than to unduly influence the jury in her behalf and incline them to find in her favor upon the theory that in any event the government could not be a loser.” *United States v. One Pearl Necklace*, 111 Fed. 164, 49 C. C. A. 287, 56 L. R. A. 130.

42. The words “brought in” may

N. JUDGMENT.—When the verdict shows the jury found as to the fraudulent intent, the judgment need not recite this.⁴³

The court may leave the decision of questions of proper classification to the board of general appraisers.⁴⁴

Vacating Judgment.—As in other cases the judgment cannot be vacated after the term.⁴⁵

O. COSTS.—Where the verdict is in claimant's favor he is not taxable with costs.⁴⁶

VII. CRIMINAL PROSECUTION FOR VIOLATION OF CUSTOMS LAWS.⁴⁷—**A. UNDER WHAT STATUTE BROUGHT.**—Offenders may be indicted either under the specific provisions of the customs acts, or under the general provisions of the statutes against conspiracy, forgery, etc.⁴⁸

B. LIMITATION OF ACTIONS.—Where the indictment is brought directly under the provisions of the customs act, the limitation provisions for crimes arising under the revenue laws prevails;⁴⁹ but where it is under the general provisions as to conspiracy the general limitation as to crimes governs.⁵⁰

C. JOINDER OF DEFENDANTS.—Where customs officials and individuals are charged with conspiracy to defraud the government of customs, they may be joined in one indictment.⁵¹

be fairly construed as referring to the entering or attempting to enter. *Origit v. United States*, 125 U. S. 240, 8 Sup. Ct. 846, 31 L. ed. 743.

43. Under section 16 of Act of Congress, June 22, 1874; *Friedenstein v. United States*, 125 U. S. 224, 8 Sup. Ct. 838, 31 L. ed. 736; *Origit v. United States*, 125 U. S. 240, 8 Sup. Ct. 846, 31 L. ed. 743.

44. Having decided that no forfeiture should be declared, because the importer simply made a mistake. *United States v. Seventy-five Bales of Tobacco*, 147 Fed. 127, 77 C. C. A. 353.

45. *United States v. Four Lorgnette Holders*, 132 Fed. 564.

46. *United States v. 150 Head of Cattle and 52 Calves*, 3 Ariz. 134, 77 Pac. 489.

47. See also the title "Grand Jury" for immunity because of testimony before. See also the titles "Indictment and Information;" "New Trial,"

Remission of Forfeiture.—See the titles "Fines;" "Penalties;" "Forfeitures;" "Pardon."

48. **Punishable for Forgery.**—*United States v. Lawrence*, 13 Blatch. (U. S.) 211, 26 Fed. Cas. No. 15,572.

Officer indicted under general conspiracy statute, though also indictable for violation of duty as an officer.

Grumberg v. United States, 145 Fed. 81, 76 C. C. A. 51, *affirming* 131 Fed. 137. See also *United States v. Hirsch*, 100 U. S. 33, 25 L. ed. 539.

Plea By One Conspirator.—Whether or not the plea of one conspirator shall be received in open court in the presence of the panel before the jurors are called is within the discretion of the court. *Grumberg v. United States*, 145 Fed. 81, 76 C. C. A. 51.

Peremptory Challenges.—One indicted for smuggling has only three peremptory challenges because, in degree, the crime is only a misdemeanor. *Reagan v. United States*, 157 U. S. 301, 15 Sup. Ct. 610, 39 L. ed. 709.

49. *United States v. Hirsch*, 100 U. S. 33, 25 L. ed. 539; *United States v. Shorey*, 27 Fed. Cas. No. 16,282; *In re Landsberg*, 14 Fed. Cas. No. 8,041.

50. *United States v. Hirsch*, 100 U. S. 33, 25 L. ed. 539.

51. Though the officers might have been indicted under §3169 Rev. St. which has reference to officers only. *Grumberg v. United States*, 145 Fed. 81, 76 C. C. A. 51, *affirming* 131 Fed. 137; *following United States v. Boyden*, 1 Low. 266, 24 Fed. Cas. No. 14,632, *disapproving United States v. McKee*, 26 Fed. Cas. No. 15,683; *United States*

D. SUFFICIENCY OF INDICTMENT.⁵² — 1. Joinder of Counts. When all the acts complained of are connected with the same transaction, such acts may be charged in one count.⁵³

2. Description of Property. — A reasonable amount of detail in description is all that can be required.⁵⁴ The goods may be described specifically by the names usually appropriated to them.⁵⁵

3. Alleging Intent and Knowledge. — Where the intent to evade the customs laws is the gist of the offense that intent must be alleged in detail,⁵⁶ and there must be a sufficient allegation of scienter.⁵⁷

v. Macdonald, 3 Dill 543, 26 Fed. Cas. No. 15,670.

52. See also the title "Indictment and Information."

53. An indictment is not double which charges "in a single count a false and fraudulent entry by means of a false and fraudulent affidavit, a false and fraudulent paper, and a false and fraudulent written statement." *United States v. Cutagar*, 60 Fed. 744.

The offense of effecting an entry, and of aiding in effecting an entry, being different stages of the same offense, may be charged conjunctively in one count against the same person. *United States v. Bettilini*, 1 Woods (U. S.) 654, 24 Fed. Cas. No. 14,587, *criticizing United States v. Ballard*, 24 Fed. Cas. No. 14,506.

54. The language used to identify the goods was "certain goods, wares and merchandise, to-wit: a large quantity of silk goods, to-wit, six cases containing silk goods of the value of \$30,000, a more particular description of which is to the jurors unknown." There is also the additional statement that the goods were dutiable goods introduced into the port of New York from France." *United States v. Claflin*, 13 Blatch. 178, 25 Fed. Cas. No. 14,798. See also *United States v. White*, 171 Fed. 775.

55. An indictment is proper which describes the goods as "smoking opium," or "prepared opium," though the exact words of the statute are "opium prepared for smoking." *United States v. Gardner*, 42 Fed. 832.

"Prepared opium, subject to duty by law, to-wit: the duty of twelve dollars per pound," is a sufficient description. *Dunbar v. United States*, 156 U. S. 185, 15 Sup. Ct. 325, 39 L. ed. 390, *affirming* 60 Fed. 75.

It is sufficient to describe goods as

"diamonds" of a certain value and subject to duty. *Keck v. United States*, 172 U. S. 434, 19 Sup. Ct. 254, 43 L. ed. 505.

56. An indictment under §2987, Rev. St., for fraudulently removing goods from a public warehouse sufficiently alleges that such removal was made with intent to evade the law where it recites that the goods were withdrawn "with the false . . . pretense" that they were to be exported. *United States v. Ehr Gott*, 182 Fed. 267.

57. "Did wilfully, unlawfully, and knowingly, and with intent to defraud the revenues of the United States, smuggle and clandestinely introduce into the United States," sufficiently alleged a scienter. *Dunbar v. United States*, 156 U. S. 185, 15 Sup. Ct. 325, 39 L. ed. 390, *affirming* 60 Fed. 75.

Availing that the goods have been "smuggled and clandestinely introduced," etc., is sufficient in an indictment for concealing, transporting or facilitating the sale of such goods. *United States v. Claflin*, 13 Blatch. 178, 25 Fed. Cas. No. 14,798.

An indictment "under the sixth section of the customs administrative act of June 10, 1890 (1 Supp. Rev. St., p. 748) which declares that 'any person who shall knowingly make any false statement in the declarations provided for in the preceding section,'" etc., is sufficient which avers that defendant "wilfully declared that he was the owner of the goods,—whereas in fact he was not the owner as he then and there well knew." *United States v. Fawcett*, 86 Fed. 900.

"Did unlawfully and wilfully conspire to commit an offense against the United States in and by knowingly and wilfully smuggling and clandestinely introducing into the United States, at the port and collection district of

4. Alleging the Criminal Acts.—It is not sufficient to allege the offense merely in the words of the statute,⁵⁸ but it is not necessary to plead all the details.⁵⁹

An indictment for receiving goods illegally brought in, need not set forth the original offense with the particularity necessary in an indictment therefor.⁶⁰

New York, from a foreign country with intent to defraud the revenue of the United States, certain goods, etc.,” held sufficient. *United States v. White*, 171 Fed. 775.

58. *Keck v. United States*, 172 U. S. 434, 19 Sup. Ct. 254, 43 L. ed. 505; *United States v. Kee Ho*, 33 Fed. 333; *United States v. Thomas*, 4 Ben. 370, 28 Fed. Cas. No. 16,473; *United States v. Claffin*, 13 Blatch. 178, 25 Fed. Cas. No. 14,798.

Such circumstances should be alleged as will show that a false sample was exhibited, in what false, and to whom exhibited, what false representations were made and to whom, what false device was used and how, with what officer of the revenue the collusion was had. *United States v. Bettilini*, 1 Woods 654, 24 Fed. Cas. No. 14,587, criticizing *United States v. Ballard*, 24 Fed. Cas. No. 14,506.

Variance.—The indictment alleged a conspiracy to defraud the United States of moneys thereafter coming due from defendants as importers. The proof was that the goods were consigned to customs brokers who entered the goods and paid part of the duties. It was held no variance as the moneys to be paid were in fact to come from the importer and not from the broker. *Grumberg v. United States*, 145 Fed. 81, 76 C. C. A. 51.

59. It is not sufficient to merely allege in general terms that the defendants have conspired to defraud the customs. Parties may so conspire to defraud by smuggling in goods at night; by bribing the customs house officers; by forging invoices; by false invoices; and the pleader must ordinarily show in a general way which of these methods the parties intended. But it is not necessary to plead all the details. *United States v. Grunberg*, 131 Fed. 137.

An indictment is sufficient which shows that goods were entered upon a false classification as to value and the particular in which the classification was false without setting forth in toto the various steps taken or setting out the documents used by their tenor. *United States v. Moller*, 16 Blatch. 65, 26 Fed. Cas. No. 15,794.

60. The same particularity of time, place or circumstances would not be required. *United States v. Claffin*, 13 Blatch. 178, 25 Fed. Cas. No. 14,798.

While consenting to the main proposition the court says that it is not sufficient to allege as to opium merely that it was imported contrary to law. For there are other illegal ways of bringing in opium besides smuggling. *United States v. Kee Ho*, 33 Fed. 333.

CUTTING TIMBERS.—See Logs and Logging.

CY PRES DOCTRINE.—See Charities; Trusts and Trustees.

DAMAGES.—See various specific titles.

DEATH.—See generally Revivor; Survival. See also Abatement, Pleas of; Admiralty; Appeals; Bankruptcy Proceedings; Continuances; Decrees; Dismissal and Nonsuit; Execution; Judgment; and various specific titles.

DEATH BY WRONGFUL ACT

(THE ACTION FOR)

By CHARLES W. FOURL,
Of the California Bar.

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I. SCOPE OF ARTICLE.—This article is restricted to actions for the recovery of damages under statutes giving a right of action for death to designated beneficiaries and will not treat actions under the so-called survival statutes removing the operation of the maxim, *actio personalis moritur cum persona*, and perpetuating the deceased's action for injuries only. It excludes all matters pertaining to the general law of negligence and all questions of pleading and practice not peculiar to actions for death by wrongful act.

II. GENERAL DISCUSSION OF THE ORIGIN AND SCOPE OF THE REMEDY.—In accordance with the maxim *actio personalis moritur cum persona*, no cause of action existed at common law for death resulting from the wrongful act, neglect or default of another, and the right of action is therefore wholly dependent upon the statutes of the various states.¹ Such statutes giving a right of action for

1. **U. S.**—Workman *v.* New York City, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. ed. 314; Mobile L. Ins. Co. *v.* Brame, 95 U. S. 754, 756, 24 L. ed. 580; Fithian *v.* St. Louis, etc., R. Co., 188 Fed. 842; Pulum *v.* Dold P. Co., 182 Fed. 356; Viscount De Valla Da Costa *v.* Southern Pac. Co., 176 Fed. 843, 846, 100 C. C. A. 313; Western Union T. Co. *v.* McGill, 57 Fed. 699, 6 C. C. A. 521, 21 L. R. A. 818. **Ala.**—Kennedy *v.* Davis, 55 So. 104; White *v.* Ward, 157 Ala. 345, 47 So. 166, 18 L. R. A. (N. S.) 568. **Ark.**—Earnest *v.* St. Louis, etc. Co., 87 Ark. 65, 112 S. W. 141. **Cal.**—Bond *v.* United R. Co., 159 Cal. 270, 113 Pac. 366; Burk *v.* Arcata, etc., R. Co., 125 Cal. 364, 57 Pac. 1065, 73 Am. St. Rep. 52. **Colo.**—Hindry *v.* Holt, 24 Colo. 464, 51 Pac. 1002, 65 Am. St. Rep. 235. **Conn.**—Goodsell *v.* Hartford, etc., R. Co., 33 Conn. 51; Connecticut Mut. L. Ins. Co. *v.* New York, etc., R. Co., 25 Conn. 265, 65 Am. Dec. 571. **Del.**—Perry *v.* Philadelphia, etc., R. Co., 77 Atl. 725. **D. C.**—United States Elec. Light Co. *v.* Sullivan, 22 App. Cas. 115. **Fla.**—Jacksonville Elec. Co. *v.* Bowden, 54 Fla. 461, 45 So. 755, 15 L. R. A. (N. S.) 451. **Ga.**—Fuller *v.* Inman, 74 S. E. 287; Southern Bell T. Co. *v.* Cassin, 111 Ga. 575, 36 S. E. 881 (see this case for history of legislation); Georgia R., etc., Co. *v.* Wynn, 42 Ga. 331. **Ill.**—Crane *v.* Chicago, 233 Ill. 259, 84 N. E. 222; Chicago Bridge, etc., Co. *v.* La Montia, 112 Ill. App. 43; Chicago, etc., R. Co. *v.* Schroeder, 18 Ill. App. 328. **Ind.**—Princeton Coal, etc., Co. *v.* Lawrence, 95 N. E. 423; Wabash R. Co. *v.* Hasset, 170 Ind. 370, 83 N. E. 705; Citizens' St. R. Co. *v.* Cooper, 22 Ind. App. 459, 53 N. E. 1092, 72 Am. St. Rep. 319. **Ia.**—Seney *v.* Chicago, etc., R. Co., 125 Iowa 290, 101 N. W. 76. **Kan.**—Eureka *v.* Merrifield, 53 Kan. 794, 37 Pac. 113. **Ky.**—Smith's Admr. *v.* National Coal, etc., Co., 135 Ky. 671, 117 S. W. 280; Louisville, etc., R. Co. *v.* Raymond's Admr., 135 Ky. 738, 123 S. W. 281, 27 L. R. A. (N. S.) 176. **La.**—Van Amburg *v.* Vicksburg, etc., R. Co., 37 La. Ann. 650, 55 Am. Rep. 517. **Me.**—Hammond *v.* Lewiston, etc., R. Co., 106 Me. 209, 76 Atl. 672. **Md.**—Stewart *v.* United Elec., etc., Co., 104 Md. 332, 65 Atl. 49, 118 Am. St. Rep. 410, 8 L. R. A. (N. S.) 384. **Mass.**—O'Donnell *v.* North Attleborough, 93 N. E. 1084; Sherlag *v.* Kelley, 200 Mass. 232, 86 N. E. 293, 128 Am. St. Rep. 414, 19 L. R. A. 633; Smith *v.* Thomason, etc., Elec. Co., 188 Mass. 371, 74 N. E. 664. **Mich.**—Mascitelli *v.* Union Carbide Co., 151 Mich. 693, 115 N. W. 721. **Minn.**—Vander Wegen *v.* Great Nav. R. Co., 114 Minn. 113, 130 N. W. 70. **Mo.**—Clark *v.* Kansas City, etc., R. Co., 219 Mo. 524, 118 S. W. 40; Crohn *v.* Kansas City, etc., Co., 131 Mo. App. 313, 109 S. W. 1068. **Mont.**—Dillon *v.* Great Northern R. Co., 38 Mont. 485, 100 Pac. 960. **Neb.**—Murphy *v.* Willow Springs Brg. Co., 81 Neb. 219, 223, 115 N. W. 761-763. **N. H.**—Piper *v.* Boston, etc., R. Co., 75 N. H. 435, 75 Atl. 1041. **N. J.**—Brethauer *v.* Jacobson, 79 N. J. L. 223, 75 Atl. 560; Myers *v.* Halborn, 58 N. J. L. 193, 33 Atl. 389, 55 Am. St. Rep. 606, 30 L. R. A. 345. **N. Y.**—Duncan *v.* St. Luke's Hospital, 192 N.

wrongful death have been enacted in practically all the states.²

Some statutes merely provide that the deceased's right of action for injuries shall not abate by reason of his death. This is known as a survival statute and perpetuates the deceased's right of action for the injuries received; it does not create a new cause of action.³

Y. 580, 85 N. E. 1109; *Stuber v. McEntee*, 142 N. Y. 200, 36 N. E. 878; 31 Abb. N. C. 246, 58 N. Y. St. 455; *Debevoise v. New York, etc., R. Co.*, 98 N. Y. 377. N. D.—*Harshman v. Northern Pac. R. Co.*, 14 N. D. 69, 103 N. W. 412. Ohio.—*Steel v. Kurtz*, 28 Ohio St. 191, 195; *Worley v. C. H., etc., Co.*, 1 Handy 481. Okla.—*Bartlett v. Chicago, etc., R. Co.*, 21 Okla. 415, 96 Pac. 468. Ore.—*Putnam v. Southern Pac. Co.*, 21 Ore. 230, 27 Pac. 1033. Pa.—*Martin v. Pittsburg R. Co.*, 227 Pa. 18, 75 Atl. 837, 26 L. R. A. (N. S.) 1221; *Waltz v. Pennsylvania R. Co.*, 216 Pa. 165, 65 Atl. 401; *Usher v. West Jersey R. Co.*, 126 Pa. 206, 17 Atl. 597, 12 Am. St. Rep. 863. S. C.—*Pinson v. Southern R. Co.*, 85 S. C. 355, 67 S. E. 464. S. D.—*Lintz v. Holy Terror Min. Co.*, 13 S. D. 489, 83 N. W. 570. Tenn.—*Holston v. Coal, etc., Co.*, 95 Tenn. 521, 32 S. W. 486; *Holder v. Nashville, etc., R. Co.*, 92 Tenn. 141, 20 S. W. 537. Tex.—*Farmers', etc., Bank v. Hanks*, 137 S. W. 1120, *reversing*, 128 S. W. 147; *Gutierrez v. El Paso, etc., R. Co.*, 102 Tex. 378, 117 S. W. 426; *Nelson v. Galveston, etc., R. Co.*, 78 Tex. 621, 14 S. W. 1021, 22 Am. St. Rep. 81, 11 L. R. A. 391; *Rader v. Galveston, etc., R. Co. (Tex. Civ. App.)*, 137 S. W. 718. Utah.—*Thomas v. Union Pac. R. Co.*, 1 Utah 232. Vt.—*Sherman v. Johnson*, 58 Vt. 40, 2 Atl. 707; *Good v. Towns*, 56 Vt. 410, 48 Am. Rep. 797. Va.—*Stevenson v. Ritter L. Co.*, 108 Va. 575, 62 S. E. 351, 18 L. R. A. (N. S.) 316. Wash.—*Hedrick v. Ilwaco, etc., Nav. Co.*, 4 Wash. 400, 30 Pac. 714. Wis.—*Quinn v. Chicago, etc., R. Co.*, 141 Wis. 497, 124 N. W. 653; *Brown v. Chicago, etc., R. Co.*, 102 Wis. 137, 77 N. W. 748, 78 N. W. 771, 44 L. R. A. 579. Can.—*Monaghan v. Horn*, 7 Can. Sup. Ct. 409.

Proposition Not Open to Question. The authorities are so numerous, and so uniform to the proposition that, by the common law, no civil action lies for an injury resulting in death, that it is impossible to speak of it as a propo-

sition open to question. *Mobile L. Ins. Co. v. Brame*, 95 U. S. 754, 24 L. ed. 580.

History of Legislation.—To correct this hardship, Lord Campbell, in 1846, introduced in the British Parliament an act to authorize the recovery of damages in cases of the wrongful homicide of a person. This act which is known in history as "Lord Campbell's Act," is the basis for statutes which have been adopted in practically all the states of the American Union. *Fuller v. Inman (Ga.)*, 74 S. E. 287, 289. Lord Campbell's Act, by reason of its peculiar wording, was held to have been intended to give compensation to the relatives of the person killed for the wrong done. The damages were not to be in the nature of a *solatium*, but compensation to the family of the deceased equivalent to the pecuniary benefits which the family might have expected from the continuance of his life. *Blake v. Midland R. Co.*, 18 Q. B. 93, 83 E. C. L. 93.

The first statute passed in this country was the act of the New York legislature of 1847, ch. 450. *Quin v. Moore*, 15 N. Y. 432; *Trafford v. Adams Exp. Co.*, 8 Lea (Tenn.) 96.

2. *Fuller v. Inman (Ga.)*, 74 S. E. 287, 289; *Stewart v. United Elec., etc., Co.*, 104 Md. 332, 65 Atl. 49, 50, 8 L. R. A. (N. S.) 384.

See cases cited to preceding note, and statutes of various states.

3. U. S.—*Lyon v. Boston, etc., Co.*, 107 Fed. 386. Ala.—*Williams v. Alabama, etc. Co.*, 158 Ala. 396, 48 So. 485. Ark.—*St. Louis, etc., R. Co. v. McNamare*, 91 Ark. 515, 122 S. W. 102 (*construing* Missouri statute); *St. Louis, etc., R. Co. v. Dawson*, 68 Ark. 1, 56 S. W. 46. Conn.—*Wilmot v. McPadden*, 79 Conn. 367, 65 Atl. 157, 19 L. R. A. (N. S.) 1101; *Budd v. Meriden Elec. Co.*, 69 Conn. 272, 37 Atl. 683. Del.—*Perry v. Philadelphia, etc., R. Co.*, 77 Atl. 725; 13 Del. Laws, ch. 31; *Rev. Code*, 1893, p. 783, §1. Ia.—*Sachs v. Sioux City*, 109 Iowa 224, 80 N. W. 336; *Conners v. Burlington*,

Other statutes give an action for the death as contradistinguished from the injuries. Such a statute creates a new cause of action in favor of the beneficiaries named in the statute, and is in no sense a continuation of the right vested in the deceased in his lifetime to recover damages for the injuries received.⁴

- etc., R. Co., 71 Iowa 490, 32 N. W. 465; *Sherman v. West-Stage Co.*, 24 Iowa 515. **Kan.**—*Atchison*, etc., R. Co. v. *Napole*, 55 Kan. 401, 40 Pac. 669. **Ky.**—*Louisville*, etc., R. Co. v. *Raymond's Admr.*, 123 S. W. 281. **Mass.**—*Maher v. Boston*, etc., R. Co., 158 Mass. 36, 32 N. E. 950; *Mulcahey v. Washburn*, etc., Co., 145 Mass. 281, 14 N. E. 106, 1 Am. St. Rep. 458. **Mich.**—*West v. Detroit United R. Co.*, 159 Mich. 269, 123 N. W. 1101; *Jones v. McMillan*, 129 Mich. 86, 88 N. W. 206. **Miss.**—*Illinois Cent. R. Co. v. Pendergrass*, 69 Miss. 425, 12 So. 954. **Mo.**—*Strode v. St. Louis Trans. Co.*, 197 Mo. 616, 95 S. W. 851; *Gray v. McDonald*, 104 Mo. 303, 16 S. W. 398. **Mont.**—*Beeler v. Butte*, etc., Co., 41 Mont. 465, 110 Pac. 528 (injuries in mine); *Dillon v. Great Northern R. Co.*, 38 Mont. 485, 100 Pac. 960. **Pa.**—*Black v. Baltimore*, etc., R. Co., 224 Pa. 519, 73 Atl. 903. **S. D.**—*Belding v. Black Hills*, etc., R. Co., 3 S. D. 369, 53 N. W. 750 (§5498 Comp. Laws). **Vt.**—*Needham v. Grand Trunk R. Co.*, 38 Vt. 294.
4. **U. S.**—*Chesapeake*, etc., R. Co. v. *Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. ed. 121; *Louisville*, etc., R. Co. v. *Clarke*, 152 U. S. 230, 14 Sup. Ct. 579, 38 L. ed. 422; *Seaboard*, etc., Co. v. *Allen*, 192 Fed. 480, 483; *Fithian v. St. Louis*, etc., Co., 188 Fed. 842, 844. *Walsh v. New York*, etc., R. Co., 173 Fed. 494 (Federal Employers' Liability Act). **Ala.**—*White v. Ward*, 157 Ala. 345, 47 So. 166; *Hadley v. Bryars*, 58 Ala. 185. **Cal.**—*Burk v. Arcata*, etc., R. Co., 125 Cal. 364, 367, 57 Pac. 1065; *Munro v. Pacific*, etc., Co., 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248. **Del.**—*Perry v. Philadelphia*, etc., R. Co., 77 Atl. 725; 13 Del. Laws, ch. 31; Rev. Code, 1893, p. 788, §2. **Ill.**—*Chicago-Virden C. Co. v. Bradley*, 134 Ill. App. 234, *affirmed*, 231 Ill. 622, 83 N. E. 424. **Ind.**—*Malott v. Shimer*, 153 Ind. 35, 54 N. E. 101, 74 Am. St. Rep. 278; *Pittsburgh*, etc., R. Co. v. *Hosea*, 152 Ind. 412, 53 N. E. 419. **Me.**—*Anderson v. Wetter*, 103 Me. 257, 69 Atl. 105, 15 L. R. A. (N. S.) 1003; *Sawyer v. Perry*, 88 Me. 42, 33 Atl. 660. **Md.**—*Stewart v. United Elec.*, etc., R. Co., 104 Md. 332, 65 Atl. 49, 118 Am. St. Rep. 410, 8 L. R. A. (N. S.) 384. **Minn.**—*Aho v. Jesmore*, 101 Minn. 449, 112 N. W. 538. **N. Y.**—*Whitford v. Panama R. Co.*, 23 N. Y. 465; *Uss v. Crane Co.*, 138 App. Div. 256, 123 N. Y. Supp. 94. **N. C.**—*Hall v. Southern R. Co.*, 149 N. C. 108, 62 S. E. 899. **Ohio.**—*Mahoning Val. R. Co. v. Van Alstine*, 77 Ohio 395, 83 N. E. 601. **Ore.**—*Putman v. Southern Pac. Co.*, 27 Ore. 230, 27 Pac. 1033, 1034. **Pa.**—*Fink v. Garmann*, 40 Pa. 95; *Pennsylvania R. Co. v. Zebe*, 33 Pa. 318. **S. C.**—*Osteen v. Southern R. Co.*, 76 S. C. 368, 57 S. E. 196. **S. D.**—*Smith v. Chicago*, etc., R. Co., 6 S. D. 583, 62 N. W. 967, 28 L. R. A. 573. **Utah.**—*Mason v. Union Pac. R. Co.*, 7 Utah 77, 24 Pac. 796. **Va.**—*Beaver's Admx. v. Putnam's Curator*, 110 Va. 713, 67 S. E. 353; *Stevenson v. Ritter L. Co.*, 108 Va. 575, 62 S. E. 351, 18 L. R. A. (N. S.) 316. **Tenn.**—*St. Louis*, etc., R. Co. v. *Leazer*, 119 Tenn. 1, 107 S. W. 684, *Shannon's Code*, §4025. **Wis.**—*Brown v. Chicago*, etc., R. Co., 102 Wis. 137, 77 N. W. 748, 78 N. W. 771, 44 L. R. A. 579. **Eng.**—*Seward v. Verra Cruz*, L. R. 10 App. Cas. 59; *Legott v. Great Northern R. Co.*, L. R. 1 Q. B. Div. 599; *Blake v. Midland R. Co.*, 18 Q. B. 93, 83 E. C. L. 93.
- In *Anderson v. Wetter*, 103 Me. 257, 69 Atl. 105, 15 L. R. A. (N. S.) 1003, it is said: "With different parties in interest, different ground of suit, different rule of damages, different application of funds, and different time of limitation, can there be any doubt that there is a different and a new cause of action?"
- Minority Doctrine.**—In a few states it has been held not to create a new cause of action. **Ark.**—*St. Louis*, etc., R. Co. v. *McNamare*, 91 Ark. 515, 122 S. W. 102. **D. C.**—*Moore v. Peywell*, 29 App. Cas. 312. **Ky.**—*Louisville*, etc., R. Co. v. *Raymond's Admr.*, 135 Ky. 738, 123 S. W. 281, 27 L. R. A. (N. S.) 176. **Tenn.**—*Holston v. Day-*

Action Under Survival Act as Precluding Death Action.—In some states both a survival statute and a statute giving an action for wrongful death exist.⁵ In these jurisdictions the question often arises whether or not both actions may be maintained or whether the pursuit of one

ton, etc., R. Co., 95 Tenn. 521, 32 S. W. 486. **Vt.**—*Legg v. Britton*, 64 Vt. 652, 24 Atl. 1016, creates only a new class of damages.

The theory of the statute is that the designated beneficiaries have a pecuniary interest in the life of the person killed and the value of this interest is the amount for which the jury are to give their verdict. Neither the personal wrong, or outrage to the decedent, nor the pain and suffering he may have endured, are to be taken into account. These would be the foundation of the action, and would furnish the criterion of damages, if death had not ensued, and the injured party had brought the suit. But the claim of the administrator and through him of the next of kin is altogether different. The statute imputes to them a direct pecuniary loss in being deprived of a life to them of greater or less value. *Quin v. Moore*, 15 N. Y. 432, 435. See also: **Ark.**—*Davis v. St. Louis, etc., R. Co.*, 53 Ark. 117, 13 S. W. 801, 7 L. R. A. (N. S.) 283. **Md.**—*Tucker v. State*, 89 Md. 471, 43 Atl. 778, 44 Atl. 1004, 46 L. R. A. 181. **Minn.**—*Foot v. Great Northern R. Co.*, 81 Minn. 493, 84 N. W. 342, 52 L. R. A. 354. **Ore.**—*Putman v. Southern Pac. Co.*, 21 Ore. 230, 27 Pac. 1033.

Death Is Basis of Action.—In *Holland v. Brown*, 35 Fed. 43, Mr. Justice Deady said: "The action given by the statute is for the death simply. This includes, of course, all such losses to his estate, or creditors, and next of kin to whom it belongs, and for whose benefit the action is allowed, as may be fairly implied from the cessation of his life. The fact on which the damages are computed is death, and its consequences, and not its antecedents or cause." *Perham v. Portland, etc., Co.*, 33 Ore. 451, 53 Pac. 14, 72 Am. St. Rep. 730, 40 L. R. A. 799.

"In determining the measure of damages, the nature of the statute under which the action is brought is to be closely observed. If the statute is merely a survival statute, the recovery is limited to such damages as might have been recovered by the de-

ceased himself, had he survived the injury and brought the action. If the statute, however, creates a new cause of action distinct from that which the deceased might have maintained, the measure of damages is the pecuniary loss sustained by the parties entitled to the benefit of the action. In the one case—that is, under the survival statute—the damages are limited to compensation for the pain and suffering endured by the deceased, his loss of time, and his expenses between the time of his injury and his death. . .

. In the other case—that is, under the act of 1852—the injury resulting from the death of a person is to be measured by the standard of the pecuniary value of the life of the person to the party entitled to the damages. *Id.* 910; *B. & O. R. R. Co. v. State, Use of Hauer*, 60 Md. 467. Or, as epigrammatically stated in *Needham v. C. T. R. Co.*, 38 Vt. 294: "Such damages to the widow and next of kin begin where the damage of the intestate ended, viz., with his death." *Stewart v. United Elec. Light & P. Co.*, 104 Md. 332, 65 Atl. 49, 8 L. R. A. (N. S.) 384.

5. **Ill.**—*Prouty v. Chicago*, 250 Ill. 222, 95 N. E. 147. **Ky.**—*Louisville R. Co. v. Raymond's Admr.*, 135 Ky. 738, 123 S. W. 281, 27 L. R. A. (N. S.) 176; *Louisville, etc., R. Co. v. Simrall*, 32 Ky. L. Rep. 240, 104 S. W. 1199. **Me.**—*Sawyer v. Perry*, 88 Me. 42, 33 Atl. 660. **Md.**—*Stewart v. United Elec., etc., Co.*, 104 Md. 332, 65 Atl. 49, 50 8 L. R. A. (N. S.) 384, annotated to this point. **Mass.**—*Clare v. New York, etc., R. Co.*, 172 Mass. 211, 51 N. E. 1083. **Mich.**—*Ely v. Detroit United R. Co.*, 162 Mich. 287, 127 N. W. 259; *Oliver v. Houghton, etc., Co.*, 134 Mich. 367, 96 N. W. 434.

The limitation in Lord Campbell's Act that but one suit should be brought was with reference to suits brought under it. It provided that but one suit should be brought for all the beneficiaries or sharers in the damages recovered. *Legg v. Britton*, 64 Vt. 652, 24 Atl. 1016.

remedy excludes the other, and in such case it is generally held that but one of these actions can be maintained.⁶ In other jurisdictions it is held that neither is the alternative of, or substitute for the other, but that both actions may be maintained.⁷

6. U. S.—*Alder Co. v. Fleming*, 159 Fed. 593, 86 C. C. A. 419; *Peers v. Nevada Power, etc., Co.*, 119 Fed. 400; *Hulbert v. Topeka*, 34 Fed. 510 (where Judge Brewer doubted correctness of holding and followed it only in deference to Kansas holdings). **Conn.**—*Goodsell v. Hartford, etc., R. Co.*, 33 Conn. 51. **Ill.**—*Holton v. Daly*, 106 Ill. 131 (because there was but one ground of liability, the wrongful act and all claims for damages grew out of the one wrong); *Chicago, etc., R. Co. v. O'Connor*, 119 Ill. 586, 9 N. E. 263; *Consolidated Coal Co. v. Drombroski*, 106 Ill. App. 641. **Ind.**—*Hecht v. Ohio, etc., R. Co.*, 132 Ind. 507, 32 N. E. 302. **Ky.**—*Louisville, etc., R. Co. v. McElwain*, 98 Ky. 700, 34 S. W. 236, 56 Am. St. Rep. 385, 34 L. R. A. 788, annotated to point. **Mass.**—*Smith v. Thomson-Houston Elec. Co.*, 188 Mass. 371, 74 N. E. 664. **Miss.**—*Mohle, etc., R. Co. v. Hicks*, 91 Miss. 273, 46 So. 360, 124 Am. St. Rep. 679. **N. Y.**—*Littlewood v. New York*, 89 N. Y. 24, 42 Am. Rep. 271; *McGovern v. New York, etc., R. Co.*, 67 N. Y. 417. **Ohio.**—*Gallagher v. River Furnace, etc., Co.*, 2 Ohio N. P. (N. S.) 661. **R. I.**—*Lubrano v. Atlantic Mills*, 19 R. I. 129, 32 Atl. 205, 34 L. R. A. 797. **S. C.**—*Price v. Richmond, etc., R. Co.*, 33 S. C. 556, 12 S. E. 413, 26 Am. St. Rep. 700. **Utah.**—*Fritz v. Western Union Tel. Co.*, 25 Utah 263, 71 Pac. 209. **Vt.**—*Legg v. Britton*, 64 Vt. 652, 24 Atl. 1016. **Va.**—*Brammer's Admr. v. Norfolk, etc., R. Co.*, 107 Va. 206, 57 S. E. 593. **Eng.**—*Wood v. Gray*, L. R. (1892) App. Cas. 576.

In some jurisdictions the beneficiaries may elect as to whether they will bring the action under the survival statute or under the death act, but a recovery under one will bar the remedy on the other (*Chesapeake, etc., R. Co. v. Bank's Admr.*, 142 Ky. 746, 135 S. W. 285; *Louisville R. Co. v. Raymond's Admr.*, 135 Ky. 738, 123 S. W. 281, 27 L. R. A. (N. S.) 176; *Conner's Admr. v. Paul*, 12 Bush (Ky.) 144; *Brammer's Admr. v. Norfolk, etc., R. Co.*, 107 Va. 206, 57 S. E. 593)

though where it appears that his death was due to the injuries, his election to sue for the injuries will not be allowed to defeat the statute, and the recovery will be treated by the court as belonging to the beneficiaries under the statute. *Louisville, etc., R. Co. v. Raymond's Admr.*, 135 Ky. 738, 123 S. W. 281, 27 L. R. A. (N. S.) 176.

In other jurisdictions if the injured party dies from the injuries received, the action is for the death, but if he dies from other causes, the proper action is an action for the injury to his person surviving to his personal representative. **Ill.**—*Prouty v. Chicago*, 250 Ill. 222, 95 N. E. 147. **Kan.**—*Martin v. Missouri, etc., R. Co.*, 58 Kan. 475, 49 Pac. 605; *McCarthy v. Chicago, etc., R. Co.*, 18 Kan. 46, 26 Am. Rep. 742. **Ohio.**—*Gallagher v. River Furnace, etc., Co.*, 2 Ohio N. P. (N. S.) 661. **Utah.**—*Mason v. Union Pac. R. Co.*, 7 Utah 77, 24 Pac. 796. But in some states where both statutes exist there can be a recovery only for death by wrongful act in cases of immediate death; otherwise the action is for the injuries under the survival statute. *Sawyer v. Perry*, 88 Me. 42, 33 Atl. 660; *Oliver v. Houghton, etc., Co.*, 134 Mich. 367, 96 N. W. 434, 104 Am. St. Rep. 607; *Storie v. Grand Trunk R. Co.*, 134 Mich. 227, 96 N. W. 569; *Jones v. McMillan*, 129 Mich. 86, 88 N. W. 206. See also: *Belding v. Black Hills, etc., R. Co.*, 3 S. D. 369, 53 N. W. 750.

7. Ark.—*Davis v. St. Louis, etc., R. Co.*, 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283. **Ga.**—*Augusta R. Co. v. Glover*, 92 Ga. 132, 18 S. E. 406. **Md.**—*Stewart v. United Elec., etc., Co.*, 104 Md. 332, 65 Atl. 49, 54, 8 L. R. A. (N. S.) 384. **Mass.**—*Clare v. New York, etc., R. Co.*, 172 Mass. 211, 51 N. E. 1083; *Bowes v. Boston*, 155 Mass. 344, 29 N. E. 633, 15 L. R. A. 365. **Mich.**—*Ely v. Detroit United Ry.*, 162 Mich. 287, 127 N. W. 259; *Dolson v. Lake Shore, etc., R. Co.*, 128 Mich. 444, 87 N. W. 629. **Mo.**—*Strode v. St. Louis, etc., R. Co.*, 87 S. W. 976; *s. c.*, 197 Mo. 616, 95 S. W. 851. **Ohio.**—*Mahoning Val. R. Co. v. Van Alstine*, 77 Ohio St. 395, 83 N. E. 601, 14 L. R.

Recovery for Deceased's Injuries as Barring Beneficiaries' Action. — In those jurisdictions where but one action may be brought for either the death or the injuries, it is well settled that the recovery of damages in an action for the injuries bars the beneficiaries' action for the death,⁸ or the recovery of damages for the death bars an action for the injuries causing the death.⁹ But the fact that deceased had instituted an action for the injuries before his death which was not prosecuted to judgment, does not bar the action for death,¹⁰ unless the statute makes it a prerequisite to the death action that deceased had not instituted an action for the injuries prior to his death.¹¹

On the other hand in those jurisdictions where both an action for death and an action for injuries to deceased under the survival act may be brought concurrently, a recovery in one action is no bar to a recovery in the other action.¹²

A. (N. S.) 893. Ore.—Putnam *v.* Southern Pac. Co., 21 Ore. 230, 27 Pac. 1033.

Wash.—Hedrick *v.* Ilwaco, etc., Co., 4 Wash. 400, 30 Pac. 714. Wis.—Brown *v.* Chicago, etc., R. Co., 102 Wis. 137, 77 N. W. 748, 78 N. W. 771, 44 L. R. A. 579, reasons *pro* and *contra* fully discussed in the opinion. Eng.—Robinson *v.* Canadian Pac. R. Co., L. R. (1892) App. Cas. 481; Leggott *v.* Great Northern R. Co., L. R. 1 Q. B. Div. 599, 45 L. J. Q. B. (N. S.) 557, 35 L. T. (N. S.) 334; Bradshaw *v.* Lancashire, etc., R. Co., L. R. 10 C. P. 189.

The cases holding that release or a recovery by deceased in his lifetime bars the action for death are not an authority upon this question as they are based upon the theory that since it is a condition to the action for death that deceased must have been able to recover for his injuries and could not under these circumstances, it bars the death action by the beneficiaries. Brown *v.* Chicago, etc., R. Co., 102 Wis. 137, 77 N. W. 748, 78 N. W. 771, 44 L. R. A. 579.

In Wisconsin though the injured party dies from the injuries, the action under the survival statutes may be maintained, and is not limited to actions where death does not ensue from the injury. Lehmann *v.* Farwell, 95 Wis. 185, 70 N. W. 170, 37 L. R. A. 333.

In Massachusetts if death is not instantaneous, no provision is made for separate suits, but an action in which both the damages to deceased as well as to the beneficiaries may be recovered is provided for. Smith *v.* Thomas-

Houston Elec. Co., 188 Mass. 371, 74 N. E. 664.

8. Ind.—Hecht *v.* Ohio, etc. R. Co., 132 Ind. 507, 32 N. E. 302. Ky.—Donahue *v.* Drexler, 82 Ky. 157, 56 Am. Rep. 886; Conner's Admr. *v.* Paul, 12 Bush 144. N. Y.—Littlewood *v.* New York, 89 N. Y. 24, 42 Am. Rep. 271; McGovern *v.* New York Cent., etc., R. Co., 67 N. Y. 417. Vt.—Legg *v.* Britton, 64 Vt. 652, 24 Atl. 1016. Va.—Brammer's Admr. *v.* Norfolk, etc., R. Co., 107 Va. 206, 57 S. E. 593. Eng.—Wood *v.* Gray, L. R. (1892) App. Cas. 576.

9. Louisville, etc. R. Co. *v.* McElwain, 98 Ky. 700, 34 S. W. 236, 56 Am. St. Rep. 385, 34 L. R. A. 788; Lubrano *v.* Atlantic Mills, 19 R. L. 129, 32 Atl. 205, 34 L. R. A. 797.

10. Indianapolis, etc. R. Co. *v.* Stout, 53 Ind. 143; International, etc. R. Co. *v.* Kuehn, 70 Tex. 582, 8 S. W. 484.

11. Under the Pennsylvania act creating a right of action for wrongful death, there must not have been a suit for damages for the injuries instituted by deceased in his lifetime. If such suit was instituted, the remedy is to prosecute such action to conclusion. In such a case a suit for wrongful death cannot be instituted after his death. Black *v.* Baltimore, etc. R. Co., 224 Pa. 519, 73 Atl. 903; Edwards *v.* Gimbel, 202 Pa. 30, 51 Atl. 357; McCaffrey *v.* Pennsylvania R. Co., 193 Pa. 339, 44 Atl. 453, 74 Am. St. Rep. 690.

12. Clare *v.* New York, etc. R. Co., 172 Mass. 211, 51 N. E. 1083; Hedrick

Recovery by One Beneficiary as Barring Action by Other Beneficiaries. Under the statutes giving a right of action to several different persons as the heirs, widow and children, etc., it is well settled that there is but one cause of action to be prosecuted in a single proceeding by all the beneficiaries, and it cannot be split up and separate recoveries had, but a recovery by one of the beneficiaries bars a recovery by the other beneficiaries,¹³ and the pendency of a suit by one beneficiary may be pleaded in bar of an action by another.¹⁴

Recovery for Death of One Brother as Barring Action for Death of Other Brother.—Where two brothers were killed at the same time by the same accident, the fact that the beneficiaries are the same in both cases and the same person sues in both cases does not make a recovery for the death of one brother a bar to an action for the death of the other.¹⁵

Law at Time of Injury or Death as Governing.—The right of action for death by wrongful act is governed by the law in force at the time of death and not by that existing at the time of injury.¹⁶

v. Ilwaco R., etc. Co., 4 Wash. 400, 30 Pac. 714.

Recovery for the death of a person under such a statute is not barred by the recovery of damages for the destruction of the horse and wagon which deceased was driving at the time of the injury. *Peake v. Baltimore, etc. R. Co.*, 26 Fed. 495.

In *Barley v. Chicago, etc. R. Co.*, 4 Biss. 430, 2 Fed. Cas. No. 997, it was held in a cause arising in Illinois that a recovery by the parents of a deceased child for the loss of service of the child from the time of injury until he died, for medical attendance, funeral expenses, and the loss of time of the father and mother, by reason of the accident, from the time of the occurrence of the accident until the death does not bar an action for the damages recoverable under the statute giving an action for death.

13. **U. S.**—*St. Louis, etc. R. Co. v. Needham*, 52 Fed. 371, 3 C. C. A. 129, 10 U. S. App. 339. **Cal.**—*Daubert v. Western Meat Co.*, 139 Cal. 480, 69 Pac. 297, 73 Pac. 244, 96 Am. St. Rep. 154 (bars action by posthumous child); *Hartigan v. Southern Pac. R. Co.*, 86 Cal. 142, 24 Pac. 851; *Munro v. Pacific Coast, etc. Co.*, 84 Cal. 515, 24 Pac. 303. **Ill.**—*Consolidated Coal Co. v. Dombroski*, 106 Ill. App. 641. **Ky.**—*Louisville, etc. R. Co. v. Sanders*, 86 Ky. 259, 5 S. W. 563. **La.**—*Eichorn v. New Orleans, etc. R. Co.*, 112 La. 236, 36 So. 335, 104 Am. St. Rep. 437. **Minn.**—*Almquist v. Wilcox*, 115 Minn. 37, 131 N. W. 796. **Mo.**—*McNamara*

v. Slavens, 76 Mo. 329. **Ore.**—*Putnam v. Southern Pac. Co.*, 21 Ore. 230, 27 Pac. 1033. **Utah.**—*Fritz v. Western Union Tel. Co.*, 25 Utah 263, 71 Pac. 209. **Wash.**—*Riggs v. Northern Pac. R. Co.*, 60 Wash. 292, 111 Pac. 162; *Graetz v. McKenzie*, 3 Wash. 194, 28 Pac. 331. But see *contra*, *Galveston, etc. R. Co. v. Kutae*, 72 Tex. 643, 11 S. W. 127, holding an action by the surviving husband did not preclude an action by the children as the defendant should have required their joinder in the one action, though in *East Line R. Co. v. Culberson*, 68 Tex. 664, 5 S. W. 820; *Houston, etc. R. Co. v. Moore*, 49 Tex. 31, 36 Am. Rep. 98, it was said the statute intended that but one suit should be brought.

Child Subsequently Born.—In California in conformity with the above rule it has been held that a recovery by some of the beneficiaries bars the action by a posthumous child. *Daubert v. Western Meat Co.*, 139 Cal. 480, 69 Pac. 297, 73 Pac. 244, 96 Am. St. Rep. 154.

But in Texas it was held that a recovery by the widow and child did not bar an action by a posthumous child. *Nelson v. Galveston, etc. R. Co.*, 78 Tex. 621, 14 S. W. 1021, 11 L. R. A. 391. See also *infra*, VII, C.

14. *Fulwider v. Trenton, etc. Co.*, 216 Mo. 582, 116 S. W. 508. See generally the title "Another Action Pending."

15. *Illinois Cent. R. Co. v. Slater*, 139 Ill. 190, 28 N. E. 830.

16. *Isola v. Weber*, 147 N. Y. 329,

Must Decedent Have Had Right of Action.—Notwithstanding the action is a new cause of action, under the statutes modeled after Lord Campbell's Act, it is generally provided by statute, or it is held by construction, that the action for wrongful death is only maintainable where the circumstances are such as would have entitled the deceased to recover for his injuries had he survived.¹⁷

41 N. E. 704, 69 N. Y. St. 691; Weber v. Third Ave. R. Co., 12 App. Div. 512, 42 N. Y. Supp. 789, *distinguishing* O'Reilly v. Utah, etc. Co., 87 Hun 406, 34 N. Y. Supp. 858, 68 N. Y. St. 432.

Injury Antedating Statute.—**Death Afterwards.**—A statute giving a right of action to beneficiaries not named in a preceding statute, passed subsequent to the injury though before his death resulting therefrom, the injury having been caused by negligence of another under such circumstances that had such person lived he could have recovered, does not give an action for such death to such beneficiaries. Quinn v. Chicago, etc. R. Co., 141 Wis. 497, 124 N. W. 653.

Statute After Death Reducing Limitation Period.—Since the cause of action accrues upon the death and not when the action is commenced, a statute passed after the death reducing the limitation period does not affect the action for death accruing prior thereto. O'Donnell v. Healy, 134 Ill. App. 187.

17. **U. S.**—Louisville R. Co. v. Clarke, 152 U. S. 230, 236, 14 Sup. Ct. 579, 38 L. ed. 422; Scheffer v. Washington City M. Co., 105 U. S. 249, 26 L. ed. 1070; Seaboard, etc. Co. v. Allen, 192 Fed. 480, 112 C. C. A. 642 (Alabama statute); Barron v. Illinois Cent. R. Co., 1 Biss. 453, 2 Fed. Cas. No. 1,053. **Ala.**—Suell v. Derricott, 161 Ala. 259, 49 So. 895, 23 L. R. A. (N. S.) 996. **Cal.**—Watts v. Murphy, 9 Cal. App. 564, 99 Pac. 1104. **Del.**—Perry v. Philadelphia, etc. R. Co., 77 Atl. 725. **Fla.**—Duval v. Hunt, 34 Fla. 85, 15 So. 876. **Ga.**—Southern Bell Tel. Co. v. Cassin, 111 Ga. 575, 36 S. E. 881; Hopkins v. Southern R. Co., 110 Ga. 85, 35 S. E. 307; Yonge v. Kinney, 28 Ga. 111. **Ill.**—Holton v. Daly, 106 Ill. 131; Quincy Coal Co. v. Hood, 77 Ill. 68; Donk Bros. Coal Co. v. Leavitt, 109 Ill. App. 385. **Ind.**—Malott v. Shimer, 153 Ind. 35, 54 N. E. 101, 74 Am. St. Rep. 278; Hecht v.

Ohio, etc. R. Co., 132 Ind. 507, 32 N. E. 302; Ohio, etc. R. Co. v. Tindall, 13 Ind. 366. **Kan.**—Sewell v. Atchison, etc. R. Co., 78 Kan. 1, 96 Pac. 1007. **Ky.**—Louisville, etc. R. Co. v. Raymond's Admr., 123 S. W. 281, 27 L. R. A. (N. S.) 176. **Mich.**—Dolson v. Lake Shore, etc. R. Co., 128 Mich. 444, 87 N. W. 629, 631; Sweetland v. Chicago, etc. R. Co., 117 Mich. 329, 75 N. W. 1066, 43 L. R. A. 568 (statute so provides). **Minn.**—Keever v. Mankato, 113 Minn. 55, 129 N. W. 158, 33 L. R. A. (N. S.) 339 (§4503 Rev. Laws, 1905, so provides); Sykora v. Case Threshing Mach. Co., 59 Minn. 130, 60 N. W. 1008. **Mo.**—Hawkins v. Smith, 147 S. W. 1042; Strode v. St. Louis, etc. R. Co., 197 Mo. 616, 95 S. W. 851, 7 Am. & Eng. Ann. Cas. 1084; Spiva v. Osage Coal & M. Co., 88 Mo. 68; Hawkins v. Smith, 147 S. W. 1042; Butler v. Chicago, etc. R. Co., 155 Mo. App. 287, 136 S. W. 729. **Neb.**—Chicago, etc. R. Co. v. Zerneck, 59 Neb. 689, 82 N. W. 26, 55 L. R. A. 610. **N. Y.**—Hughes v. Auburn, 161 N. Y. 96, 55 N. E. 389, 46 L. R. A. 636; Sullivan v. Dunham, 161 N. Y. 290, 55 N. E. 923, 76 Am. St. Rep. 274, 47 L. R. A. 715; Littlewood v. New York, 89 N. Y. 24, 42 Am. Rep. 271; Lynch v. Davis, 12 How. Pr. 323; Shields v. Pugh, 122 App. Div. 586, 107 N. Y. Supp. 604. **Ohio.**—Mahoning Val., etc. R. Co. v. Van Alstine, 77 Ohio St. 395, 83 N. E. 601. **Ore.**—Perham v. Portland El. R. Co., 33 Ore. 451, 53 Pac. 14. **R. I.**—Neilson v. Brown, 13 R. I. 651, 43 Am. Rep. 58. **S. C.**—Price v. Richmond, etc. R. Co., 33 S. C. 556, 12 S. E. 413. **Tex.**—Thompson v. Fort Worth, etc. R. Co., 97 Tex. 590, 80 S. W. 990; Texas, etc. R. Co. v. Berry, 67 Tex. 238, 5 S. W. 817; Southwestern, etc. Co. v. Solomon, 54 Tex. Civ. App. 306, 117 S. W. 214. **Vt.**—Carty's Admr. v. Winooski, 78 Vt. 104, 2 Atl. 45, 2 L. R. A. (N. S.) 95; Legg v. Britton, 64 Vt. 652, 24 Atl. 1016. **Va.**—Brammer's Admr. v. Norfolk, etc. R. Co., 107 Va. 206, 57

III. THE ACTION BY WHICH THE RIGHT CAN BE ENFORCED.—Where the statute creates a cause of action for wrongful death without creating a special remedy for its enforcement, it may be enforced by any appropriate common law action.¹⁸

Waiver of Remedy.—But where two different remedies are given a person for wrongful death, his adoption of one is a waiver of the other remedy.¹⁹

IV. ABATEMENT AND REVIVAL.—A. BY DEATH OF PLAINTIFF.—In the absence of statutory provisions to the contrary, a pending action for death by wrongful act upon the death of the sole beneficiary abates and cannot be revived in the name of the personal representative of such beneficiary,²⁰ or in the name of surviving

S. E. 593. **Wis.**—*Johnson v. Eau Claire*, 135 N. W. 481; *Ean v. Chicago*, etc. R. Co., 95 Wis. 69, 69 N. W. 997. **Eng.**—*Read v. Great Eastern R. Co.*, L. R. 3 Q. B. Div. 555, 37 L. J. Q. B. 278, 18 L. T. N. S. 82, 9 B. & S. 714, 16 W. R. 1040. **Can.**—*Canadian Pac. R. Co. v. Robinson*, 19 Can. Sup. 292; *Erdman v. Walkerton*, 20 Ont. App. 444, 23 Can. Sup. 352.

In *German American T. Co. v. Lafayette Box, etc. Co.* (Ind. App.), 98 N. E. 874, it is held that the foundation of the action is the death and not the injury; in which case the court decided the death action was not barred though deceased's action for injuries was barred by limitations prior to his death.

The provision that the personal representative may maintain an action if the deceased could have maintained one, if the injury had not caused death, is applicable to the cause of action and not to the person bringing it. *Pittsburg, etc. R. Co. v. Vining's Admr.*, 27 Ind. 513, 92 Am. Dec. 269; *Jeffersonville R. Co. v. Swayne's Admr.*, 26 Ind. 477.

Statute Applicable to Causes of Action Subsequently Created.—A statute giving a cause of action for wrongful death "is general and applies 'whenever' a death has been caused under circumstances which would have given a cause of action had the person survived." It is not applicable only to cases which might arise under the law as it then was, but is a general and very wholesome rule, as applicable to causes of action arising under subsequent remedial statutes as to those arising under the common law or under statutes then existing. Judge

Cooley in *Merkle v. Bennington*, 58 Mich. 156, 24 N. W. 776, 55 Am. St. Rep. 666. See also *Hawkins v. Smith* (Mo.), 147 S. W. 1042, *disapproving Strottman v. St. Louis, etc. R. Co.*, 211 Mo. 227, 109 S. W. 769.

18. *Union, etc. T. Co. v. Shacklet*, 119 Ill. 232, 239, 10 N. E. 896.

Declaring on Contract.—Under the New York act of 1849 giving an action for death from the negligence, etc., of any railroad employe, conductor, etc., the personal representative of deceased may properly declare on contract for the death of deceased while a passenger. *Doedt v. Wiswall*, 15 How. Pr. (N. Y.) 128.

Entitling Pleadings.—Though a rule of court requires actions for personal injuries, and actions of trover and trespass on the case for injuries to property to be styled in the process and pleadings "actions of tort," an action for damages for wrongful death need not be so styled as it is not within the above rule. *Van Blarcom v. Delaware, etc. Co.*, 49 N. J. L. 179, 6 Atl. 503.

19. **Waiver of Remedy.**—Where a person has a remedy for wrongful death under two distinct statutes, the measure of damages, the issues and defenses being different under each statute, and he adopts one of these remedies he thereby waives the other remedy. *Kanton v. Kelly* (Wash.), 121 Pac. 833. See generally the title "Choice and Election of Remedies."

20. **U. S.**—*Sanders' Admx. v. Louisville, etc. Co.*, 111 Fed. 708, 49 C. C. A. 565, Tennessee statute. **Ark.**—*Billingsley v. St. Louis, etc. R. Co.*, 84 Ark. 617, 107 S. W. 173, 120 Am. St. Rep. 95 (neither injury to person or

property so right of action would survive under general statute providing such actions should survive). **Ga.**—*Frazier v. Georgia R. Co.*, 101 Ga. 77, 28 S. E. 662; *Peebles v. Charleston, etc. R. Co.*, 7 Ga. App. 279, 66 S. E. 953. **Ind.**—*Dillier v. Cleveland, etc. R. Co.*, 34 Ind. App. 52, 72 N. E. 271, if right vests in widow or children, if any, or next of kin, upon death of widow where there are no children, pending action, the action abates. **La.**—*Huberwald v. Orleans R. Co.*, 50 La. Ann. 477, 23 So. 474; *Chivers v. Rogers*, 50 La. Ann. 57, 23 So. 100 (death before judgment). **Me.**—*Hammond v. Lewiston, etc. R. Co.*, 106 Me. 209, 76 Atl. 672, 30 L. R. A. (N. S.) 78. **Md.** *State v. Baltimore, etc. R. Co.*, 70 Md. 319, 17 Atl. 88. **Mo.**—*Gilkeson v. Missouri Pac. R. Co.*, 222 Mo. 173, 121 S. W. 138; *Millar v. St. Louis, etc. Co.*, 216 Mo. 99, 115 S. W. 521 (death pending appeal); *McMurray v. St. Louis, etc. R. Co.* (Mo. App.), 142 S. W. 479 (death pending appeal). **Ohio.**—*Doyle v. Baltimore, etc. R. Co.*, 81 Ohio St. 184, 90 N. E. 165. **Tenn.** *Louisville, etc. R. Co. v. Bean*, 94 Tenn. 383, 29 S. W. 370; *Loague v. Memphis, etc. R. Co.*, 91 Tenn. 458, 19 S. W. 430. **Wis.**—*Schmidt v. Menasha, etc. Co.*, 99 Wis. 300, 74 N. W. 797; *Woodward v. Chicago, etc. R. Co.*, 23 Wis. 400 (though brought by personal representative as a nominal party). **Can.**—*McHugh v. Grand Trunk R. Co.*, 2 Ont. L. Rep. 600, *reversing* 32 Ont. 234.

Minority Rule.—But in a few states the death of the "next of kin" entitled to a recovery, where there are other next of kin who would take under statutes of descent and distribution does not abrogate the liability of the wrongdoer, incurred for the pecuniary injury sustained and which vested in the statutory beneficiary upon the death. The death of the beneficiary pending suit has a controlling effect on the quantum of damages only and the right of action survives to the beneficiary's administrator as the damages are to the property rights of the beneficiaries. *Cooper v. Shore El. Co.*, 63 N. J. L. 558, 44 Atl. 633; *Meekin v. Brooklyn Hts. R. Co.*, 164 N. Y. 145, 58 N. E. 50, 79 Am. St. Rep. 635, 51 L. R. A. 235; *Conway v. New York*, 139 App. Div. 446, 124 N. Y. Supp. 660; *Pitkin v. New*

York Cent. R. Co., 94 App. Div. 31, 87 N. Y. Supp. 906; *Mundt v. Glokner*, 24 App. Div. 110, 48 N. Y. Supp. 940, *affirmed*, 160 N. Y. 571, 55 N. E. 297.

Action for Wrongful Death as Property Right Which Survives.—It has been specifically held in *Doyle v. Baltimore, etc. R. Co.*, 81 Ohio St. 184, 90 N. E. 165, that the right of action for wrongful death is not "property" so as to pass to the heirs or next of kin of the designated beneficiaries, unless so provided by statute. The New Jersey and New York cases cited to the minority doctrine above are based on the theory of damage to the property rights of the designated beneficiaries. *Cooper v. Shore El. Co.*, *supra*; *Meekin v. Brooklyn Hts. R. Co.*, *supra*. See also *Fitzgerald v. Edison Elec. Co.*, 207 Pa. 118, 56 Atl. 350; *Haggerty v. Pittston*, 17 Pa. Super. 151. It has also been held in *Heald v. Wallace*, 109 Tenn. 346, 71 S. W. 80, that while a beneficiary's action for wrongful death abated by his death prior to judgment, and could not be revived by his administrator, as to those dying after judgment and pending appeal, the action did not abate but converted the liability for tort into a debt which was a property right which passed.

Death Pending Appeal.—The rule stated in the text is applicable though there has been a judgment for the plaintiff and he dies pending an appeal. There is no merger of the original cause into dollars and cents. Property rights cannot be read into the judgment. *Millar v. St. Louis, etc. Co.*, 216 Mo. 99, 115 S. W. 521.

Texas.—*One Beneficiary Suing on Behalf of Others.*—If a suit is brought by one beneficiary on behalf of himself and other beneficiaries, the suit does not abate upon the death of the plaintiff, but may be revived in the name of the other beneficiaries entitled to the recovery. *Houston, etc. R. Co. v. Moore*, 49 Tex. 31. By the Texas statute the suite abates upon the death of the sole plaintiff, where he is the only party entitled to the money recovered. *Texas Loan Agency v. Fleming*, 18 Tex. Civ. App. 668, 46 S. W. 63, *reversed* on other grounds, 92 Tex. 458, 49 S. W. 1039, 44 L. R. A. 279.

Assignment Prior to Suit.—The statute allowing the assignment of any claim "after" suit filed does not pre-

beneficiaries belonging to a subsequent class of beneficiaries.²¹ The death of one of several beneficiaries, however, does not abate the action as to all, but only as to the deceased beneficiary.²²

vent the abatement of a suit for wrongful death, assigned "prior" to suit brought, by the death of the sole beneficiary. *Southern Pac. Co. v. Winton*, 27 Tex. Civ. App. 503, 66 S. W. 477.

All Beneficiaries Killed in Common Disaster.—Where all the beneficiaries within the purview of the statute perished together in one common disaster, there is no person left to whom the action could survive, and it cannot be maintained by the administrator of one of the statutory beneficiaries. *Gibbs v. Hannibal City*, 82 Mo. 143, cited in *Gilkeson v. Missouri Pac. R. Co.*, 222 Mo. 173, 121 S. W. 138.

Action Prosecuted in Name of State.
Death of Equitable Plaintiff.—The fact that the statute requires the action to be brought in the name of the state does not prevent the action from abating on the death of the beneficiary entitled to the recovery. There is no contractual relation in such cases between the state, the legal plaintiff and the defendant. The state is merely a formal party and upon the death of the equitable plaintiff, the suit cannot be carried on in the name of the state against the defendant. *State v. Baltimore*, etc. R. Co., 70 Md. 319, 17 Atl. 88.

21. **Me.**—*Hammond v. Lewiston*, etc. R. Co., 106 Me. 209, 76 Atl. 672, 30 L. R. A. (N. S.) 78. **Ohio.**—*Doyle v. Baltimore*, etc. R. Co., 81 Ohio St. 184, 90 N. E. 165. **Tenn.**—*Loague v. Memphis*, etc. R. Co., 91 Tenn. 458, 19 S. W. 430. **Wis.**—*Schmidt v. Menasha*, etc. Co., 99 Wis. 300, 74 N. W. 797; *Woodward v. Chicago*, etc. R. Co., 23 Wis. 400.

But see *contra*, *Morris v. Spartenburg*, etc. Co., 70 S. C. 279, 49 S. E. 854, holding that upon the death of the sole beneficiary of one class, the father, the action did not abate but was to be prosecuted for the benefit of any of the statutory beneficiaries belonging to any of the classes then existing. See also *Meekin v. Brooklyn Hts. R. Co.*, 164 N. Y. 145, 58 N. E. 50, 79 Am. St. Rep. 635, 51 L. R. A. 235, *affirming*, 51 App. Div. 1, 64 N. Y. Supp. 291.

22. **Cal.**—*Taylor v. Western Pac. R. Co.*, 45 Cal. 323, upon the death of the widow where the widow and children sue, evidence as to the damage to the widow is irrelevant, but the only question is compensation to the children. **Ga.**—*David v. Southwestern R. Co.*, 41 Ga. 223, one parent suing for death of other parent for benefit of himself and children. **Ind.**—*Jeffersonville*, etc. R. Co. *v. Hendricks*, 41 Ind. 48, 75. **Mo.**—*Senn v. Southern R. Co.*, 124 Mo. 621, 28 S. W. 66 (death of father, where father and mother sue); *Tobin v. Missouri Pac. R. Co.*, 18 S. W. 996 (where the parents sue for the wrongful death of their child, the death of one parent does not abate the action). **Pa.**—*Fitzgerald v. Edison El.*, etc. Co., 207 Pa. 118, 56 Atl. 350. **Tenn.**—*Heald v. Wallace*, 109 Tenn. 346, 71 S. W. 80. **Tex.**—*Houston*, etc. R. Co. *v. Moore*, 49 Tex. 31, 45 (though brought in name of one beneficiary for himself and others); *Texas L. Agency v. Fleming*, 18 Tex. Civ. App. 668, 46 S. W. 63, reversed on other grounds, 92 Tex. 458, 49 S. W. 1039, 44 L. R. A. 279.

Death of One Parent Suing for Death of Child.—Where husband and wife sue for the death of their child, on the death of one parent the action survives to the other party. *Senn v. Southern R. Co.*, 124 Mo. 621, 28 S. W. 66; *Tobin v. Missouri Pac. R. Co.* (Mo.), 18 S. W. 996.

Making Personal Representative of Deceased Beneficiary Party.—Under the Texas statutes providing that "the action shall not abate by the death of either party to the record, if any person entitled to the benefit of the action survives," and that "if the plaintiff dies pending the suit, when there is only one plaintiff (one party being authorized to sue for all) some one or more of the parties entitled to the money recovered may by order of the court be made plaintiff," the action is confined to the parties named in the statute and does not survive them. Therefore upon the death of the mother, where suit was brought by the widow, children and parents, the mother's personal representative could

But by statute in some jurisdictions the action for wrongful death does not abate by reason of the death of the beneficiaries.²³

Death in Common Disaster.—Under a statute providing that the widow is entitled to the recovery where there are no children, if husband and wife are injured in the same disaster, and the wife survives the husband for a time, the right of action for the death of the husband survives to the heirs of the wife and not to the husband's heirs.²⁴

B. BY DEATH OF DEFENDANT.—The common law rule that a right of action for tort does not survive the death of the tortfeasor is applicable to actions for wrongful death,²⁵ unless there is a statutory provision that the death of the wrongdoer shall not abate the action,

not be made a party. *Texas Loan Agency v. Fleming*, 18 Tex. Civ. App. 668, 46 S. W. 63, *reversed* on other grounds, 92 Tex. 458, 49 S. W. 1039, 44 L. R. A. 279.

23. Ga.—*Frazier v. Georgia, etc. R. Co.*, 101 Ga. 77, 28 S. E. 662; *Peebles v. Charleston, etc. R. Co.*, 7 Ga. App. 279, 66 S. E. 953. **Ill.**—*Devine v. Healy*, 241 Ill. 34, 89 N. E. 251, *reversing* 141 Ill. App. 290. **Ind.**—*Pennsylvania Co. v. Davis*, 4 Ind. App. 51, 29 N. E. 425. **Ky.**—*Thomas v. Maysville Gas Co.*, 112 Ky. 569, 66 S. W. 398. **Mo.**—*Behen v. St. Louis Transit Co.*, 186 Mo. 430, 85 S. W. 346. **Ohio.** *Doyle v. Baltimore, etc. R. Co.*, 81 Ohio St. 184, 90 N. E. 165. **Pa.** *Fitzgerald v. Edison Illum. Co.*, 207 Pa. 118, 56 Atl. 350 (plaintiff's administrator substituted); *McArdle v. Pittsburgh R. Co.*, 41 Pa. Super. 162; *Haggerty v. Pittston*, 17 Pa. Super. 151 (taxed as a species of property also). **Tenn.**—*St. Louis, etc. R. Co. v. Leazer*, 119 Tenn. 1, 107 S. W. 684, statute not retroactive. **Tex.**—*Texas Loan Agency v. Fleming*, 18 Tex. Civ. App. 668, 46 S. W. 63, *reversed* on other grounds, 92 Tex. 458, 49 S. W. 1039, 44 L. R. A. 279. **Va.**—*Beaver's Admx. v. Putnam's Curator*, 110 Va. 713, 67 S. E. 353.

Pending Actions Only Affected by Statute.—A statute providing that actions for death shall not abate by reason of the death of plaintiff or defendant refers to pending actions only and does not prevent the abatement of an action not commenced by the beneficiary entitled thereto. *Frazier v. Georgia, etc. R. Co.*, 101 Ga. 77, 28 S. E. 662; *Peebles v. Charleston, etc. R. Co.*, 7 Ga. App. 279, 66 S. E. 953.

No Other Beneficiary Alive.—Such statutes do not prevent the abatement of a suit because of the death of the beneficiary, where there is no other statutory beneficiary alive. *Doyle v. Baltimore, etc. R. Co.*, 81 Ohio St. 184, 90 N. E. 165.

24. Waldo v. Goodsell, 33 Conn. 432.

25. Ark.—*Davis v. Nichols*, 54 Ark. 358, 15 S. W. 880. **Colo.**—*Letson v. Brown*, 11 Colo. App. 11, 52 Pac. 287. **Ind.**—*Hamilton v. Jones*, 125 Ind. 176, 25 N. E. 192. **Minn.**—*Green v. Thompson*, 26 Minn. 500, 5 N. W. 376. **Mo.** *Bates v. Sylvester*, 205 Mo. 493, 104 S. W. 73, 12 Am. & Eng. Ann. Cas. 457. **N. Y.**—*Moriarty v. Bartlett*, 99 N. Y. 651, 1 N. E. 794; *Hegerich v. Keddie*, 99 N. Y. 258, 1 N. E. 787, 52 Am. Rep. 25, *disapproving* *Yertore v. Wiswall*, 16 How. Pr. 8; *Norton v. Wiswall*, 14 How. Pr. 42. **Ohio.**—*Russell v. Sunbury*, 37 Ohio St. 372, 41 Am. Rep. 523, right to begin action abates. But see *Hudson v. Adin*, 4 Ohio Dec. (Reprint) 211, 1 Cleve. 122, holding a pending action does not abate. **Pa.**—*Moe v. Smiley*, 125 Pa. 136, 17 Atl. 228, 3 L. R. A. 341; *Weiss v. Hunsicker*, 14 Pa. Co. Ct. 398.

See also *Rinker v. Hurd* (Wash.), 124 Pac. 687, holding the action did not survive the death of the wrongdoer and cannot be maintained against the tortfeasor's personal representative.

Dissolution of Corporation.—But a judgment dissolving a corporation and the appointment of a receiver for the corporation does not abate the action for wrongful death, which survives against the receiver. *People v. Troy Steel, etc. Co.*, 82 Hun 303, 31 N. Y. Supp. 337.

and that it may be revived against the wrongdoer's personal representative.²⁶ Such statutes are strictly construed.²⁷

C. BY DEATH OF PERSONAL REPRESENTATIVE.—Upon the death of the personal representative in whose name the statute requires the action to be brought, the action does not abate;²⁸ but it should not be revived in the name of the personal representative's executor. A successor should be appointed and the action revived in his name.²⁹

V. THE COURTS IN WHICH THE ACTION MAY BE MAINTAINED.—The right of action is generally transitory not local, and the liability may be enforced in any county of the state where the wrongdoer,³⁰ or any one of several wrongdoers, resides or may be

26. *Ill.*—Devine v. Healey, 241 Ill. 34, 89 N. E. 251, reversing 141 Ill. App. 290. *Ky.*—Moorehead's Admx. v. Bittner, 106 Ky. 523, 50 S. W. 857; Merrill v. Puckett's Curator, 29 Ky. L. Rep. 595, 93 S. W. 912. *Mo.*—Bates v. Sylvester, 205 Mo. 493, 104 S. W. 73. *N. C.*—Collier v. Arrington, 61 N. C. 356. *Pa.*—Moe v. Smiley, 125 Pa. 136, 17 Atl. 228, 23 W. N. C. 461. *Tex.*—Johnson v. Farmer, 89 Tex. 610, 35 S. W. 1062. *Va.*—Beaver's Admx. v. Putnam's Curator, 110 Va. 713, 67 S. E. 353.

27. Under a statute providing for the survival of "all actions at law whatsoever, save and except actions on the case for slander or libel, or trespass for injuries done to the person," since an action for death, if given at common law, would have been an action of trespass on the case, it does not survive. *Munal v. Brown*, 70 Fed. 967.

Death of Wrongdoer Prior to Suit Brought.—A statute providing that upon the death of the wrongdoer "after suit brought," the action shall be revived against his personal representative, is to be strictly construed, and upon the death of the wrongdoer prior to the commencement of an action the suit abates. *Johnson v. Farmer*, 89 Tex. 610, 35 S. W. 1062. See also *Peebles v. Charleston*, etc. R. Co., 7 Ga. App. 279, 66 S. E. 953.

Upon the death of the wrongdoer prior to accrual of action or the death of plaintiff's intestate, the action for death never comes into existence. *Beaver's Admx. v. Putnam's Curator*, 110 Va. 713, 67 S. E. 353, where the wrongdoer committed suicide immediately after shooting deceased.

28. *Conway v. New York*, 139 App. Div. 446, 124 N. Y. Supp. 660.

29. *Hodges v. Webber*, 65 App. Div. 170, 72 N. Y. Supp. 508. See generally the title "Executors and Administrators."

30. *Ala.*—Alabama, etc. R. Co. v. Ambrose, 163 Ala. 220, 50 So. 1030, residence of corporation or place of injury causing death, unless it has no agent doing business in the county. *Ga.*—Southwestern R. Co. v. Paulk, 24 Ga. 356, under act of 1850—death by railroad. *Ky.*—Louisville, etc. R. Co. v. Hoskins', Admr., 32 Ky. L. Rep. 1263, 108 S. W. 305; Louisville, etc. R. Co. v. Cooley's Admr., 20 Ky. L. Rep. 1372, 49 S. W. 339. *N. J.*—Acker-son v. Erie R. Co., 31 N. J. L. 309. *Ohio.*—Stuart v. Porter, 79 Ohio St. 1, 85 N. E. 1062, action against insane defendant must be brought where he has a legal domicile.

Utah.—Venue of Actions by Non-Residents.—An action for wrongful death by a nonresident must be brought in county of defendant's residence, or, if defendant is a corporation, where it has its principal place of business. This may be waived. *Stone v. Union Pac. R. Co.*, 32 Utah 185, 89 Pac. 715.

In Texas defendants must be sued in the county of defendant's residence and not at the place where the injury occurred, as this does not fall within the statute allowing civil actions, where the foundation thereof is a "crime, offense, or trespass," to be brought in the county where the crime, offense, or trespass was committed. *Austin v. Cameron*, 83 Tex. 351, 18 S. W. 437.

Foreign Corporation.—A domestic railroad, owning no rolling stock, and several foreign companies, who are connecting carriers and operate their trains over the domestic railroad, may

served.³¹ If the action is against a railroad, the statutes in some states allow it to be brought in the county of plaintiff's residence.³² Generally the action may also be brought where the wrongful act causing death occurred.³³

Statutes Have No Extraterritorial Force.—Statutes giving a right of action for wrongful death are not extraterritorial, and do not give the court jurisdiction under the local statute, of a cause arising in another state.³⁴

Jurisdiction Under Federal Employer's Liability Act.—State and federal courts have concurrent jurisdiction of actions to recover for deaths caused by violations of the federal employer's liability act.³⁵

be sued in the county in which either of the railroads operate their train. *St. Louis, etc. Co. v. Sizemore*, 53 Tex. Civ. App. 491, 116 S. W. 403. See generally the title "**Venue.**"

31. *Drea v. Carrington*, 32 Ohio St. 595.

32. The action for wrongful death may be brought in the county where plaintiff resides, if the railroad runs through such county, though the injury occurred in another county, and deceased resided in another county when the death occurred. *Louisville, etc. R. Co. v. Hoskins' Admr.*, 32 Ky. L. Rep. 1263, 108 S. W. 305.

Administrator's Residence as Governing Venue.—Where the action for wrongful death must be prosecuted by deceased's personal representative, and is against a carrier, and must be prosecuted in the county in which the injury occurred, or where defendant resides, or where plaintiff resides, the county of plaintiff's residence is that where the administrator resides. *Illinois Cent. R. Co. v. Stith's Admr.*, 120 Ky. 237, 85 S. W. 1173, 1 L. R. A. (N. S.) 1014. See also *Louisville, etc. R. Co. v. Cooley's Admr.*, 20 Ky. L. Rep. 1372, 49 S. W. 339; *Smith v. Patterson* (N. C.), 74 S. E. 923 (residence of administrator and not his official residence or place of qualification is meant).

North Carolina.—Residence of Administrator and Decedent.—A domestic lumber corporation operating a lumber road may be sued in the county of the administratrix's residence and where deceased resided when the cause of action arose, whether the lumber road was a railroad or not. *Roberson v. Greenleaf, etc. Co.*, 153 N. C. 120, 68 S. E. 1064. See also *Smith v. Patterson* (N. C.), 74 S. E. 923.

33. **Ala.**—Alabama, etc. *R. Co. v. Ambrose*, 163 Ala. 220, 50 So. 1030, actions against corporation. **Ga.**—*Christian v. Columbus, etc. R. Co.*, 79 Ga. 460, 7 S. E. 216; *Georgia R. & B. Co. v. Oaks*, 52 Ga. 410; *Davis v. Waycross* (Ga. App.), 73 S. E. 556 (not where death occurred). **Ky.**—*Louisville, etc. R. Co. v. Hoskins' Admr.*, 32 Ky. L. Rep. 1263, 108 S. W. 305; *Illinois, etc. R. Co. v. Stith's Admr.*, 120 Ky. 237, 85 S. W. 1173, 1 L. R. A. (N. S.) 1014. **La.**—*Castille v. Cafery, etc. R. Co.*, 48 La. Ann. 322, 19 So. 332; *Houston v. Vicksburg, etc. R. Co.*, 39 La. Ann. 796, 2 So. 562, 34 Am. & Eng. R. Cas. — (venue not affected by provisions of the charter of the railroad subsequently granted).

Utah.—If the injury is inflicted in one county and the death in another, the action may be brought either where the injury occurred or the death occurred. *White v. Rio Grande, etc. R. Co.*, 25 Utah 346, 71 Pac. 593.

34. **Ala.**—*Louisville, etc. R. Co. v. Williams*, 113 Ala. 402, 21 So. 938, Alabama courts refused jurisdiction because wrongful act committed in another state, though death occurred in Alabama. **Ga.**—*Selma, etc. R. Co. v. Lacey*, 49 Ga. 106. **Kan.**—*McCarthy v. Chicago, etc. R. Co.*, 18 Kan. 48, 26 Am. Rep. 742, wrongful act in one state, death in Kansas. **Ky.**—*Taylor's Admr. v. Pennsylvania R. Co.*, 78 Ky. 348. **Minn.**—*Herrick v. Minneapolis, etc. R. Co.*, 31 Minn. 11, 16 N. W. 413. **N. Y.**—*Mahler v. Norwich, etc. Co.*, 35 N. Y. 352; *Whitford v. Panama R. Co.*, 23 N. Y. 465; *Vandeventer v. New York, etc. R. Co.*, 27 Barb. 244. **Ohio.** *Wabash R. Co. v. Fox*, 64 Ohio St. 133, 59 N. E. 888, 83 Am. St. Rep. 739.

35. **U. S.**—*Mondou v. New York,*

Lex Loci of Injury Determines Jurisdiction.—Since the gist of the tort is not the death, but the negligence, violence or wrongful act, though death must result before the action accrues, the jurisdiction of the court depends upon the *lex loci* of the injury and not upon the place where the death occurred.³⁶

Negligence in One State Causing Injury Producing Death in Other State. Where the negligence causing an accident producing death occurs in one state and the accident in another state, the courts of the state where the accident occurs have jurisdiction, and the law of the state where the fatal accident occurred governs as to the right of action.³⁷

The Doctrine of Comity.—Though the right of action for wrongful death is dependent solely on the statute of the state where the tort causing death occurred, the action is not local but transitory, and may be enforced, when not contrary to positive law or settled public policy of the forum, in any court having jurisdiction of the subject-matter in any state having a similar statute where the wrongdoer can be found and served with process,³⁸ even though the statute of the

etc. R. Co., 223 U. S. 1, 32 Sup. Ct. 169, 56 L. ed. —, jurisdiction cannot be declined because contrary to policy of state. **Fla.**—Atlantic Coast Line R. Co. v. Whitney, 56 So. 937. **Ky.**—Lemon's Admr. v. Louisville, etc. Co., 137 Ky. 276, 125 S. W. 701.

36. **U. S.**—Van Doren v. Pennsylvania R. Co., 93 Fed. 260, 35 C. C. A. 282. **Ala.**—Alabama G. S. R. Co. v. Carroll, 97 Ala. 126, 11 So. 803. **Ill.**—Crane v. Chicago, etc. R. Co., 233 Ill. 259, 84 N. E. 222. **Kan.**—McCarthy v. Chicago, etc. R. Co., 18 Kan. 46, 26 Am. Rep. 742. **Minn.**—Herrick v. Minneapolis, etc. R. Co., 31 Minn. 11, 14, 16 N. W. 413. **Ohio.**—Ott v. Lake Shore, etc. R. Co., 18 Ohio C. C. 395. **Pa.**—Derr v. Lehigh Val. R. Co., 153 Pa. 365, 27 Atl. 1002. **Tex.**—De Harn v. Mexican Nat. R. Co., 86 Tex. 68, 23 S. W. 381. **Vt.**—Needham v. Grand Trunk R. Co., 38 Vt. 294. **Wis.**—Rudiger v. Chicago, etc. R. Co., 94 Wis. 191, 68 N. W. 661.

Wrongful Act Committed on Boundary River.—The courts of a state have jurisdiction of an action for wrongful death occurring on its side of a boundary river. **U. S.**—Sherlock v. Aling, 93 U. S. 99, 23 L. ed. 819. **Ind.**—Memphis, etc. Co. v. Pikey, 142 Ind. 304, 40 N. E. 527. **Minn.**—Opsahl v. Judd, 30 Minn. 126, 14 N. W. 575.

37. **U. S.**—Rundell v. La Campagne, 100 Fed. 655, 40 C. C. A. 625, 49 L. R. A. 92. **Ala.**—Alabama, etc. R. Co. v. Carroll, 97 Ala. 126, 11 So. 803, 18 L. R. A. 433. **Ark.**—Kansas City,

etc. R. Co. v. Becker, 67 Ark. 1, 53 S. W. 406, 46 L. R. A. 814 (fellow servant doctrine of place of accident applied); Cameron v. Vandergriff, 53 Ark. 381, 13 S. W. 1092 (blast in one state killing person in another state). **Miss.**—Chicago, etc. R. Co. v. Doyle, 60 Miss. 977, accident in Tennessee traceable to neglect to get orders in point in Mississippi. **Mo.**—Darks v. Seudders-Gale Grocer Co. (Mo. App.), 130 S. W. 430, extract containing poison shipped from one state causing death in other.

In Pennsylvania it is held that jurisdiction may be maintained where the death occurs in Pennsylvania, and the negligence occurs there, though the injury causing death resulting from such negligence actually occurs in another state. Hoodmacher v. Lehigh Val. R. Co., 218 Pa. 21, 66 Atl. 975; Deer v. Lehigh Val. R. Co., 153 Pa. 365, 27 Atl. 1002, 38 Am. St. Rep. 848. But in Moore v. Pywell, 29 App. Cas. (D. C.) 312, 9 L. R. A. (N. S.) 1078, where a prescription was negligently filled in the District of Columbia, and the medicine taken in Maryland, causing the death, it is held that jurisdiction is maintainable where the negligent act occurred, though the act causing death occurred in another state, as the tort consists of both the act which causes the injury and the damage consequent thereto, and where the laws of both states permit an action for death by wrongful act.

38. **U. S.**—Stewart v. Baltimore, etc.

R. Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. ed. 537 (both unlawful act and death occurred in Maryland and action took place in District of Columbia); *Dennick v. Central R. Co.*, 103 U. S. 11, 26 L. ed. 439; *Southern Pac. Co. v. Del Valle Da Costa*, 190 Fed. 639; *Dodge v. North Hudson*, 177 Fed. 936; *Missouri Pac. R. Co. v. Larussi*, 161 Fed. 66, 88 C. C. A. 230, *affirming* 155 Fed. 654. **Ark.**—*St. Louis, etc. Co. v. Corman*, 92 Ark. 102, 122 S. W. 116; *St. Louis, etc. Co. v. McNamare*, 91 Ark. 515, 122 S. W. 102. **Cal.**—*Ryan v. No. Alaska S. Co.*, 153 Cal. 438, 95 Pac. 862. **Colo.**—*Denver, etc. R. Co. v. Warring*, 37 Colo. 122, 86 Pac. 305. **D. C.**—*Weaver v. Baltimore, etc. R. Co.*, 21 D. C. 499. **Ga.**—*Central R. v. Swint*, 73 Ga. 651; *Southern R. Co. v. Decker*, 5 Ga. App. 21, 62 S. E. 678 (though *lex loci* limits actions therefor to own state). **Ill.**—*Fitzgerald v. Cleveland, etc. Co.*, 151 Ill. App. 32; *Brennan v. Electrical, etc. Co.*, 120 Ill. App. 461; *Shedd v. Moran*, 10 Ill. App. 618. **Ind.**—*Wabash R. Co. v. Hassett*, 170 Ind. 370, 83 N. E. 705; *Cincinnati, etc. R. Co. v. McMullen*, 117 Ind. 439, 20 N. E. 287, 10 Am. St. Rep. 67. **Ia.**—*Romano v. Capital, etc. Co.*, 125 Iowa 591, 101 N. W. 437, 106 Am. St. Rep. 323; *Morris v. Chicago, etc. R. Co.*, 65 Iowa 727, 23 N. W. 143, 54 Am. Rep. 39; *Boyce v. Wabash R. Co.*, 63 Iowa 70, 18 N. W. 673. **Kan.**—*Rochester v. Wells Fargo, etc., Express*, 123 Pac. 729; *Bolinger v. Beacham*, 81 Kan. 746, 106 Pac. 1094. **Ky.**—*Bruce v. Cincinnati, etc. R. Co.*, 83 Ky. 174; *Murray's Admx. v. Louisville, etc. R. Co.*, 33 Ky. L. Rep. 545, 110 S. W. 334. **Me.**—*Alley v. Caspari*, 80 Me. 234, 14 Atl. 12. **Mass.**—*Walsh v. Boston, etc. Co.*, 201 Mass. 527, 88 N. E. 12 (New York statute); *Higgins v. Central, etc. Co.*, 155 Mass. 176, 29 N. E. 534, 31 Am. St. Rep. 544. **Minn.**—*Stangeland v. Minneapolis, etc. R. Co.*, 105 Minn. 224, 117 N. W. 386; *Powell v. Great Northern R. Co.*, 102 Minn. 443, 113 N. W. 1017. **Miss.**—*Illinois Cent. R. Co. v. Crudup*, 63 Miss. 291; *Chicago, etc. R. Co. v. Doyle*, 60 Miss. 977. **Mo.**—*Newlin v. St. Louis, etc. R. Co.*, 222 Mo. 375, 121 S. W. 125; *Husted v. Missouri Pac. R. Co.*, 143 Mo. App. 623, 128 S. W. 282. **Neb.**—*Missouri Pac. R. Co. v. Lewis*, 24 Neb. 848, 40 N. W. 401. **Nev.**—*Christensen v. Floriston, etc. Co.*, 29 Nev. 552, 92 Pac. 210. (This case says the rule does not rest upon comity, but because it is a personal and not a real action.) **N. Y.** *Johnson v. Phoenix Brew. Co.*, 197 N. Y. 316, 90 N. E. 953; *Wooden v. Western, etc. R. Co.*, 126 N. Y. 10, 26 N. E. 1050; *Robinson v. Oceanic S. Nav. Co.*, 112 N. Y. 315, 321, 19 N. E. 625; *Debevoise v. New York, etc. R. Co.*, 98 N. Y. 377; *Gurofsky v. Lehigh Val. R. Co.*, 121 App. Div. 126, 105 N. Y. Supp. 514; *Harrill v. South Carolina, etc. R. Co.*, 132 N. C. 655, 44 S. E. 109. **Ohio.**—*Essewine v. Pennsylvania Co.*, 11 Ohio Dec. (Reprint) 277. **Pa.**—*Hoodmacher v. Lehigh Val. R. Co.*, 218 Pa. 21, 66 Atl. 975; *Usher v. West Jersey, etc. Co.*, 126 Pa. 206, 17 Atl. 597, 12 Am. St. Rep. 863, 4 L. R. A. 261; *Knight v. West Jersey R. Co.*, 108 Pa. 250, 56 Am. Rep. 200. **R. I.**—*O'Reilly v. New York, etc. R. Co.*, 16 R. I. 388, 17 Atl. 171, 906, 19 Atl. 244. **S. C.**—*Dennis v. Atlantic, etc. R. Co.*, 70 S. C. 254, 49 S. E. 869, 106 Am. St. Rep. 746. **Tenn.**—*Whitlow v. Nashville, etc. R. Co.*, 114 Tenn. 344, 84 S. W. 618; *Nashville, etc. Co. v. Sprayberry*, 8 Baxt. 341. **Tex.**—*Texas, etc. R. Co. v. Miller* (Tex. Civ. App.), 128 S. W. 1165; *St. Louis, etc. Co. v. Sizemore*, 53 Tex. Civ. App. 491, 116 S. W. 403 (Tennessee statute). **Utah.**—*Stone v. Union Pac. R. Co.*, 32 Utah 185, 89 Pac. 715; *Utah Sav., etc. Co. v. Diamond C. & C. Co.*, 26 Utah 299, 73 Pac. 524; *Thorpe v. Union Pac. Coal Co.*, 24 Utah 475, 68 Pac. 145. **Vt.** *McLeod v. Connecticut & P. R. Co.*, 58 Vt. 727, 6 Atl. 648; *Needham v. Grand Trunk R. Co.*, 38 Vt. 294. **Va.** *Norfolk, etc. R. Co. v. Denny*, 106 Va. 383, 56 S. E. 321; *Nelson v. Chesapeake, etc. R. Co.*, 88 Va. 971, 14 S. E. 838, 15 L. R. A. 583. **W. Va.**—*Pickelsen v. Wheeling Elec. Co.*, 67 W. Va. 335, 67 S. E. 788.

Maryland.—In *Dronenburg v. Harris*, 108 Md. 597, 71 Atl. 81; *State v. Pittsburgh, etc. R. Co.*, 45 Md. 41, it was held that the action could not be maintained there, on the ground that the Maryland law gave no such remedy because a statute provided for an action in the name of the state only. See *infra*, VII. A. 2.

The Florida statute providing that an action for wrongful death will lie though there are no beneficiaries alive,

lex delicti provides that an action for wrongful death shall be brought only within the courts of the state,³⁹ unless the statute of the *lex fori* prohibits an action for death occurring without the state from being brought in the courts of the state.⁴⁰

has been held unenforceable in New York because against the public policy of the forum. *Gallagher v. Florida East Coast R. Co.*, 196 Fed. 1000. See also *Zeikus v. Florida East Coast R. Co.*, 144 App. Div. 91, 128 N. Y. Supp. 933.

Comity.—It is, however, the statute of the state creating the right of action, not of the forum, that must be looked to and enforced, not as obligatory on the courts of the forum, but purely as a matter of comity due by one state to another. **U. S.**—*Slater v. Mexican, etc. R. Co.*, 194 U. S. 120, 24 Sup. Ct. 581, 48 L. ed. 900. **Ark.** *St. Louis, etc. R. Co. v. Hesterly*, 135 S. W. 874. **Ga.**—*Seaboard Air-Line R. Co. v. Shigg*, 117 Ga. 454, 43 S. E. 706; *Selma, etc. Co. v. Lacey*, 49 Ga. 106. **Mass.**—*Walsh v. Boston, etc. R. Co.*, 201 Mass. 527, 88 N. E. 12. **Minn.** *Stewart v. Great Northern R. Co.*, 103 Minn. 156, 114 N. W. 953. **Mo.**—*Keele v. Atchison, etc. Co.*, 151 Mo. App. 364, 131 S. W. 730. **Nev.**—*Christensen v. Floriston Pulp, etc. Co.*, 29 Nev. 552, 92 Pac. 210. **N. Y.**—*Johnson v. Phoenix Bridge Co.*, 197 N. Y. 316, 90 N. E. 953; *Johnson v. Phoenix Brew. Co.*, 133 App. Div. 807, 118 N. Y. Supp. 88, except as to matters of procedure. **Ohio.**—*Ott v. Lake Shore, etc. Co.*, 18 Ohio C. C. 395, 10 Ohio Cir. Dec. 85. **S. C.**—*Free v. Southern R. Co.*, 83 S. C. 178, 65 S. E. 212. **Tex.** *Texas, etc. R. Co. v. Miller* (Tex. Civ. App.), 128 S. W. 1165, 1168. **Va.** *Dowell v. Cox*, 108 Va. 460, 62 S. E. 272. But in *Christensen v. Floriston Pulp, etc. Co.*, *supra*, the reason is said to be because the action is transitory and not because of comity.

Venue of Suit as Affecting Jurisdiction of Other State Courts.—The statute of the *lex delicti* restricting actions against railroads to the county where the accident occurred, or to the county where plaintiff resides, does not prevent a suit in courts of another state than that where accident occurred. *Husted v. Missouri Pac. R. Co.*, 143 Mo. App. 623, 128 S. W. 282.

Ohio.—Reciprocity Rule.—It is pro-

vided by statute in Ohio that a right of action for wrongful death arising in another state may be enforced in Ohio only when such other state, territory or country allows the enforcement of the Ohio statute in its courts. *Wabash R. Co. v. Fox*, 64 Ohio St. 133, 59 N. E. 888, 83 Am. St. Rep. 739.

Where All Parties Non-Residents. The courts of a state other than that where the injury causing death occurred need not assume jurisdiction where all those interested are non-residents, "where the accident happened in another state, and where, but for the fact that the decedent left a small proportion of property in this state, the courts of this state would have had no jurisdiction." *Pietrarroia v. New Jersey, etc. R. Co.*, 131 App. Div. 829, 116 N. Y. Supp. 249.

39. *Southern R. Co. v. Decker*, 5 Ga. App. 21, 62 S. E. 678, Alabama statute.

40. *Crane v. Chicago, etc. R. Co.*, 233 Ill. 259, 84 N. E. 222; *Brennan v. Electrical Installation Co.*, 120 Ill. App. 461 (not applicable to causes of action existing at the time of enactment of the statute).

Act Causing Death Occurring Within State.—A statute providing that no action shall be brought in the courts of the state for a death occurring outside the state does not bar an action for death occurring in another state from injuries inflicted within the state, but prohibits actions in the state only where the act causing death happened in another state. *Crane v. Chicago, etc. R. Co.*, 233 Ill. 259, 84 N. E. 222; *Campe v. Chicago, etc. R. Co.*, 148 Ill. App. 224.

Effect of Statute on Jurisdiction of Federal Courts.—It may be brought in the federal courts of another state having jurisdiction of the parties, notwithstanding any law of the state inhibiting such actions where death occurs in another state. *Missouri Pac. R. Co. v. Larussi*, 161 Fed. 66, *affirming* 155 Fed. 654.

Some courts have denied jurisdiction on the ground that the foreign statute was substantially dissimilar from that of the forum,⁴¹ or because the foreign statute was penal.⁴² But it is not necessary that the statutes of both states be precisely alike in order to give the courts of another state jurisdiction so long as they are substantially similar.⁴³

Where such statutes are enforceable in another state the *lex delicti*

41. **U. S.**—Slater *v.* Mexican Nat. R. Co., 194 U. S. 120, 24 Sup. Ct. 581, 48 L. ed. 900. **Ala.**—Kahl *v.* Memphis, etc. R. Co., 95 Ala. 337, 10 So. 661. **Kan.**—McCarthy *v.* Chicago, etc. R. Co., 18 Kan. 46. **Md.**—Dronenburg *v.* Harris, 108 Md. 597, 71 Atl. 81; Ash *v.* Baltimore, etc. R. Co., 72 Md. 144, 19 Atl. 643. **Ohio.**—Baltimore, etc. R. Co. *v.* Chambers, 73 Ohio St. 16, 76 N. E. 91 (Pennsylvania statute); Wabash R. Co. *v.* Fox, 64 Ohio St. 133, 59 N. E. 888, 83 Am. St. Rep. 739. **Tex.**—Mexican Nat. R. Co. *v.* Jackson, 89 Tex. 107, 33 S. W. 857, 59 Am. St. Rep. 28, 31 L. R. A. 276 (because subsequent suits for same tort allowed by *lex delicti*. But see *contra*, Every *v.* Mexican Cent. R. Co., 81 Fed. 294, 26 C. C. A. 407); St. Louis, etc. R. Co. *v.* McCormick, 71 Tex. 660, 9 S. W. 540, 1 L. R. A. 804.

42. **U. S.**—Marshall *v.* Wabash R. Co., 46 Fed. 269. **Ill.**—Raisor *v.* Chicago, etc., R. Co., 215 Ill. 47, 74 N. E. 69 (Rev. St. [Mo.], 1899, §2864, is penal because not providing the injury must be pecuniary); Shedd *v.* Moran, 10 Ill. App. 618. **Kan.**—Matheson *v.* Kansas City, etc., R. Co., 61 Kan. 667, 60 Pac. 747 (provided specified sums to be recovered); Dale *v.* Atchison, etc., R. Co., 57 Kan. 601, 47 Pac. 521. **Mass.**—Richardson *v.* New York, etc., R. Co., 98 Mass. 85. **Ohio.**—Van Camp *v.* Aldrich & Co., 5 Ohio Dec. (Reprint) 92. **R. I.**—O'Reilly *v.* New York, etc., R. Co., 16 R. I. 388, 17 Atl. 171-906, 19 Atl. 244. **Tenn.**—Whitlow *v.* Nashville, etc., R. Co., 114 Tenn. 344, 84 S. W. 618, Code (Ala.), 1896, §27, is not penal so as to be unenforceable in Tennessee. **Vt.**—Adams *v.* Fitchburg, etc., R. Co., 67 Vt. 76, 30 Atl. 687, 48 Am. St. Rep. 800, culpability of defendant as fixing damages and minimum recovery fixed if any liability.

But in Boston, etc., R. Co. *v.* Hurd, 108 Fed. 116, 47 C. C. A. 615, it was decided that though the statute was penal in form, it would be en-

forced in another state where the purpose of the statute was remedial only.

Statute Fixing Maximum Amount of Recovery.—A statute is not penal so as to be unenforceable in another jurisdiction because fixing a maximum amount of recovery. Higgins *v.* Central R. Co., 155 Mass. 176, 29 N. E. 534, 31 Am. St. Rep. 544.

Statute Providing for Exemplary Damages.—Where the foreign statute provides for the recovery of exemplary damages, and the prayer of the petition shows a waiver of these damages the liability may be enforced. Rochester *v.* Wells, etc., Express (Kan.), 123 Pac. 729.

43. **U. S.**—Stewart *v.* Baltimore, etc., R. Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. ed. 537; Boston, etc., R. Co. *v.* McDuffey, 79 Fed. 934, 25 C. C. A. 247; Keep *v.* National Tube Co., 154 Fed. 121. **D. C.**—Weaver *v.* Baltimore, etc., R. Co., 21 D. C. 499. **Ill.**—Hanna *v.* Grand Trunk R. Co., 41 Ill. App. 116. **Ind.**—Burns *v.* Grand Rapids, etc., R. Co., 113 Ind. 169, 15 N. E. 230. **Ia.**—Morris *v.* Chicago, etc., R. Co., 65 Iowa 727, 23 N. W. 143, 54 Am. Rep. 39. **Kan.**—Matheson *v.* Kansas City, etc., R. Co., 61 Kan. 667, 60 Pac. 747. **Mass.**—Higgins *v.* Central, etc., R. Co., 155 Mass. 176, 29 N. E. 534. **Minn.**—Powell *v.* Great Northern R. Co., 102 Minn. 448, 113 N. W. 1017. **N. Y.**—Wooden *v.* Western, etc., R. Co., 126 N. Y. 110, 26 N. E. 1050; Debovoise *v.* New York, etc., R. Co., 98 N. Y. 377; Strauss *v.* New York, etc., R. Co., 91 App. Div. 583, 87 N. Y. Supp. 67. **N. C.**—Harrill *v.* South Carolina, etc., Co., 132 N. C. 655, 44 S. E. 109. **Ohio.**—Essenwine *v.* Pennsylvania R. Co., 11 Ohio Dec. (Reprint) 277. **S. C.**—Free *v.* Southern R. Co., 78 S. C. 57, 58 S. E. 952. **Tenn.**—Whitlow *v.* Nashville, etc., R. Co., 114 Tenn. 344, 84 S. W. 618.

Dissimilarities in Statutes as Affecting Jurisdiction.—Jurisdiction is not defeated because of the dissimilar-

governs as to the right of action, while the pleadings and procedure are governed by the *lex fori*.⁴⁴

ity affecting persons, by or for the benefit of whom the action may be maintained, and the proportion in which the fund recovered shall be distributed. **U. S.**—Boston, etc., R. Co. v. Hurd, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 196; Davidow v. Pennsylvania R. Co., 85 Fed. 943; Boston, etc., R. Co. v. McDuffey, 79 Fed. 934, 25 C. C. A. 247. **D. C.**—Moore v. Pywell, 29 App. Cas. 312, 9 L. R. A. (N. S.) 1078. **Ky.**—McDonald v. McDonald, 96 Ky. 209, 28 S. W. 482, 49 Am. St. Rep. 289. **Mo.**—Stoeckman v. Terre Haute, etc., Co., 15 Mo. App. 503. **N. Y.**—Wooden v. Western, etc., R. Co., 126 N. Y. 10, 26 N. E. 1050, 22 Am. St. Rep. 803, 13 L. R. A. 458. **Ohio.**—Essenwine v. Pennsylvania Co., 11 Ohio Dec. (Reprint) 277, 25 Wkly. L. B. 396. **E. I.**—Connor v. New York, etc., R. Co., 28 R. I. 560, 68 Atl. 481, 18 L. R. A. (N. S.) 1252. **S. C.**—Free v. Southern R. Co., 78 S. C. 57, 58 S. E. 952, North Carolina statute named beneficiaries; statute of *lex fori* left recovery in administrator's hands for general distribution. **Tenn.**—Whitlow v. Nashville, etc., R. Co., 114 Tenn. 344, 84 S. W. 618. **Tex.**—Texas, etc., R. Co. v. Miller (Tex. Civ. App.), 128 S. W. 1165. **Va.**—Nelson v. Chesapeake, etc., R. Co., 88 Va. 971, 14 S. E. 838, 15 L. R. A. 583. (*Contra*, Zeikus v. Florida El. R. Co., 70 Misc. 339, 128 N. Y. Supp. 931, recovery for estate, which was not allowed in New York); nor because the statute of *lex delicti* provided for an action in the name of the state, while the law of the forum provided for an action by the personal representative of deceased (Stewart v. Baltimore, etc., R. Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. ed. 537. But see, Ash v. Baltimore, etc., R. Co., 72 Md. 144, 19 Atl. 643, 20 Am. St. Rep. 461, holding that this fact in connection with the fact that the *lex loci* placed a restriction on the amount of recovery, as the *lex fori* did not, and placed a limitation of two years instead of one year as the *lex fori* did, was such dissimilarity as to prevent the enforcement); nor because the judge apportions the recovery among the beneficiaries under

the law of the *lex delicti* instead of the distribution being made according to the laws of descent and distribution (Stewart v. Baltimore, etc., R. Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. ed. 537 (W. Va. statute); Hanna v. Grand Trunk R. Co., 41 Ill. App. 116 [Canada statute]); or because of dissimilarities as to the elements of damages (**Ga.**—Southern R. Co. v. Decker, 5 Ga. App. 21, 62 S. E. 678. **N. Y.**—Boyle v. Southern R. Co., 36 Misc. 289, 73 N. Y. Supp. 465. **Tex.**—Texas, etc., R. Co. v. Gross (Tex. Civ. App.), 128 S. W. 1173 [deprivation of decedent's society and burial expenses and mental anguish allowed by *lex loci delicti*, but not by *lex fori*]; Texas, etc., R. Co. v. Miller (Tex. Civ. App.), 128 S. W. 1165, 1170 [pain and suffering of deceased and wife's distress recoverable as element in *lex loci delicti*, but not by statute of *lex fori*]); or because the *lex fori* restricts the right of recovery to a specified amount, while the *lex delicti* allows any amount to be recovered (Hanna v. Grand Trunk R. Co., 41 Ill. App. 116. See also, Hyde v. St. L. & Pac. R. Co., 61 Iowa 441, 16 N. W. 351, 47 Am. Rep. 820); or because the laws of the *lex delicti* require a higher degree of negligence for the recovery of punitive damages than the forum (Bruce v. Cincinnati, etc., R. Co., 83 Ky. 174), or by a provision in the act incorporating the defendant exempting it from liability for the death of an employe (Texas, etc., R. Co. v. Miller (Tex. Civ. App.), 128 S. W. 1165).

44. **U. S.**—Northern Pac. R. Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. ed. 958; Brown v. New York, etc., R. Co., 136 Fed. 700. **Ark.**—St. Louis, etc., R. Co. v. Corman, 92 Ark. 102, 122 S. W. 116; Earnest v. St. Louis, etc., R. Co., 87 Ark. 65, 112 S. W. 141. **Ga.**—Southern R. Co. v. Decker, 5 Ga. App. 21, 62 S. E. 678. **Ia.**—Mooney v. Union Pac. R. Co., 60 Iowa 346, 14 N. W. 343. **Kan.**—Swisher v. Atchison, etc., R. Co., 76 Kan. 97, 90 Pac. 312. **Mass.**—Walsh v. New York, etc., R. Co., 160 Mass. 571, 36 N. E. 584. **Miss.**—Runt v. Illinois Cent. R. Co., 88 Miss. 575,

The United States Courts, sitting in one state, have jurisdiction of a cause arising under the laws of another state.⁴⁵

Of Cause Arising in Foreign Country.—Since the laws of a state can have no operation within a foreign jurisdiction, it is well settled that no action for wrongful death can be maintained under the local statute for a death resulting from wrongful acts committed within a foreign jurisdiction.⁴⁶ But where the law of the foreign country where the wrongful act causing death occurred gives a right of action for wrongful death, the liability imposed by such statute may be enforced in another jurisdiction than that where the wrongful act occurred.⁴⁷

Death on High Seas.—Every vessel while at sea is constructively part of the territory of the state to which she belongs, whose laws follow her until she comes within the jurisdiction of some other government. Hence an action for wrongful death may be brought under such statute for wrongful death occurring on the high seas on board a ship registered in a port within the state,⁴⁸ or belonging to a cor-

41 So. 1. S. C.—*Bussey v. Charleston*, etc., R. Co., 73 S. C. 215, 53 S. E. 165. **Tex.**—*Texas, etc., R. Co. v. Miller* (Tex. Civ. App.), 128 S. W. 1165. **Va.**—*Dowell v. Cox*, 108 Va. 460, 62 S. E. 272. **Wis.**—*Eingartner v. Illinois Steel Co.*, 94 Wis. 70, 68 N. W. 664, 34 L. R. A. 503.

All the limitations prescribed by the foreign act as to notice of injury, claim, etc., are part of the cause of action and not a part of the procedure, and must be observed. *Swisher v. Atchison, etc., R. Co.*, 76 Kan. 97, 90 Pac. 812; *N. M. Act*, 1903, §1.

The statute of limitations goes only to the remedy and is governed by the *lex fori*. *Larue v. Kershaw Cont. Co.* (Ala.), 59 So. 155.

45. *Texas, etc., R. Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. ed. 829; *Dennick v. Central, etc., R. Co.*, 103 U. S. 11, 26 L. ed. 439; *Missouri Pac. R. Co. v. Larussi*, 161 Fed. 66, 88 C. C. A. 230; *Leman v. Baltimore, etc., R. Co.*, 128 Fed. 191.

An "administrator, appointed in New York, of a resident decedent, injured by negligence and dying in another state, having a similar statute giving a right of action for wrongful death, may maintain an action on such statute in the circuit court of the United States of the district where such deceased person resided and such administrator resides." *Hoyt v. Ogden, etc., Co.*, 185 Fed. 889.

46. *Whitford v. Panama R. Co.*, 23

N. Y. 465; *Crowley v. Panama R. Co.*, 30 Barb. (N. Y.) 99.

47. *Johnson v. Phoenix Bridge Co.*, 197 N. Y. 316, 90 N. E. 953; *Geoghegan v. Atlas St. Co.*, 3 Misc. 224, 22 N. Y. Supp. 749, 51 N. Y. St. 868, *affirmed*, 146 N. Y. 369, 40 N. E. 507.

48. **U. S.**—*La Bourgogne*, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. ed. 973; *American, etc., Co. v. Chace*, 16 Wall. 522, 21 L. ed. 369; *The Hamilton*, 146 Fed. 724, 77 C. C. A. 150; *Int. Nav. Co. v. Lindstrom*, 123 Fed. 475, 60 C. C. A. 649, *reversing*, 117 Fed. 170; *Southern Pac. Co. v. De Valle da Costa*, 190 Fed. 689. **Ill.**—*Chicago T. Co. v. Campbell*, 110 Ill. App. 366. **N. Y.** *McDonald v. Mallory*, 77 N. Y. 546, 33 Am. Rep. 664, 7 Abb. N. C. 84, *reversing*, 12 Jones & S. 80 (local law follows ship until she comes within the jurisdiction of some other government); *Stallknecht v. Pennsylvania R. Co.*, 13 Hun 451.

Injury Causing Death Within Three Mile Limit.—The territorial jurisdiction of a state extends to the three mile limit at sea and it has jurisdiction of a cause of action for wrongful death arising from an injury inflicted within its three mile limit. *Humboldt Lumb., etc., Co. v. Christopherson*, 73 Fed. 239, 19 C. C. A. 481, 44 U. S. App. 434, *affirming*, 60 Fed. 428 (action under California statute); *Lennan v. Hamburg-American S. Co.*, 73 App. Div. 357, 77 N. Y. Supp. 60 (New Jersey statute applied to action in New York courts for death within three mile limit).

poration which is a citizen of one of the United States.⁴⁹

Of Admiralty.—No action for wrongful death lies in admiralty under the general maritime law,⁵⁰ though where the statute of the state to which the vessel belongs gives a remedy by a civil action for wrongful death, the liability may be enforced in admiralty where it arises from a maritime tort.⁵¹ But the proper remedy is by a proceeding *in personam* and not by a proceeding *in rem* against the vessel,⁵² unless the local law expressly gives a lien upon the vessel.⁵³

49. The cause of action arises under the law of the state to which the ship on which the tortious act causing death belongs. *Old Dominion S. S. Co. v. Gilmore*, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. ed. 264; *Viscount De Valle Da Costa v. Southern Pac. Co.*, 176 Fed. 843, 100 C. C. A. 313, *s. c.*, 190 Fed. 689.

50. *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140; 30 L. ed. 358; *The Aurora*, 163 Fed. 633; *The Lotta*, 150 Fed. 219; *Williams v. Quebec, etc., Co.*, 126 Fed. 591; *In re La Bourgogne*, 117 Fed. 261, *affirmed*, 139 Fed. 433, 71 C. C. A. 489. See generally the title "Admiralty."

51. *The Hamilton*, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. ed. 264; *The Robert Lewers Co. v. Kekaouha*, 114 Fed. 849, 52 C. C. A. 483; *State v. Hamburg-American, etc., Co.*, 190 Fed. 240; *Trauffer v. Detroit, etc., Co.*, 181 Fed. 256; *State v. Miller*, 180 Fed. 796; *The Northern Queen*, 117 Fed. 906; *Williams v. Alaska Com. Co.*, 2 Alaska 43.

Admiralty has jurisdiction of action for wrongful death occurring on the high seas where the law of the state to which the vessel belonged gives such right of action. *Fisher v. Bou-telle, etc., Co.*, 162 Fed. 994.

Action Based on State Statute.—In proceedings in admiralty for death by wrongful act, the remedy is derived from the state statute giving the right of action. *Gretschmann v. Fix*, 189 Fed. 716.

Death on Shore.—But where death occurs on shore from injuries received on the high seas, admiralty has no jurisdiction. *Ryley v. Philadelphia, etc., R. Co.*, 173 Fed. 839.

State Law Providing for Jury Trial. Though the state statute provides that the damages are to be assessed by the jury and that the jury shall apportion the recovery among the designated ben-

eficiaries, this does not make the participation of the jury such an essential part of the proceeding as to prevent admiralty from taking jurisdiction. *State v. Hamburg-American, etc., Co.*, 190 Fed. 240; *State v. Miller*, 180 Fed. 796, 805 (Maryland statute).

Contributory negligence of deceased is a defense in admiralty to an action for wrongful death. *Gretschmann v. Fix*, 189 Fed. 716.

52. *Barton v. Brown*, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. ed. 727; *The Mariska*, 107 Fed. 989, 47 C. C. A. 115, *reversing*, 100 Fed. 500; *The Onoko*, 107 Fed. 984, 47 C. C. A. 111, *affirming*, 100 Fed. 477; *The Nora*, 181 Fed. 845; *The City of Norwalk*, 55 Fed. 98; *The Manhasset*, 18 Fed. 918; *The Sylvan Glen*, 9 Fed. 335.

Appearance in Action In Rem as Waiver.—Where there is no prayer, process or personal judgment in the libel, and no personal process upon the owner of the vessel, the fact that he appears and answers the libel *in rem* does not give the court of admiralty jurisdiction to render a personal judgment against him. *The Ethel*, 66 Fed. 340, 13 C. C. A. 504. See also, *The Lowlands*, 147 Fed. 986; *The Monte A*, 12 Fed. 331.

A writ of prohibition will not lie to enjoin the prosecution of a libel *in rem* for loss of life. *Ex parte Gordon*, 104 U. S. 515, 26 L. ed. 814.

Amendment—In Rem to In Personam.—Where a suit *in rem* is begun against the vessel, the complaint cannot be amended so as to make it a personal action as this would introduce an entirely new party to the action. *Barton v. Brown*, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. ed. 727.

53. *Laidlow v. Oregon, etc., Co.*, 81 Fed. 876, 26 C. C. A. 665; *The Glendale*, 81 Fed. 633, 26 C. C. A. 500; *Aurora Shipping Co. v. Boyce*, 191 Fed. 960; *The General Foy*, 175 Fed. 590

VI. PARTIES.—A. WHO MUST BRING ACTION.—1. Under Domestic Statute.—a. General Rule.—Most of the statutes provide who shall bring the action for wrongful death, and since the right of action for wrongful death is purely statutory, the law is well settled that the action can only be brought by and in the name of the person or persons to whom the right to sue is given by the statute⁵⁴

(Oregon statute); *The Aurora*, 163 Fed. 633 (Oregon statute); *The Oregon*, 45 Fed. 62, *reversed*, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. ed. 943, on other grounds.

54. U. S.—*Mobile Ins. Co. v. Brame*, 95 U. S. 754, 24 L. ed. 580 (creditor cannot bring action where not named in statute); *Fithian v. St. Louis*, etc., R. Co., 188 Fed. 842; *Choctaw*, etc., Co. v. *Jackson*, 182 Fed. 342. **Ala.** *Woodward Co. v. Cook*, 124 Ala. 349, 27 So. 455; *Stewart v. Louisville*, etc., R. Co., 83 Ala. 493, 4 So. 373. **Ark.** *Davis v. R. Co.*, 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283; *Little Rock*, etc., Co. v. *Townsend*, 41 Ark. 382. **Cal.**—*Bond v. United Railroad Co.*, 159 Cal. 270, 113 Pac. 366; *Salmon v. Rathjens*, 152 Cal. 290, 92 Pac. 733. **Fla.** *Seaboard Air Line R. Co. v. Moseley*, 60 Fla. 186, 53 So. 718; *Louisville*, etc., R. Co. v. *Jones*, 45 Fla. 407, 34 So. 246. **Ga.**—*Western & A. R. Co. v. Harris*, 128 Ga. 394, 57 S. E. 722; *Southern Bell Tel. Co. v. Cassin*, 111 Ga. 575, 36 S. E. 881. **Ind.**—*Collins Coal Co. v. Hadley*, 38 Ind. App. 637, 75 N. E. 832, 78 N. E. 353; *Baltimore*, etc., R. Co. v. *Gillard*, 34 Ind. App. 339, 71 N. E. 58; *Dickason Coal Co. v. Unverferth*, 30 Ind. App. 546, 66 N. E. 759. **Kan.**—*Railway Co. v. Townsend*, 71 Kan. 524, 81 Pac. 205; *Eureka v. Merrifield*, 53 Kan. 794, 37 Pac. 113. **Ky.**—*Louisville v. Hart's Admx.*, 143 Ky. 171, 136 S. W. 212; *Cincinnati*, etc., R. Co. v. *Adams' Admr.*, 11 Ky. L. Rep. 833, 13 S. W. 428. **La.**—*Walker v. Vicksburg*, etc., R. Co., 110 La. 713, 34 So. 749. **Me.**—See *Anderson v. Wetter*, 103 Me. 257, 69 Atl. 105, 15 L. R. A. (N. S.) 1003. **Mass.**—*Dacey v. Old Colony R. Co.*, 153 Mass. 112, 26 N. E. 437. **Minn.**—*Nash v. Tousley*, 28 Minn. 5, 8 N. W. 875. **Miss.**—*Mobile*, etc., Co. v. *Hicks*, 91 Miss. 273, 46 So. 360, 124 Am. St. Rep. 679, widow as administratrix not entitled to sue where action given to widow and children. **Mo.**—*Gilkeson v. Missouri Pac. R. Co.*,

222 Mo. 173, 121 S. W. 138; *Clark v. Kansas City*, etc., R. Co., 219 Mo. 524, 118 S. W. 40; *Oates v. Union Pac. R. Co.*, 104 Mo. 514, 16 S. W. 487, 24 Am. St. Rep. 348; *Keele v. Atchison*, etc., R. Co., 151 Mo. App. 364, 131 S. W. 730. **Neb.**—*Wilson v. Bumstead*, 12 Neb. 1, 10 N. W. 411. **N. Y.**—*Wooden v. Western New York*, etc., Co., 126 N. Y. 10, 26 N. E. 1050, 22 Am. St. Rep. 803, 13 L. R. A. 458; *Johnson v. Phoenix*, etc., Co., 133 App. Div. 807, 118 N. Y. Supp. 88. **N. C.**—*Bennett v. North Carolina R. Co.*, 74 S. E. 883. **N. D.**—*Satterberg v. Minneapolis*, etc., Co., 121 N. W. 70; *Harshman v. Northern Pac. Co.*, 14 N. D. 69, 103 N. W. 412 (father not included in parties who may sue). **Ohio.** *Weidner v. Rankin*, 26 Ohio St. 522. **Pa.**—*Hoodmacher v. Lehigh Val. R. Co.*, 218 Pa. 21, 66 Atl. 975; *Boulder v. Pennsylvania R. Co.*, 205 Pa. 264, 54 Atl. 906; *Usher v. West Jersey R. Co.*, 126 Pa. 206, 17 Atl. 597, 12 Am. St. Rep. 863, 4 L. R. A. 261. **Tenn.** *Railroad v. Johnson*, 97 Tenn. 667, 37 S. W. 558, 34 L. R. A. 442; *Holder v. Nashville*, etc., R. Co., 92 Tenn. 141, 20 S. W. 537. **Tex.**—*Winnt v. International*, etc., R. Co., 74 Tex. 32, 11 S. W. 907; *Vernon Oil Co. v. Catron* (Tex. Civ. App.), 137 S. W. 404. **Wash.** *Johnson v. Seattle El. Co.*, 39 Wash. 211, 81 Pac. 705. **Wis.**—*Quinn v. Chicago R. Co.*, 141 Wis. 497, 124 N. W. 653.

Raising Question of Capacity To Sue.

In the absence of objection by demurrer that one or all of the beneficiaries sue individually instead of as administrator as required by statute, the objection is waived and cannot be raised for the first time on appeal. **U. S.** *St. Louis*, etc., R. Co. v. *Herr*, 193 Fed. 950; *Missouri*, etc., R. Co. v. *Wulf*, 192 Fed. 919; *Choctaw*, etc., R. Co. v. *Jackson*, 182 Fed. 342. **Ark.** *Texarkana Gas*, etc., Co. v. *Orr*, 59 Ark. 215, 27 S. W. 66. **Kan.**—*Atchison v. Twine*, 9 Kan. 350. **Tex.**—*El Paso*, etc., R. Co. v. *Gutierrez* (Tex.

in force at the time of the death,⁵⁵ unless the statutes provide that one or more of the designated beneficiaries may bring the action on behalf of himself and the other beneficiaries entitled to a recovery.⁵⁶

b. *Parents*.—Though the recovery is for the benefit of the parents of a deceased child, in accordance with the general rule heretofore

Civ. App.), 111 S. W. 159; St. Louis, etc. R. Co. v. Seale (Tex. Civ. App.), 148 S. W. 1099.

But see, *contra*, Crohn v. Kansas City, etc., Co., 131 Mo. App. 313, 109 S. W. 1068, holding it may be raised at the trial though demurrer was not interposed. See also, Weidner v. Rankin, 26 Ohio St. 522, holding where the widow and children sue, instead of the administrator, the error is not cured by appointing the widow administratrix and making her a party plaintiff in that capacity after judgment, though defendant did not demur.

May Insurer Bring Action.—Though the statute giving an action for wrongful death provides certain persons shall bring the action, such statute does not preclude the insurer who by reason of a "contract of indemnity against employer's liability," from maintaining an action against a third party whose negligence has caused liability to the insured employer for injuries resulting in the death of the employee. Travel Ins. Co. v. Great Lakes Eng. Co., 184 Fed. 426, 107 C. C. A. 20, 36 L. R. A. 60. But in Mobile L. Ins. Co. v. Brame, 95 U. S. 754, 24 L. ed. 580, and Connecticut, etc., Ins. Co. v. New York, etc. R. Co., 25 Conn. 265, 65 Am. Dec. 571, it was held that the insurance company could not maintain the action for wrongful death because it was compelled to pay a policy of insurance on the person killed, because no common law action existed and the statute limited the right of recovery to designated persons of whom the insurance company was none. Travelers' Ins. Co. v. Great Lakes Eng. Co., *supra*, is distinguished on the ground that a contract of indemnity existed in that case, which did not exist in the other cases cited above, and on the further principle that the principle of subrogation was not applicable in the other cases because rights thereunder must have been asserted in the name of the insured, and his right of action abated by his death.

55. Birmingham v. Crane (Ala.), 56 So. 723; Piper v. Boston, etc., R. Co., 75 N. H. 435, 75 Atl. 1041.

Parties Given Subsequent Right Cannot Sue.—The parties entitled to the action under the statutes in force at the time of death are the only parties who may bring it; not parties who have been given a right of action subsequent to the death but before the commencement of the action. Quinn v. Chicago, etc., R. Co., 141 Wis. 497, 124 N. W. 653.

56. Vernon C. Oil Co. v. Catron (Tex. Civ. App.), 137 S. W. 404 (allowed by statute in Texas); Texas, etc., R. Co. v. Berry, 67 Tex. 238, 5 S. W. 817.

Petition Should Show Recovery Was for Benefit of Others Also.—Unquestionably, all parties entitled to share in the recovery may, and, no doubt, should, more appropriately join in the suit; but if some of them fail or neglect to do so, any one of them may maintain and prosecute it, but he must do so for the benefit of the other parties as well as himself. The petition should show all amongst whom the amount recovered should be divided. Houston, etc., R. Co. v. Moore, 49 Tex. 31.

Mother Suing for Benefit of Children.—Where a child dies leaving parents only, who as "next of kin" are the sole owners of the right of action, and no administrator is appointed, and the parents sue, upon the death of the father the mother cannot enforce the suit as trustee for the other minor children as upon the death of the father the sisters of the deceased child became "statutory next of kin" and as such were necessary parties. The mother could not represent their interest as trustee of an express trust where the statute does not authorize one as "next of kin" to represent the others of that class. They should be represented by a guardian. Keele v. Atchison, etc., R. Co., 151 Mo. App. 364, 131 S. W. 730.

stated, the parents cannot bring an action for its wrongful death unless the statute expressly provides that the action may be brought by them individually.⁵⁷ But the statutes in some states expressly provide for an action by a parent or parents in his or their own name.⁵⁸

- 57. Ala.**—*Williams v. Southern, etc.*, R. Co., 91 Ala. 635, 9 So. 77. **Ark.** St. Louis, etc., R. Co. v. *Garner*, 76 Ark. 555, 89 S. W. 550. **Del.**—*Kennedy v. Delaware Cotton Co.*, 4 Penne. 477, 58 Atl. 825. **Ga.**—*Frazier v. Georgia R., etc. Co.*, 96 Ga. 785, 22 S. E. 936. **Kan.**—*Eureka v. Merrifield*, 53 Kan. 794, 37 Pac. 113. **Ky.**—*Louisville, etc., R. Co. v. Coppage*, 12 Ky. L. Rep. 200, 13 S. W. 1086. **Minn.** *Scheffler v. Minneapolis, etc., R. Co.*, 32 Minn. 125, 19 N. W. 656; *Nash v. Tousley*, 28 Minn. 5, 8 N. W. 875 (a parent may sue as the personal representative of the deceased where the personal representative must bring action). **Neb.**—*Wilson v. Bumstead*, 12 Neb. 1, 10 N. W. 411. **N. J.**—*Ferguson v. Delaware Tel. Co.*, 71 N. J. L. 59, 58 Atl. 74. **N. Y.**—*Ohnmacht v. Mt. Morris Elec. Light Co.*, 66 App. Div. 482, 73 N. Y. Supp. 296. **N. C.** *Killian v. Southern R. Co.*, 128 N. C. 261, 38 S. E. 873. **N. D.**—*Harshman v. Northern Pac. R. Co.*, 14 N. D. 69, 103 N. W. 412. **R. I.**—*Goodwin v. Nickerson*, 17 R. I. 478, 23 Atl. 12. **S. C.**—*Edgar v. Castello*, 14 S. C. 20, 37 Am. Rep. 714. **Va.**—*Stevenson v. Ritter Lumb. Co.*, 108 Va. 575, 62 S. E. 351, 18 L. R. A. (N. S.) 316. **Wash.** *Nesbitt v. Northern Pac. R. Co.*, 22 Wash. 698, 61 Pac. 141. **W. Va.**—*Shaw v. Charleston*, 57 W. Va. 433, 50 S. E. 527.
- 58. U. S.**—*Winfree v. Northern Pac. R. Co.*, 173 Fed. 65, 97 C. C. A. 392, *affirming*, 164 Fed. 698, Washington statute (parent sues as heir). **Ala.**—*Birmingham v. Crane*, 56 So. 723, code of 1907, §2485. **Colo.**—*Bailey v. College of Sacred Heart*, 119 Pac. 1067; *Pierce v. Connors*, 20 Colo. 178, 37 Pac. 721, 46 Am. St. Rep. 279. **Fla.**—*Seaboard Air Line R. Co. v. Moseley*, 60 Fla. 186, 53 So. 718. **Idaho.**—*Palmer v. Utah, etc., R. Co.*, 2 Idaho 315, 13 Pac. 425. **Ind.**—*Louisville, etc., R. Co. v. Goodykoontz*, 119 Ind. 111, 21 N. E. 472, 12 Am. St. Rep. 371; *Citizens' St. R. Co. v. Cooper*, 22 Ind. App. 459, 53 N. E. 1092, 72 Am. St. Rep. 319. **Ia.**—*Lawrence v. Birney*, 40 Iowa.
- 377. La.**—*La Blanc v. United Ir. Co.*, 129 La. 196, 55 So. 761 (both father and mother have action); *Mount v. Tremont L. Co.*, 121 La. 64, 46 So. 103, 16 L. R. A. (N. S.) 199. **Mass.**—*Mulhall v. Fallon*, 176 Mass. 266, 57 N. E. 386, 79 Am. St. Rep. 309, 54 L. R. A. 934. **Miss.**—*Alabama, etc., R. Co. v. Williams*, 78 Miss. 209, 28 So. 853, 84 Am. St. Rep. 624, 51 L. R. A. 836; *Illinois, etc., R. Co. v. Hunter*, 70 Miss. 471, 12 So. 482. **Mo.** *Lee v. Knapp*, 155 Mo. 610, 56 S. W. 458; *Clark v. Kansas City R. Co.*, 133 Mo. App. 689, 135 S. W. 979, *affirming*, 219 Mo. 524, 118 S. W. 40. **N. M.**—*Romero v. Atchison, etc., R. Co.*, 11 N. M. 679, 72 Pac. 37. **Ore.** *Schleiger v. Northern Ter. Co.*, 43 Ore. 4, 72 Pac. 324 (personal representative may also bring action); *Craft v. Northern Pac. R. Co.*, 25 Ore. 275, 35 Pac. 250. **Pa.**—*Holmes v. Pennsylvania R. Co.*, 220 Pa. 189, 69 Atl. 597; *Kerr v. Pennsylvania R. Co.*, 169 Pa. 95, 32 Atl. 96.
- Georgia.**—*When Father May Sue.* If a statute gives a right of action for death of child to mother, and if no mother, to the father, the father cannot sue while the mother is living. *Frazier v. Georgia R., etc., Co.*, 96 Ga. 785, 22 S. E. 936.
- Parent as Meaning Father.**—The term parent in the Mississippi statute (Code of 1880, §1510) providing that the action shall be brought in the name of such parent, where the prior part of the statute provided the action could be maintained only where deceased left "a husband or father," means father, and the mother cannot sue in her own name. *Amos v. Mobile, etc., R. Co.*, 63 Miss. 509.
- Parent "as Legal Representative of Deceased."**—A statute giving the father or mother an action for the death of a child "as the legal representative" of the deceased child requires the action to be brought by the parent personally and not as administrator of deceased. *Seaboard Air Line R. Co. v. Moseley*, 60 Fla. 186, 53 So. 718.

Under such a statute, only actual or natural parents may bring the action.⁵⁹

Parents of Illegitimate Child.—Such a statute gives no right of action to the parents of an illegitimate child, as *prima facie* the word “child or children” as used in such statute means legitimate child or children only,⁶⁰ though where the statutes permit illegitimate children

59. *Citizens' St. R. Co. v. Cooper*, 22 Ind. App. 459, 53 N. E. 1092, 72 Am. St. Rep. 319; *Citizens' St. R. Co. v. Willoebey*, 15 Ind. App. 312, 43 N. E. 1058; *Mount v. Tremont L. Co.*, 121 La. 64, 46 So. 103, 15 Am. & Eng. Ann. Cas. 148.

See also, *Heidecamp v. Jersey City*, etc., R. Co., 69 N. J. L. 284, 55 Atl. 239, 101 Am. St. Rep. 707, statutes did not give foster parent right to inherit, and parent was, therefore, not “next of kin” within the statute.

The stepfather of a child cannot maintain an action for his wrongful death under such statute. *Thornburg v. American*, etc., Co., 141 Ind. 443, 46 N. E. 1062, 50 Am. St. Rep. 334; *Hennesey v. Bavarian B. Co.*, 63 Mo. App. 111.

Not Parents of Adopted Child.—*Mount v. Tremont L. Co.*, 121 La. 64, 46 So. 103; *Heidecamp v. Jersey City*, etc., Co., 69 N. J. L. 284, 55 Atl. 239, 101 Am. St. Rep. 707. But see, *Omaha Water Co. v. Schamel*, 147 Fed. 502, 78 C. C. A. 68. And in *Thornburg v. American Strawboard Co.*, 141 Ind. 443, 40 N. E. 1062, 50 Am. St. Rep. 334. But in *McDonald v. Pittsburgh*, etc. R. Co., 144 Ind. 459, 43 N. E. 447, 55 Am. St. Rep. 185, it is said that nothing but adoption in accordance with law would allow the foster parents to recover.

In Missouri, though the statute allows an adopting parent to recover for the wrongful death of his child, the law of adoption must be strictly complied with, and if the adopting parent fails to make the acknowledgment as required by law, the adoption is not sufficient and he cannot recover. *Sarazin v. Union R. Co.*, 153 Mo. 479, 55 S. W. 92, holding that adoption cannot be completed after death of child.

Foster Parent.—A woman, not the mother of a child, cannot recover for the wrongful killing of a child, which she has not legally adopted, though it was given her in infancy, and she

had ever since maintained it and treated it as her own. *Citizens' St. R. Co. v. Cooper*, 22 Ind. App. 459, 53 N. E. 1092, 72 Am. St. Rep. 319.

One Marrying Mother of Illegitimate Child.—Under a statute giving the father a right of action for the homicide of his child, one who marries the mother of a bastard child and receives such child into his home as a member of his family, cannot sue for the death of the child (*Thornburg v. American Strawboard Co.*, 141 Ind. 443, 40 N. E. 1062, 50 Am. St. Rep. 334), even though he acknowledges the child as his own (*McDonald v. Pittsburgh R. Co.*, 144 Ind. 459, 43 N. E. 447, 55 Am. St. Rep. 185, 32 L. R. A. 309).

60. **U. S.**—*Marshall v. Wabash R. Co.*, 46 Fed. 269. **Ga.**—*Robinson v. Georgia R. Co.*, 117 Ga. 168, 43 S. E. 452, 97 Am. St. Rep. 156, 60 L. R. A. 555. **Ind.**—*McDonald v. Pittsburgh*, etc., R. Co., 144 Ind. 459, 43 N. E. 447, 55 Am. St. Rep. 185, action by putative father who had acknowledged and reared child. **La.**—*Lynch v. Knopp*, 118 La. 611, 43 So. 252, 118 Am. St. Rep. 391, 8 L. R. A. (N. S.) 480, subsequent acknowledgment immaterial. **Miss.**—*Runt v. Illinois Cent. R. Co.*, 88 Miss. 575, 41 So. 1; *Alabama*, etc., R. Co. *v. Williams*, 78 Miss. 209, 28 So. 853, 84 Am. St. Rep. 624, 51 L. R. A. 836 (no statute allowing mother to inherit from illegitimate child in Mississippi). **Pa.**—*Harkins v. Philadelphia*, etc., R. Co., 15 Phila. 286. But see, *Thompson v. Delaware*, etc., R. Co., 41 Pa. Super. 617, holding rule changed by statute. **S. C.**—*McDonald v. Southern R. Co.*, 71 S. C. 352, 51 S. E. 138, 110 Am. St. Rep. 576, 2 L. R. A. (N. S.) 640. **Eng.**—*Clarke v. Carfin Coal Co.*, L. R. (1891) App. Cas. 412; *Dickinson v. North-eastern R. Co.*, 2 Hurl. & C. 735 (action for benefit of illegitimate child for death of mother). **Can.**—*Gibson v. Midland R. Co.*, 2 Ont. 658.

In these cases the argument was made that the statute was meant to

and their mother to take and inherit from each other, the mother may maintain an action for the wrongful death of an illegitimate child.⁶¹

May Divorced or Deserted Wife Sue.—Since only the persons named in the statute may bring the action it is held that unless the deserted or divorced wife comes within the terms of the statute, she cannot sue for the death of her child,⁶² unless the statute provides the mother may sue where the father is dead or has deserted the family.⁶³

be co-extensive with the moral right of support, and that for many purposes the law recognizes the relationship of a bastard child to the parent; and that, therefore, the question of legitimacy or illegitimacy was immaterial, but the court said they were not convinced by this reasoning. *Harkins v. Philadelphia, etc., R. Co.*, 15 Phila. 286; *Dickinson v. Northeastern R. Co.*, 2 Hurl. & C. (Eng.) 735.

61. Ill.—*Security Title & T. Co. v. West Chicago, etc., R. Co.*, 91 Ill. App. 332, because statutes removed the common law disability of illegitimacy the mother was "next of kin" within statute. **Ind.**—*Dickason, etc., Co. v. Liddie* (Ind. App.), 94 N. E. 411, action by mother who could inherit from the child. **Mo.**—*Marshall v. Wabash R. Co.*, 120 Mo. 275, 25 S. W. 179 (mother could sue alone, though statute provided father and mother could join, without making reputed father party); *Buel v. St. Louis Transfer Co.*, 45 Mo. 562 (parents though divorced may sue jointly); *Clark v. Kansas City R. Co.*, 153 Mo. App. 689, 135 S. W. 979, *affirming*, 219 Mo. 524, 118 S. W. 40 (wife cannot maintain suit though divorced and granted custody of child). **Ohio.**—*Muhl's Admr. v. Michigan So. R. Co.*, 10 Ohio St. 272, holding that the fact that an illegitimate son was the next of kin does not affect the right of recovery by the administrator. **Pa.**—*Holmes v. Pennsylvania R. Co.*, 220 Pa. 189, 69 Atl. 597; *Kerr v. Pennsylvania R. Co.*, 169 Pa. 95, 32 Atl. 96 (wife may sue alone); *Thompson v. Delaware, etc., R. Co.*, 41 Pa. Super. 617 (mother of illegitimate child may recover since act of July 10, 1901, P. L. 639); *Davis v. Pennsylvania R. Co.*, 34 Pa. Super. 388. **Tex.**—*Galveston, etc., Co. v. Walker*, 48 Tex. Civ. App. 52, 106 S. W. 705.

62. *Clark v. Kansas City, etc., R.*

Co., 153 Mo. App. 689, 135 S. W. 979; *s. c.*, 219 Mo. 524, 118 S. W. 40 (though granted the custody of the child upon divorce). See also, *Swift v. Johnson*, 138 Fed. 867, 71 C. C. A. 619, 1 L. R. A. (N. S.) 1161; *Thompson v. Chicago, etc., R. Co.*, 104 Fed. 845 (mother not next of kin within statute); *Cook v. American, etc., Co.*, 70 N. J. L. 65, 56 Atl. 114 (father was "next of kin" but not deserted wife).

Georgia.—**Separation of Husband and Wife.**—Where the wife lives separate from her husband and is dependent upon a son's support, she may recover in Georgia, under common law principles for the death of her son for loss of services, in her own name and in that of her husband's for her use. *East Tennessee, etc., R. Co. v. Maloy*, 77 Ga. 237, 2 S. E. 941.

63. Under some statutes the wife can sue for the wrongful death of her child, where the father is dead or has deserted the family. **Cal.**—*Dela-tour v. Mackay*, 139 Cal. 621, 73 Pac. 454. **Ind.**—*Chicago, etc., Co. v. Nelson*, 32 Ind. App. 355, 69 N. E. 705, desertion of husband in such case is a substantial and issuable fact. **Ia.** *Lawrence v. Birney*, 46 Iowa 377. **Pa.**—*Kerr v. Pennsylvania R. Co.*, 169 Pa. 95, 32 Atl. 96. **Ore.**—*Schleiger v. Northern Term Co.*, 43 Ore. 4, 72 Pac. 324, personal representative may also sue. **Wash.**—*Clark v. Northern Pac. R. Co.*, 29 Wash. 139, 69 Pac. 636.

Divorce.—The procuring of a divorce on the ground of extreme cruelty, because threatening her life and driving the wife and children from the house, and the failure to support either wife or child after divorce, is such desertion within the meaning of the statute as authorizes the wife to sue. *Dela-tour v. Mackay*, 139 Cal. 621, 73 Pac. 454. But in Missouri the wife, though granted the custody of the deceased child can not sue alone, as no

Joinder of Parents. — Under statutes providing for a joint action by the father and mother of the deceased child, of course the action must be brought by the parents jointly,⁶⁴ but some statutes provide for an action by either the father or mother.⁶⁵

c. **Widow.** — In some jurisdictions the first right of action for the wrongful death of the husband and father has been given to the widow, and in such case the action can only be brought by her in her name.⁶⁶ In other jurisdictions the widow can sue only where

such provision exists there. *Clark v. Kansas City, etc., R. Co.*, 153 Mo. App. 689, 135 S. W. 979; *s. c.*, 219 Mo. 524, 118 S. W. 40.

Custody of Child. — Though a divorce has been obtained and the child awarded to the husband, the wife may sue, where the statute provides the mother may sue where the husband dies or deserts the family, where the husband brought the child to the divorced wife, left it and never returned, and the wife has always supported the child. *Clark v. Northern Pac. R. Co.*, 29 Wash. 139, 69 Pac. 636, 59 L. R. A. 508.

In Georgia, the deserted wife was allowed to recover for the death of her son under the general statute allowing the wife to sue for torts to her children when she lives separate and apart from her husband.

64. *Clark v. Kansas City, etc., R. Co.*, 153 Mo. App. 689, 135 S. W. 979, *s. c.*, 219 Mo. 524, 118 S. W. 40; *Davis v. Pennsylvania R. Co.*, 34 Pa. Super. 388.

65. *Bailey v. College of Sacred Heart (Colo.)*, 119 Pac. 1067; *Wilson v. Banner L. Co.*, 108 La. 590, 32 So. 460.

Colorado. — While both the father and mother may join in a suit for the wrongful death of their child (*Bailey v. College of Sacred Heart (Colo.)*, 119 Pac. 1067), the non-joinder of either the father or mother in an action for the death of their child is material only to the parties themselves, not to the defendant, since either may sue alone, but only one suit will lie (*Pierce v. Connors*, 20 Colo. 178, 37 Pac. 721, 46 Am. St. Rep. 279).

Divorced Wife as Necessary Party. Two Actions Allowed. — The divorced wife is not a necessary party where the statute gives both the mother and the father an action for the death of the son. *LeBlanc v. United Irr. Co.*, 129 La. 196, 55 So. 761.

66. **U. S.** — *Thompson v. Wabash R. Co.*, 184 Fed. 554 (Missouri statute); *Conover v. Pennsylvania R. Co.*, 176 Fed. 638 (Pennsylvania statute); *Hall v. Louisville, etc., R. Co.*, 157 Fed. 464 (Florida statute). **Colo.** — *Hayes v. Williams*, 17 Colo. 465, 30 Pac. 352. **Fla.** — *Louisville, etc., R. Co. v. Jones*, 45 Fla. 407, 34 So. 246; *Gen. St.*, 1906, §3146. **Ga.** — *Western, etc., R. Co. v. Harris*, 128 Ga. 394, 57 S. E. 722. **Ill.** — *Willis Coal, etc., Co. v. Grizzell*, 198 Ill. 313, 65 N. E. 74 (under Miner's act, *Rev. St.*, 1899, p. 1175; *Hart v. Penwell Coal M. Co.*, 146 Ill. App. 155 (Miners' act)). **Ind.** — *Pittsburg, etc., R. Co. v. Reed*, 44 Ind. App. 635, 88 N. E. 1080; *Collins Coal Co. v. Hadley*, 39 Ind. App. 637, 75 N. E. 832, 78 N. E. 353; *Dickason Coal Co. v. Unverferth*, 30 Ind. App. 546, 66 N. E. 759 (Miner's act); *Boyd v. Brazil, etc., Co.*, 25 Ind. App. 157, 57 N. E. 732, rehearing denied, 50 N. E. 368 (Miner's act, *Rev. St.*, 1894, §474). **Kan.** — *Chicago, etc., R. Co. v. Mills*, 57 Kan. 687, 47 Pac. 834. **Ky.** — *McClurg v. Iglehart*, 17 Ky. L. Rep. 913, 33 S. W. 80. **La.** — *Davis v. Arkansas-Southern R. Co.*, 117 La. 320, 41 So. 587. **Mass.** — *Silva v. New England Brick Co.*, 185 Mass. 151, 69 N. E. 1054. **Miss.** — *Mobile, etc., R. Co. v. Hicks*, 91 Miss. 273, 46 So. 361, employer's liability act, *Code*, 1906, §721. **Mo.** — *Paekard v. Hanibal, etc., R. Co.*, 181 Mo. 421, 80 S. W. 951, 103 Am. St. Rep. 607 (*Rev. St.*, 1899, §2864); *Hamman v. Central Coal, etc., Co.*, 156 Mo. 232, 56 S. W. 1091 (death in mines act); *Hegberg v. St. Louis, etc., R. Co. (Mo. App.)*, 147 S. W. 192 (§5425). **N. D.** — *Satterberg v. Minneapolis, etc., R. Co.*, 19 N. D. 38, 121 N. W. 70. **Pa.** — *Shambach v. Middlecreek, etc., R. Co.*, 81 Atl. 802; *Haughey v. Pittsburg, etc., R. Co.*, 210 Pa. 363, 59 Atl. 1110; *Gross v. Electric T. Co.*, 180 Pa. 99, 36 Atl. 424 (one marrying after receiving injuries). **R. I.** — *Goodwin v.*

no personal representative has been appointed.⁶⁷

Desertion and Separation as Precluding Recovery.—That the deceased husband had deserted the wife and had not contributed to her support,⁶⁸ or that the husband and wife were living separate and apart from each other does not bar her action.⁶⁹

d. *Children.*—Under some of the statutes, deceased's children may sue for the wrongful death of a parent where there is no husband or widow surviving.⁷⁰

Nickerson, 17 R. I. 478, 23 Atl. 12.
S. D.—Belding v. Black Hills, etc., R. Co., 3 S. D. 369, 53 N. W. 750. **Tex.** Holland v. Closs (Tex. Civ. App.), 146 S. W. 671. **Wash.**—Archibald v. Lincoln County, 50 Wash. 55, 96 Pac. 831; Copeland v. Seattle, 33 Wash. 415, 74 Pac. 582, 65 L. R. A. 333. **Can.** Walkerton v. Erdman, 23 Can. Sup. 352.

Widow Assigning Right To Sue to Child.—Where the right of action is given to the husband, widow, children or parents of deceased, the widow cannot assign her right of action to the child so as to enable suit to be brought in her name for its benefit. Marsh v. Western, etc., R. Co., 204 Pa. 229, 53 Atl. 1001.

Putative Wife Not Proper Plaintiff. A statute giving a right of action to deceased's wife means lawful wife only and does not give a right of action to a putative wife by a bigamous marriage. Vaughan v. Dalton, etc., Co., 119 La. 61, 43 So. 926.

Must Children Be Made Parties.—Where the statute provides the widow shall bring the action, she need not make the children parties or allege the action as being brought for their benefit, though they participate in the recovery. Oklahoma Gas, etc., Co. v. Lukert, 16 Okla. 397, '84 Pac. 1076. And in Pennsylvania, where there is a husband or widow, the children are not necessary, nor proper parties, but it is necessary to name them in the declaration. Shambach v. Middlecreek El. Co. (Pa.), 81 Atl. 802; Black v. Baltimore & O. R. Co., 224 Pa. 519, 73 Atl. 903; Haughey v. Pittsburg, etc., R. Co., 210 Pa. 363, 59 Atl. 1110.

Subsequent Marriage.—The right to sue for the homicide of the husband vests in the widow at her husband's death, and her marriage does not bar the action. Georgia, etc., R. Co. v. Garr, 57 Ga. 277, 24 Am. Rep. 492;

International, etc., R. Co. v. Kuehn, 70 Tex. 582, 8 S. W. 484.

Marriage After Injuries Causing Death.—Such a statute allows one who marries the injured person after he receives the injury causing death to sue. Gross v. Electric T. Co., 180 Pa. 99, 36 Atl. 424.

67. Lee v. Missouri Pac. R. Co., 195 Mo. 400, 92 S. W. 614 (Kansas statute); Oklahoma Gas, etc., Co. v. Lukert, 16 Okla. 397, '84 Pac. 1076 (resident decedent).

See, *infra*, VI, A, f.

68. Ingersoll v. Detroit, etc., R. Co., 163 Mich. 268, 128 N. W. 227, 32 L. R. A. (N. S.) 362; De Garcia v. San Antonio, etc., R. Co. (Tex. Civ. App.), 77 S. W. 275; International, etc., R. Co. v. Jones (Tex. Civ. App.), 60 S. W. 978.

69. U. S.—Dunbar v. Charleston, etc., R. Co., 186 Fed. 175; Cole v. Mayne, 122 Fed. 836 (though living in adultery). **Ga.**—Augusta R. Co. v. Glover, 92 Ga. 132, 18 S. E. 406. **La.**—Williams v. Nona Mills Co., 128 La. 811, 55 So. 414. **Tex.**—Galveston, etc., R. Co. v. Murray (Tex. Civ. App.), 99 S. W. 144. **Eng.**—Stimpson v. Wood, 57 L. J. Q. B. (N. S.) 484, 59 L. T. N. S. 218, though living in adultery.

Desertion by the wife so as to bar her action for the wrongful death of her husband is not shown by the fact that she lived separate and apart from him during the pendency of divorce proceedings. Williams v. Nona M. Co., 128 La. 811, 55 So. 414.

70. **Fla.**—Louisville, etc. R. Co. v. Jones, 45 Fla. 407, 34 So. 246. **Ga.** Atlanta, etc. R. Co. v. Venable, 65 Ga. 55. **Ill.**—Houglund v. Avery Coal & M. Co., 152 Ill. App. 573, *affirmed*, 246 Ill. 609, 93 N. E. 40, Miner's Act. **N. D.**—Satterberg v. Minneapolis, etc. R. Co., 19 N. D. 38, 121 N. W. 70. **Tenn.**—Stephens v. Nashville, etc. R.

Desertion by Father.—That the father had deserted his children and failed to support them does not preclude them from recovering for his death, where such right of action is in them.⁷¹

Divorce and Custody of Children Given to Mother.—The fact that the husband and wife have been divorced and the custody of their children awarded the wife does not preclude the children from suing for the death of their father.⁷²

e. *Heirs or Next of Kin.*—Some of the statutes give either the heirs or personal representative the right to sue,⁷³ while under others

Co., 10 Lea 448; *Greenlee v. East Tennessee, etc. R. Co.*, 5 Lea 418 (if statute gives action to the widow or to the children, the children can only sue where there is no widow).

Wrongful Death of Mother.—A statute giving the widow, or if no widow, a child or children, a right of action for the homicide of a husband or parent, and providing if suit be brought by the widow or children and the former, or one of the latter dies pending the action, the same shall survive in the first case to the children, and in the latter case to the child or children, does not restrict the right of action to the homicide of the father, but gives a right of action to the minor children for the death of the mother. *Atlanta, etc. R. Co. v. Venable*, 65 Ga. 55.

Stepfather.—Such statute does not give a child a right of action for the death of his stepfather. *Marshall v. Macon, etc. Lumb. Co.*, 103 Ga. 725, 30 S. E. 571, 68 Am. St. Rep. 140, 41 L. R. A. 211.

Adult Children.—If the statute vests the right to sue where there is no widow in the minor children, adult children cannot sue. *Western, etc. R. Co. v. Harris*, 128 Ga. 394, 57 S. E. 722; *Coleman v. Hyer*, 113 Ga. 420, 38 S. E. 962; *Mott v. Central R. Co.*, 70 Ga. 680. And a complaint under the above statute alleging plaintiffs were children, and that two were adults and one a minor, is subject to demurrer for improper joinder of parties. *Western, etc. R. Co. v. Harris*, 128 Ga. 394, 57 S. E. 722.

Amendment.—The declaration may be amended by alleging that minor children sue by their next friend. *Van Pelt v. Chattanooga, etc. R. Co.*, 89 Ga. 706, 15 S. E. 622.

71. *Gulf, etc. R. Co. v. Anderson* (Tex. Civ. App.), 126 S. W. 928; Beau-

mont Tract. Co. *v. Dilworth* (Tex. Civ. App.), 94 S. W. 352.

The desertion by the husband merely affects the question as to the amount of damages. *Kroll v. Chicago, etc. R. Co.*, 150 Ill. App. 438; *Chicago, etc. R. Co. v. Downey*, 96 Ill. App. 398; *Creamer v. Moran Bros. Co.*, 41 Wash. 636, 84 Pac. 592.

72. *Taylor v. San Antonio, etc. R. Co.* (Tex. Civ. App.), 93 S. W. 674.

73. *Cal.*—*Salmon v. Rathjens*, 152 Cal. 290, 92 Pac. 733; *Webster v. Norwegian Min. Co.*, 137 Cal. 399, 70 Pac. 276, 92 Am. St. Rep. 181; *Redfield v. Oakland Cons., etc. Co.*, 110 Cal. 277, 42 Pac. 822, 1063. *Mont.*—*Beeler v. Butte, etc. Co.*, 41 Mont. 465, 110 Pac. 528. *Rev. Codes*, §5250. *Utah.*—*Fritz v. Western Union Tel. Co.*, 25 Utah 263, 71 Pac. 209, assignment by heirs to administrator does not bar the action in such case. *Wash.*—*Copeland v. Seattle*, 33 Wash. 415, 74 Pac. 582; *Nesbitt v. Northern Pac. R. Co.*, 22 Wash. 698, 61 Pac. 141.

Only One Action Contemplated.—If heirs or personal representatives may bring action, one cause of action only is contemplated prosecuted by the heirs or personal representative. *Riggs v. Northern Pac. R. Co.*, 60 Wash. 292, 111 Pac. 162. And where the heirs sue, a posthumous child cannot sue thereafter. *Daubert v. Western Meat Co.*, 139 Cal. 480, 73 Pac. 244, 69 Pac. 297, 96 Am. St. Rep. 154. But see *contra*, *Galveston, etc. R. Co. v. Contreras*, 31 Tex. Civ. App. 489, 72 S. W. 1051.

Construction of Term "Heirs."
The only necessary parties plaintiff where the statute gives a right of action to the heirs at law are those entitled to the estate under the statutes of descent and distribution. *U. S. St. Louis, etc. R. Co. v. Needham*, 52 Fed. 371, 3 C. C. A. 129, 10 U. S.

the heirs⁷⁴ or next of kin can sue only where there is no other person of a designated class.⁷⁵

App. 339, Arkansas statute. **Ark.**—Kansas City, etc. Co. v. Frost, 93 Ark. 183, 124 S. W. 748 (mother cannot bring action where deceased left children); St. Louis, etc. R. Co. v. Corman, 92 Ark. 102, 122 S. W. 116. **Cal.**—Redfield v. Oakland, etc. R. Co., 110 Cal. 277, 42 Pac. 822. **Kan.**—Atchison, etc. R. Co. v. Ryan, 62 Kan. 682, 64 Pac. 603), uncontrollable by the limitation of the statutes relating to the distribution of community property, and includes minor children (Redfield v. Oakland, etc. R. Co., 110 Cal. 277, 42 Pac. 822). Where a widow and child survive they are the only necessary parties under such a statute (St. Louis, etc. R. Co. v. Corman, 92 Ark. 102, 122 S. W. 116); it includes the father, where there is no wife or children surviving (Stangeland v. Minneapolis, etc. R. Co., 105 Minn. 224, 117 N. W. 386) or brothers and sisters, where no parent, wife or child. It is not restricted to the husband, wife or children previously referred to in the statute (Satterberg v. Minneapolis, etc. Co. (N. D.), 121 N. W. 70), though under a statute giving the "widow, heir or personal representative" of deceased a right of action for wrongful death, the word "heir" has been construed not to mean the parents or collateral relatives, but a "child or children only" (**Colo.**—Hindry v. Holt, 24 Colo. 464, 51 Pac. 1002, 65 Am. St. Rep. 235, niece could not sue. **Ky.**—Henderson v. Kentucky C. R. Co., 86 Ky. 389, 5 S. W. 875, parents or collateral relatives not included. **S. D.**—Lintz v. Holy Terror Min. Co., 13 S. D. 489, 83 N. W. 570, mother of adult son cannot sue where he left no widow or children), but under a statute giving the "heirs or personal representative" an action, "heirs" has been construed to mean the widow and children of deceased (Noble v. Seattle, 19 Wash. 133, 52 Pac. 1013, 40 L. R. A. 822).

74. U. S.—Choctaw, etc. R. Co. v. Jackson, 182 Fed. 342, Oklahoma statute. **Ark.**—Kansas City, etc. Co. v. Frost, 93 Ark. 183, 124 S. W. 748; St. Louis, etc. R. Co. v. Corman, 92 Ark. 102, 122 S. W. 116 (widow is one of heirs at law); Kansas City, etc. R. Co. v. Henrie, 87 Ark. 443, 112 S.

W. 967; McBride v. Berman, 79 Ark. 62, 94 S. W. 913. **Colo.**—Hindry v. Holt, 24 Colo. 464, 51 Pac. 1002, 65 Am. St. Rep. 235, 39 L. R. A. 351, heirs of deceased means child and children. **Ky.**—Jordan v. Cincinnati, etc. R. Co., 89 Ky. 40, 11 S. W. 1013. **Minn.**—Stangeland v. Minneapolis, etc. R. Co., 105 Minn. 224, 117 N. W. 386 ("heirs at law" includes father who leaves no widow or children, North Dakota statute).

Mother as Necessary Party.—Where the widow and mother were the only heirs, and the statute gives the right of action to the heirs at law where there is no administrator, and it is necessary to a recovery that the beneficiaries show pecuniary loss to themselves as a condition to recovery, the mother is a necessary party though having sustained no pecuniary damage. Missouri, etc. R. Co. v. Foreman, 174 Fed. 377, 98 C. C. A. 281.

The phrase "legal or personal representatives" in such a statute "embraced not only the executor or administrator, but the heirs or next of kin, as the case might be." The widow, children and personal representative may all sue in one action. Yazoo, etc. R. Co. v. Washington, 92 Miss. 129, 45 So. 614, *overruling* Railroad Co. v. Hunter, 70 Miss. 471, 12 So. 482.

75. U. S.—Swift v. Johnson, 138 Fed. 867, 71 C. C. A. 619 (Minnesota statute); Western Union Tel. Co. v. McGill, 57 Fed. 699, 6 C. C. A. 521, 21 L. R. A. 818, Kansas statute—where no personal representative; Joplin, etc. R. Co. v. Payne, 194 Fed. 387 (Kansas state). **Ind.**—Leyhan v. Leyhan (Ind. App.), 94 N. E. 337, mother not entitled where widow, widower or children. **Kan.**—Railroad Co. v. Townsend, 71 Kan. 524, 81 Pac. 205; Atchison, etc. R. Co. v. Judah, 10 Kan. App. 577, 62 Pac. 711. **N. J.**—Cook v. American, etc. Co., 70 N. J. L. 65, 56 Atl. 114. **Ore.**—Olston v. Oregon, etc. R. Co., 52 Ore. 343, 96 Pac. 1095, 97 Pac. 538, 20 L. R. A. (N. S.) 915.

Granddaughters.—A statute giving a right of action to the "widow and children, if any, or next of kin," creates two classes of beneficiaries,

Joinder of Next of Kin. — Unless the statute makes it indispensable that all the next of kin join, it is not absolutely necessary for all to join, but if some refuse to join they may be made defendants and the action proceed.⁷⁶

f. *Personal Representative.* — By a majority of the statutes, perhaps, it is provided that the action for wrongful death shall be brought by the personal representative of the deceased, and in such case he is

"the widow and children," and "the next of kin." If there are any of the first class, the second class have no rights. Grandchildren are not "children" within the first class, but are "next of kin" under the second class, and may take as beneficiaries. Nor are minor children "next of kin" within the statute, though they are in fact "next of kin." *Pittsburg, etc. R. Co. v. Reed*, 44 Ind. App. 635, 83 N. E. 1080.

A deserted wife cannot recover for the death of her child under a statute giving an action to the "next of kin," where the husband is by law the only next of kin. *Thompson v. Chicago, etc. R. Co.*, 104 Fed. 845. See also *Swift & Co. v. Johnson*, 138 Fed. 867, 71 C. C. A. 619, 1 L. R. A. (N. S.) 1161.

Who Are Next of Kin Within Statutes. — The words next of kin in such statutes has been construed to mean all persons entitled to inherit decedent's personal property (*Dickason Coal Co. v. Liddie* (Ind. App.), 94 N. E. 411; *Bolinger v. Beacham*, 81 Kan. 746, 106 Pac. 1094), or the nearest blood relation (*Watson v. St. Paul, etc. R. Co.*, 70 Minn. 514, 73 N. W. 400), but it has been held that the husband is not next of kin to his wife within a statute giving an action for wrongful death to the widow or next of kin of deceased (*U. S. — Western Union Tel. Co. v. McGill*, 57 Fed. 699, 6 C. C. A. 521, 21 L. R. A. 818, Kansas statute. *Neb. — Warren v. Englehart*, 13 Neb. 283, 13 N. W. 401. *N. Y. Drake v. Gilmore*, 52 N. Y. 389, 392; *Dickins v. New York Cent. R. Co.*, 23 N. Y. 158, reversing 28 Barb. 41; *Lucas v. New York Cent. R. Co.*, 21 Barb. 245), though where he inherits from the wife it has been held he may maintain the suit as next of kin of his wife (*U. S. — Joplin, etc. R. Co. Payne*, 194 Fed. 387. *Ill. — Rautman v. Chicago Consol. T. Co.*, 156 Ill. App. 457.

Kan. — Atchison, etc. R. Co. Townsend, 71 Kan. 524, 81 Pac. 205. *Ohio. — Steel v. Kurtz*, 28 Ohio St. 191. *Tenn. Bream v. Brown*, 5 Coldw. 168), but brothers and sisters, or their children, are next of kin within such statute (*Pineo v. New York Cent. R. Co.*, 34 Hun 80, affirmed, 99 N. Y. 644).

Illegitimate Brothers and Sisters. An illegitimate half sister has no right of action under a statute giving a sister or brother a right of action for the homicide of a sister or brother (*Illinois, etc., R. Co. v. Johnson*, 77 Mass. 727, 28 So. 753, 51 L. R. A. 837), but deceased's administrator may recover for the illegitimate brother of the half blood, where the statutes of descent and distribution allow illegitimate children to inherit from their mother and each other, and makes no distinction between children of whole and half blood (*Southern R. Co. v. Hawkins*, 35 App. Cas. [D. C.] 313).

Federal Employer's Liability Act. Under the Federal Employer's Liability Act, the "next of kin" cannot maintain the action if there is no personal representative, as the words "if none, then the next of kin dependent upon such employe" refer to the beneficiaries and not to the personal representative. *Fithian v. St. Louis, etc., R. Co.*, 188 Fed. 842.

76. *Keele v. Atchison, etc., R. Co.*, 151 Mo. App. 364, 131 S. W. 730.

Curing Non-Joinder of All of "Next of Kin." — If the non-joinder of all the "next of kin" appears on the face of the petition, unless the statute makes the joinder as parties plaintiff an indispensable pre-requisite to the prosecution of the action, the defect is cured by answering to the merits after demurrer overruled, or by failure to demur, though defendant attempts to renew the objection in his answer. *Keele v. Atchison, etc., Co.*, 151 Mo. App. 364, 131 S. W. 730, 733.

the only person who can bring the action.⁷⁷ Other statutes provide for an action by the personal representative of deceased only where

- 77. U. S.**—Baltimore, etc., R. Co. v. Evans, 188 Fed. 6, 110 C. C. A. 156 (W. Va. statute); St. Louis, etc., R. Co. v. Herr, 193 Fed. 950; Fithian v. St. Louis, etc., R. Co., 188 Fed. 842; Thompson v. Wabash R. Co., 184 Fed. 554 (widow though sole beneficiary cannot bring it under Federal Employer's Liability Act). **Ala.**—Woodstock D. Wks. v. Kline, 149 Ala. 391, 43 So. 362 (Code, 1896); Savannah, etc., R. Co. v. Shearer, 58 Ala. 672. **Ariz.**—De Amado v. Friedman, 11 Ariz. 56, 89 Pac. 588. **Ark.**—St. Louis, etc., R. Co. v. Corman, 91 Ark. 102, 122 S. W. 116; St. Louis, etc., R. Co. v. Garner, 76 Ark. 555, 89 S. W. 550. **Cal.**—Salmon v. Rathjens, 152 Cal. 290, 92 Pac. 733. **Colo.**—Denver & R. G. R. Co. v. Warring, 37 Colo. 122, 86 Pac. 305. **Conn.**—Soule v. New York, etc., R. Co., 24 Conn. 575. **D. C.**—Southern R. Co. v. Hawkins, 35 App. Cas. 313; Western Union T. Co. v. Lipscomb, 22 App. Cas. 104. **Ga.**—Western, etc., Co. v. Strong, 52 Ga. 461; Selma, etc., R. Co. v. Lacey, 49 Ga. 106 (widow cannot bring the action in her own name). **Ill.**—Devine v. Healy, 241 Ill. 34, 89 N. E. 251; Rautman v. Chicago Consol. T. Co., 156 Ill. App. 457; Chicago T. Co. v. O'Donnell, 114 Ill. App. 345, affirmed, 213 Ill. 545, 72 N. E. 1133. But not under "Miners' Act." Toover v. Empire Coal Co., 149 Ill. App. 258. **Ind.**—Collins C. Co. v. Hadley, 58 Ind. App. 637, 75 N. E. 832, 78 N. E. 353; Cleveland, etc., R. Co. v. Osgood, 36 Ind. App. 34, 73 N. E. 285 (widow and children have no right to become parties); Baltimore, etc., R. Co. v. Gillard, 34 Ind. App. 339 71 N. E. 58 (infant by his next friend cannot bring action). **Ia.**—Rietveld v. Wabash R. Co., 129 Iowa 249, 105 N. W. 515; Major v. Burlington, etc., R. Co., 115 Iowa 309, 88 N. W. 815. **Ky.**—Randolph's Admr. v. Snyder, 139 Ky. 159, 129 S. W. 562. **Mass.**—O'Donnell v. North Attleborough, 98 N. E. 1084 (R. L., ch. 171, §2; St., 1907, ch. 375). **Mich.**—Mascitelli v. Union Carbide Co., 151 Mich. 693, 115 N. W. 721; Dolson v. Lake Shore, etc., R. Co., 128 Mich. 444, 87 N. W. 629, 8 Det. Leg. N. 736. **Minn.**—Keever v. Mankato, 113 Minn. 55, 129 N. W. 158; Stangeland v. Minneapolis, etc., R. Co., 105 Minn. 224, 117 N. W. 386; Aho v. Jesmore, 101 Minn. 449, 112 N. W. 538, 10 L. R. A. (N. S.) 998; Scheffler v. Minneapolis, etc., R. Co., 32 Minn. 125, 19 N. W. 656. **Miss.**—Yazoo, etc., R. Co. v. Washington, 92 Miss. 129, 45 So. 614, overruling, R. Co. v. Hunter, 70 Miss. 471, 12 So. 482. **Mo.**—Casey v. Hoover, 197 Mo. 62, 94 S. W. 982. **Neb.**—Murphy v. Willow, etc., Co., 81 Neb. 223, 115 N. W. 761. **N. J.**—Gottlieb v. New Jersey, etc., R. Co., 72 N. J. L. 480, 63 Atl. 339. **N. M.**—Cerrillos, etc., R. Co. v. Desevant, 9 N. M. 49. **N. Y.**—Alfson v. Bush Co., 182 N. Y. 393, 75 N. E. 230, 108 Am. St. Rep. 815; Hodges v. Webber, 65 App. Div. 170, 72 N. Y. Supp. 508, 32 Civ. Proc. 208 (upon death of administrator his executrix could not continue suit); Daney v. Walz, 112 App. Div. 355, 98 N. Y. Supp. 407. **N. C.**—Bennett v. North Carolina R. Co., 74 S. E. 883. **Ohio.**—Wolf v. Lake Erie, etc. R. Co., 55 Ohio St. 517, 45 N. E. 708, 36 L. R. A. 812; Weidner v. Rankin, 26 Ohio St. 522 (widow and children cannot sue in their own names). **Okla.**—Oklahoma Gas, etc., Co. v. Lukert, 16 Okla. 397, 84 Pac. 1076. **Ore.**—Olston v. Oregon, etc., Co., 52 Ore. 343, 96 Pac. 1095, rehearing denied, 97 Pac. 538; Perham v. Portland El. Co., 33 Ore. 451, 53 Pac. 14, 72 Am. St. Rep. 730, 40 L. R. A. 799. **S. C.**—Bussey v. Charleston, etc., R. Co., 73 S. C. 215, 53 S. E. 165. **Tenn.**—Loague v. Railroad, 91 Tenn. 458, 19 S. W. 430; Trafford v. Adams Exp. Co., 8 Lea 96. **Tex.**—Gutierrez v. El Paso, etc., Co., 102 Tex. 378, 117 S. W. 426. **Utah.**—Stone v. Union Pac. R. Co., 32 Utah 185, 89 Pac. 715. **Wash.**—Archibald v. Lincoln County, 50 Wash. 55, 96 Pac. 831, either personal representative or widow and children may sue for husband's death. **Wis.**—Johnson v. Eau Claire, 135 N. W. 481; Nemecek v. Filer, etc., Co., 126 Wis. 71, 105 N. W. 225. **Can.**—Monaghan v. Horn, 7 Can. Sup. 409.
- Though the statute provides that the action for the death of a child must be brought by the father, or, in case of his death, or desertion of his family, or imprisonment, by the mother,

there are no persons of a designated class.⁷⁸ Still other statutes provide that either the personal representative of the deceased or of the beneficiaries may bring the action.⁷⁹

or by the guardian for his ward, where there is neither father, mother or guardian, the case not being specially provided for, would come within the general provisions allowing the administrator to sue. *Pittsburg, etc., R. Co. v. Vining's Admr.*, 27 Ind. 513, 92 Am. Dec. 269.

Where no Personal Representative. By statute in some states the beneficiaries may bring the action for wrongful death where there is no personal representative. (*St. Louis, etc., R. Co. v. Watson*, 97 Ark. 560, 134 S. W. 949, error to dismiss as to part but waived by failure to object; *McBride v. Berman*, 79 Ark. 62, 94 S. W. 913 (heirs may bring action where no personal representative); *Bartlett v. Chicago, etc., R. Co.*, 21 Okla. 415, 96 Pac. 468). But under the Federal Employer's Liability Act, the "next of kin" cannot sue where there is no personal representative, the words "if none" in the statute referring to the beneficiaries and not the party who may sue. *Fithian v. St. Louis, etc., R. Co.*, 188 Fed. 842.

No Beneficiaries in Existence.—Though the action is given to the administrator, it cannot be maintained where none of the beneficiaries named are in existence (*Chicago, etc., R. Co. v. LaPorte*, 33 Ind. App. 691, 71 N. E. 166), unless given for the benefit of decedent's estate (*Perham v. Portland, etc., R. Co.*, 33 Ore. 451, 53 Pac. 14, 72 Am. St. Rep. 730, 40 L. R. A. 799).

Executor or Administrator May Sue. The term personal representative means either an executor or administrator (*Cal.—Kramer v. San Francisco Market St. R. Co.*, 25 Cal. 434. **D. C.** *Southern R. Co. v. Hawkins*, 35 App. Cas. 313. **Ind.**—*Toledo, etc., R. Co. v. Reeves*, 8 Ind. App. 667, 35 N. E. 199). The term "Administrator" in such a statute means the personal representative (*Mattoon, etc., Co. v. Dolan*, 105 Ill. App. 1), and includes an ancillary executor (*Lang v. Houston, etc., R. Co.*, 75 Hun 151, 27 N. Y. Supp. 90). **Tex.**—*De Rivera v. Atchinson, etc. R. Co.* (Tex. Civ. App.), 149 S. W. 223.

Special and Temporary Administra-

tors.—A special (*Jones v. Minneapolis T. R. Co.*, 108 Minn. 129, 121 N. W. 606; *Swan v. Norvell*, 107 Wis. 625, 83 N. W. 934) or temporary administrator is for the time being the "personal representative" of the intestate, and may maintain an action for the death of his intestate, where the right to sue therefor is conferred upon the "personal representative" of deceased (*Louisville, etc., R. Co. v. Chaffin*, 84 Ga. 519, 11 S. E. 891).

Necessity for Appointing Special Administrator.—Such a statute does not require the appointment of a special administrator, to institute the action, but it may be brought by the general administrator. *Louisville, etc., Co. v. Jones*, 45 Fla. 407, 34 So. 246; *Lake Erie, etc., R. Co. v. Charman*, 161 Ind. 95, 67 N. E. 923.

As to Waiver of Administrator's Capacity To Sue, see *supra*, VII, A.

The beneficiaries have no right to become parties where the right of action for wrongful death is given to the personal representative of deceased. (*Cleveland, etc. R. Co. v. Os-good*, 36 Ind. App. 34, 73 N. E. 285.

Assignment of Right To Sue.—*Hackett v. Mellwain*, 158 Mich. 265, 122 N. W. 551.

78. Ala.—*Birmingham v. Crane*, 56 So. 723, code, 1907, §2485. **Fla.**—*Bodden v. Jacksonville El. Co.*, 51 Fla. 152, 41 So. 400; *Louisville, etc., R. Co. v. Jones*, 45 Fla. 407, 34 So. 246 (where no husband, wife, minor children or dependents). **Mo.**—*Pratt v. Missouri Pac. R. Co.*, 139 Mo. App. 502, 122 S. W. 1125. **N. D.**—*Satterberg v. Minneapolis, etc., Co.*, 121 N. W. 70.

The father of a minor child cannot recover for its wrongful death under a statute giving the "deceased's personal representative" a right to sue where no widow or widower. *Kennedy v. Delaware C. Co.*, 4 Penne. (Del.) 477, 58 Atl. 825.

79. L. & N. R. Co. v. Pitt, 91 Tenn. 86, 18 S. W. 118. See, *supra*, VI, A, e.

Under a statute giving the "legal or personal representative" an action for death, either the executor, administrator, heirs or next of kin may bring

Refusal of Administrator To Bring Suit.—If the right to sue has been given to the personal representative and he refuses to bring the action, the proper beneficiaries may use his name in bringing the suit,⁸⁰ or he may be made a defendant in some jurisdictions.⁸¹

Personal Representative Suing Where Right Vested in Beneficiaries.—On the other hand if the statute gives no right of action to the personal representative of deceased, but vests the right to sue in specified beneficiaries, the personal representative cannot sue.⁸²

g. Aliens.—Unless the statute giving an action for death by wrongful act expressly provides that non-resident aliens are not entitled to the benefit of the statute, they may sue as if they were residents.⁸³

the action, and the widow, children and administrator may join in the action. *Yazoo, etc., Co. v. Washington*, 92 Miss. 129, 45 So. 614.

Defendant Cannot Object to Action by Administrator.—If the widow fails to bring suit, where either the widow or personal representative may bring the action, the defendant cannot object because the administrator brings it, where the widow does not object. *Webb v. East Tennessee, etc., R. Co.*, 88 Tenn. 119, 12 S. W. 428.

80. *Stephens v. Nashville, etc., R. Co.*, 10 Lea (Tenn.) 448; *Flatley v. Memphis, etc., R. Co.*, 9 Heisk. (Tenn.) 230.

81. *McLemore v. Sebree Coal, etc., Co.*, 121 Ky. 53, 88 S. W. 1062, by general statute.

Where the personal representative in whom the right to bring the action for wrongful death is vested by statute, conspires with defendant to prevent a suit for the wrongful death, the beneficiaries may bring the action, under the statute that, if the consent of a necessary party plaintiff cannot be gotten, he may be made defendant. *McLemore v. Sebree Coal, etc., Co.*, *supra*.

82. **U. S.**—*Winfree v. Northern Pac. R. Co.*, 173 Fed. 65, 97 C. C. A. 392 (Washington statute); *Brown v. Sunday Creek Co.*, 165 Fed. 504 (negligence of mine owner—Ohio). **Fla.**—*Seaboard Air-Line R. Co. v. Moseley*, 60 Fla. 186, 53 So. 718. **Ill.**—*McCray v. Moweaqua Coal Co.*, 149 Ill. App. 565; *Hoover v. Empire Coal Co.*, 149 Ill. App. 258. **Ind.**—*Maule Coal Co. v. Partenheimer*, 155 Ind. 100, 55 N. E. 751, 57 N. E. 710; *Dickinson Coal Co. v. Unverferth*, 30 Ind. App. 546, 66 N. E. 759 (death in mines); *Boyd v. Brazil Bl. Coal Co.*, 25 Ind. App. 157, 57 N. E. 732. **Mo.**—*Gilkeson v.*

Missouri Pac. R. Co., 222 Mo. 173, 121 S. W. 138. **N. M.**—*Romero v. Atchison, etc., Co.*, 11 N. M. 679, 72 Pac. 37. **N. Y.**—*Johnson v. Phoenix Bridge Co.*, 197 N. Y. 316, 90 N. E. 953. **S. D.**—*Belding v. Black Hills, etc., Co.*, 3 S. D. 369, 53 N. W. 750.

Indiana.—**Death in Mines.**—Under a special statute giving certain named beneficiaries a right of action in their own name for death in mines resulting from violations of statutory provisions, the personal representative cannot bring an action for damages under the general provision giving him a right of action for certain named beneficiaries, for death by the wrongful act of another. *Collins Coal Co. v. Hadley*, 38 Ind. App. 637, 75 N. E. 832, 78 N. E. 353.

83. **U. S.**—*Saveljich v. Lytle Logging Co.*, 173 Fed. 277, 97 C. C. A. 443; *Kaneko v. Atchison, etc., R. Co.*, 164 Fed. 263 (California case—no California decisions on point); *Mahoning Ore, etc., Co. v. Blomfelt*, 163 Fed. 827, 91 C. C. A. 390 (Minnesota case following Minnesota decisions); *Patek v. American Smelt. Co.*, 154 Fed. 190, 83 C. C. A. 284 (Colorado case—no decision therein in Colorado); *Baltimore, etc., R. Co. v. Baldwin*, 144 Fed. 53, 75 C. C. A. 211 (Ohio statute); *Hirschkovitz v. Pennsylvania R. Co.*, 138 Fed. 438 (New Jersey statute); *Thompson v. Chicago, etc., R. Co.*, 104 Fed. 845. **Ala.**—*Luke v. Calhoun*, 52 Ala. 115. **Ariz.**—*Bonthron v. Phoenix Light, etc., Co.*, 8 Ariz. 129, 71 Pac. 941, 61 L. R. A. 563. **Colo.**—*Ferrara v. Aurie Min. Co.*, 43 Colo. 496, 95 Pac. 952, 17 L. R. A. (N. S.) 964. **Del.**—*Szymanski v. Blumenthal*, 3 Penn. 558, 52 Atl. 347. **D. C.**—*United States El. L. Co. v. Sullivan*, 22 App. Cas. 115. **Ill.**—*Kellyville v. Petraytis*, 195 Ill.

2. Under Foreign Statute. — a. *General Rule.* — Since the right of action for wrongful death is entirely dependent upon the law of the state where the cause of action arose, the action must be brought by and in the name of the person or persons to whom the right has been given by the statutes of the state where the injuries causing death occurred.⁸⁴

215, 63 N. E. 94, 88 Am. St. Rep. 191. **Ind.**—Cleveland, etc., R. Co. v. Osgood, 36 Ind. App. 34, 73 N. E. 235, provided action given by domicile of alien to our citizens. **Ia.**—Rietveld v. Wabash R. Co., 129 Iowa 249, 105 N. W. 515; Romano v. Capital City, etc., Co., 125 Iowa 591, 101 N. W. 437, 106 Am. St. Rep. 323, 68 L. R. A. 132. **Kan.**—Atchison, etc., R. Co. v. Fajardo, 74 Kan. 314, 86 Pac. 301, 6 L. R. A. (N. S.) 681. **Ky.**—Trotta's Admr. v. Johnson, 121 Ky. 827, 90 S. W. 540. **La.**—Lykiardopoulo v. New Orleans, etc., Co., 127 La. 309, 53 So. 575. **Mass.**—Mulhall v. Fallon, 176 Mass. 266, 57 N. E. 386, 79 Am. St. Rep. 309, 54 L. R. A. 934. **Mich.**—Mascitelli v. Union Carbide Co., 151 Mich. 693, 115 N. W. 721. **Minn.**—Renlund v. Commodore M. Co., 89 Minn. 41, 93 N. W. 1057, 99 Am. St. Rep. 534. **Mo.** Philes v. Missouri Pac. R. Co., 141 Mo. App. 561, 125 S. W. 553; Gaska v. American Car, etc., Co., 127 Mo. App. 169, 105 S. W. 3. **N. J.**—Cetofonte v. Camden Coke Co., 78 N. J. L. 662, 75 Atl. 913, 27 L. R. A. (N. S.) 1058. **N. Y.**—Alfson v. Bush Co., 182 N. Y. 393, 75 N. E. 230, 108 Am. St. Rep. 815; Tanas v. Municipal Gas Co., 88 App. Div. 251, 84 N. Y. Supp. 1053. **Ohio.**—Pittsburg, etc. R. Co. v. Naylor, 73 Ohio St. 115, 76 N. E. 505, 112 Am. St. Rep. 701, accedent also alien. **Va.**—Low Moor Iron Co. v. La Bianca, 106 Va. 83, 55 S. E. 532 (non-resident alien); Pocahontas C. Co. v. Rukas, 104 Va. 278, 51 S. E. 449 (resident alien). **Wash.**—Anustasakas v. Int., etc., Co., 51 Wash. 119, 98 Pac. 93, 130 Am. St. Rep. 1089, 21 L. R. A. (N. S.) 267, annotated case. **Eng.** Davidsson v. Hill, L. R. (1901) 2 K. B. 606. But see, *contra*, Adams v. British, etc., R. Co., 2 Q. B. 430. **Can.** Varesick v. British Columbia Copper Co., 12 Brit. Col. 236.

In Pennsylvania, aliens cannot recover. Debitulia v. Lehigh, etc., Co., 174 Fed. 886* (Pennsylvania statute); Gurofsky v. Lehigh Val. R. Co., 197

N. Y. 517, 90 N. E. 1159 (Pennsylvania statute); Maiorano v. Baltimore, etc., R. Co., 216 Pa. 402, 65 Atl. 1077, 116 Am. St. Rep. 778, *affirmed*, 213 U. S. 268, 29 Sup. Ct. 424, 53 L. ed. 792; Deni v. Pennsylvania R. Co., 181 Pa. 525, 37 Atl. 558, 59 Am. St. Rep. 676.

So in Wisconsin (McMillan v. Spider, etc., Co., 115 Wis. 332, 91 N. W. 979, 95 Am. St. Rep. 979, 60 L. R. A. 589), where it has been held that the fact that deceased left surviving as non-resident aliens his father and mother, does not preclude his resident sister from suing for his wrongful death (Pries v. Ashland, etc., Co., 143 Wis. 606, 128 N. W. 281), or preclude a non-resident alien wife from recovering for the death of her husband who had taken out his first papers (Laconte v. Kenosha (Wis.), 135 N. W. 843).

The legislature of this state has abolished the distinction between residents and non-residents whether alien or not. Ch. 226, Laws, 1911; Laconte v. Kenosha (Wis.), 135 N. W. 843.

Whether Statute Confers Right Upon Non-Resident as Jurisdictional Matter. The question as to whether a state statute confers a right of action on non-residents is a matter of defense and not of jurisdiction, which is waived if not raised in lower court. Pennsylvania Co. v. Scofield, 161 Fed. 911, 88 C. C. A. 602.

Federal Supreme Court Adopts State Rule.—The construction of the highest court of a state that the death act does not include non-resident aliens must be adopted by the federal supreme court as its rule of decision. Maiorano v. Baltimore, etc., R. Co., 213 U. S. 268, 29 Sup. Ct. 424, 53 L. ed. 792.

84. U. S.—Brown v. Sunday Creek Co., 165 Fed. 504; Cincinnati, etc., R. Co. v. Thiebaud, 114 Fed. 918, 52 C. C. A. 538; Boston, etc., R. Co. v. McDuffey, 79 Fed. 934, 25 C. C. A. 247; Van Doren v. Pennsylvania R. Co., 93 Fed. 260, 35 C. C. A. 282 (amendment

striking out "administratrix" allowed); *Hulbert v. Topeka*, 34 Fed. 510. **Cal.**—*Ryan v. No. Alaska S. Co.*, 153 Cal. 438, 95 Pac. 862. **Colo.**—*Denver, etc., R. Co. v. Warring*, 37 Colo. 122, 86 Pac. 305 (New Mexico statute). **Ga.**—*Wrightsville, etc., R. Co. v. Kelley*, 119 Ga. 883, 47 S. E. 366; *Western, etc., Co. v. Strong*, 52 Ga. 461; *Selma, etc., R. Co. v. Lacey*, 49 Ga. 106 (Alabama statute). **Ill.**—*Chicago Transit Co. v. Campbell*, 110 Ill. App. 366, since changed by statute. **Ind.**—*Fabel v. Cleveland, etc., Co.*, 30 Ind. App. 268, 65 N. E. 929. **Kan.**—*Limekiller v. Hannibal, etc., R. Co.*, 33 Kan. 83, 5 Pac. 401, 52 Am. Rep. 523; *McCarthy v. Chicago, etc., R. Co.*, 18 Kan. 46, 26 Am. Rep. 742. **Md.**—*Ash v. Baltimore, etc., R. Co.*, 72 Md. 144, 19 Atl. 643, 20 Am. St. Rep. 461. **Mass.** *Davis v. New York, etc., R. Co.*, 143 Mass. 301, 9 N. E. 815, 58 Am. Rep. 138. **Mo.**—*Casey v. Hoover*, 197 Mo. 62, 94 S. W. 982; *Lee v. Missouri Pac. R. Co.*, 195 Mo. 400, 92 S. W. 614 (securing invalid appointment as trustee does not affect the right of the party entitled under foreign law); *McGinnis v. Missouri, etc., R. Co.*, 174 Mo. 225, 73 S. W. 586, 97 Am. St. Rep. 553; *Oates v. Union Pac. R. Co.*, 104 Mo. 514, 16 S. W. 487, 24 Am. St. Rep. 348 (widow cannot sue where suit must be brought by personal representative under *lex delicti*). **N. J.**—*Lower v. Segal*, 60 N. J. L. 99, 36 Atl. 777, 59 N. J. L. 66, 34 Atl. 945. **N. Y.**—*Johnson v. Phoenix Bridge Co.*, 197 N. Y. 316, 90 N. E. 953; *Wooden v. Western, etc., Co.*, 126 N. Y. 10, 26 N. E. 1050, 22 Am. St. Rep. 803, 13 L. R. A. 458; *Stone v. Groton Bridge, etc., Co.*, 77 Hun 99, 28 N. Y. Supp. 446. **Ohio.** *Essenwine v. Pennsylvania Co.*, 11 Ohio Dec. (Reprint) 277. **Pa.**—*La Bar v. New York, etc., R. Co.*, 218 Pa. 261, 67 Atl. 413; *Hoodmacher v. Lehigh Val. R. Co.*, 218 Pa. 21, 66 Atl. 975; *Usher v. West Jersey R. Co.*, 126 Pa. 206, 17 Atl. 597, 12 Am. St. Rep. 363, 4 L. R. A. 261. **R. I.**—*Connor v. New York, etc., R. Co.*, 28 R. I. 560, 68 Atl. 481, 18 L. R. A. (N. S.) 1252. **Tenn.**—*Nashville, etc., Co. v. Sprayberry*, 9 Heisk. 852, 35 Am. Rep. 705. **Utah.**—*In re Lowham's estate*, 30 Utah 436, 85 Pac. 445; *Thorpe v. Union P. Coal Co.*, 24 Utah 475, 68 Pac. 145.

Minority Rule.—In a few jurisdictions on the ground that such statutes

are remedial, the action may be brought in the foreign jurisdiction in the name of the parties who may bring the action under the laws of the forum under the similar laws of such state. **U. S.**—*Dodge v. North Hudson*, 177 Fed. 986; *Williams v. Camden, etc. Co.*, 138 Fed. 571, *affirmed*, 140 Fed. 985, 72 C. C. A. 680; *Sanbo v. Union P. Coal Co.*, 130 Fed. 52. **Colo.**—*Denver, etc., R. Co. v. Warring*, 37 Colo. 122, 86 Pac. 305. **Mo.**—*Keele v. Atchison, etc., R. Co.*, 151 Mo. App. 364, 131 S. W. 730. **N. C.**—*Harrill v. South Carolina, etc., Co.*, 132 N. C. 655, 44 S. E. 109. **S. C.**—*Bussey v. Charleston, etc., R. Co.*, 73 S. C. 215, 53 S. E. 165 (must be so brought). **Utah.**—*Utah Sav., etc., Co. v. Diamond Coal, etc., Co.*, 26 Utah 299, 73 Pac. 524.

Can Legislature Authorize Others To Sue.—The legislature of a state has no power to authorize any one to enforce in the courts of the state a liability for wrongful death created by the laws of another state, when such person would have no right to enforce such liability in the courts of the state where the liability accrued, as such a law would be tantamount to an extraterritorial enactment. *McGinnis v. Missouri Car & F. Co.*, 174 Mo. 225, 73 S. W. 586, 97 Am. St. Rep. 553.

Resident Administrator Suing Under Foreign Statute.—In several states under statutes vesting the right to sue in the personal representative of deceased, it is held that the personal representative appointed in the jurisdiction where the cause of action arose is not the only party who may bring the action, but it may be instituted by the personal representatives appointed in the forum. **U. S.**—*Dennick v. Central R. Co.*, 103 U. S. 11, 26 L. ed. 439 (*followed*, in *Erickson v. Pacific Coast S. S. Co.*, 96 Fed. 80); *Southern Pac. R. Co. v. De Valle Da Costa*, 190 Fed. 689; *Williams v. Camden Int. Co.*, 138 Fed. 571, *affirmed*, 140 Fed. 985, 72 C. C. A. 680. **Colo.**—*Denver, etc. R. Co. v. Warring*, 37 Colo. 122, 86 Pac. 305. **Ga.**—*Central R. Co. v. Swint*, 73 Ga. 651, administrator suing under Alabama statute. **Ia.**—*Morris v. Chicago, etc., R. Co.*, 65 Iowa 727, 23 N. W. 143, 54 Am. Rep. 39. **Ky.**—*Bruce v. Cincinnati, etc., R. Co.*, 83 Ky. 174. **Miss.**—*Illinois Cent. R. Co. v. Crudup*, 63 Miss. 291. **Neb.**—*Missouri Pac. R. Co. v. Lewis*, 24 Neb. 848, 40 N. W.

b. *Foreign Administrator*.—While in the absence of statutes the general principle of law is that the executor or administrator has no right to sue in a foreign jurisdiction, this has no application to actions for death by wrongful act. The administrator in such actions is merely a nominal plaintiff for the benefit of designated beneficiaries, and the administrator appointed in the *lex loci* may sue in a foreign state without taking out ancillary administration.⁸⁵ But in a few

401, 2 L. R. A. 67. **N. Y.**—Leonard *v. Columbia, etc., Co.*, 84 N. Y. 48, 38 Am. Rep. 49 (survival statute); Stallknecht *v. Pennsylvania R. Co.*, 13 Hun 451, *affirming*, 53 How. Pr. 305. But see, Robinson *v. Oceanic, etc., Co.*, 112 N. Y. 315, 19 N. E. 625, 2 L. R. A. 639, holding a non-resident appointed administrator in New York could not sue a foreign corporation for a tort committed in another state). **N. C.**—Harrill *v. South Carolina, etc., Co.*, 132 N. C. 655, 44 S. E. 109. **Ohio**. Woodard *v. Michigan Southern R. Co.*, 10 Ohio St. 121. **Utah**.—*In re Lowham's Estate*, 30 Utah 436, 85 Pac. 445; Utah Sav., etc., Co. *v. Diamond, etc., Co.*, 26 Utah 299, 73 Pac. 524. **Va.**—Nelson *v. Chesapeake, etc., R. Co.*, 88 Va. 971, 14 S. E. 838, 15 L. R. A. 583. But see, *contra*: **Kan.**—McCarthy *v. Chicago, etc., R. Co.*, 18 Kan. 46, 26 Am. Rep. 742. **Mass.**—Richardson *v. New York Cent. R. Co.*, 98 Mass. 85. But see, Higgins *v. Central, etc., Co.*, 155 Mass. 176, 29 N. E. 534, 31 Am. St. Rep. 544, allowing domiciliary administrator to recover under statute providing deceased's action should survive to administrator. **Mo.**—Lee *v. Missouri Pac. R. Co.*, 195 Mo. 400, 92 S. W. 614; Callahan *v. Missouri, etc., R. Co.*, 174 Mo. 225, 73 S. W. 586, 97 Am. St. Rep. 553. **Ohio**.—Woodard *v. Michigan, etc., R. Co.*, 10 Ohio St. 121. **R. I.**—Connor *v. New York, etc., R. Co.*, 28 R. I. 560, 68 Atl. 481.

Maryland.—**Domestic Administrator**. A Maryland administrator cannot sue in the courts of Maryland for wrongful death under a foreign statute for death occurring in the foreign state, since actions for wrongful death are prosecuted in the name of the state for the designated beneficiaries and there is, therefore, no state law authorizing the administrator to sue in an action for wrongful death. Ash *v. Baltimore, etc., R. Co.*, 72 Md. 144, 19 Atl. 643, 20 Am. St. Rep. 461.

85. **U. S.**—Dennick *v. New Jersey,*

etc., R. Co., 103 U. S. 11, 26 L. ed. 439; Williams *v. Camden Int. R. Co.*, 138 Fed. 571, *affirmed*, 140 Fed. 985, 72 C. C. A. 680 (Ohio statute); Sanbo *v. Union Pac. Coal Co.*, 130 Fed. 52; Florida Cent. R. Co. *v. Sullivan*, 120 Fed. 799, 57 C. C. A. 167; Cincinnati, etc., R. Co. *v. Thiebaud*, 114 Fed. 918, 52 C. C. A. 538 (Gen. St. of Ohio allowing foreign administrators to sue applicable); Lyon *v. Boston, etc., Co.*, 107 Fed. 386 (because New Hampshire statute does not create a new cause of action); McCarthy *v. New York, etc., R. Co.*, 62 Fed. 437; Wilson *v. Tootle*, 55 Fed. 211. **Ark.**—St. Louis, etc., R. Co. *v. Graham*, 83 Ark. 61, 102 S. W. 700, 112 Am. St. Rep. 112. **D. C.**—Weaver *v. Baltimore, etc., R. Co.*, 21 D. C. 499. **Ga.**—South Carolina R. Co. *v. Mix*, 68 Ga. 572. **Ill.**—Chicago Transit Co. *v. Campbell*, 110 Ill. App. 366 (since changed by statute). **Ind.**—Maule Coal Co. *v. Partenheimer*, 155 Ind. 100, 55 N. E. 751, 57 N. E. 710; Memphis, etc., Co. *v. Pikey*, 142 Ind. 304, 40 N. E. 527; Jeffersonville R. Co. *v. Hendricks*, 41 Ind. 48; Fabel *v. Cleveland, etc., Co.*, 30 Ind. App. 268, 65 N. E. 929. **Kan.**—Kansas Pac. R. Co. *v. Cutter*, 16 Kan. 568. **Mass.**—Higgins *v. Central, etc., R. Co.*, 155 Mass. 176, 29 N. E. 534, 31 Am. St. Rep. 544. **Miss.**—Illinois, etc., R. Co. *v. Crudup*, 63 Miss. 291. **Neb.**—Missouri Pac. R. Co. *v. Lewis*, 24 Neb. 848, 40 N. W. 401, 2 L. R. A. 67. **N. J.**—Cetofonte *v. Camden Coke Co.*, 78 N. J. L. 662, 75 Atl. 913. **N. Y.**—Nelson *v. Young*, 87 N. Y. Supp. 1142; Gurney *v. Grand Trunk R. Co.*, 13 N. Y. Supp. 645, 37 N. Y. St. 557, *affirmed*, 138 N. Y. 638, 34 N. E. 512, 53 N. Y. St. 929. **Pa.**—Boulden *v. Pennsylvania R. Co.*, 205 Pa. 264, 54 Atl. 906. **R. I.**—Conner *v. New York, etc., R. Co.*, 28 R. I. 560, 68 Atl. 481, 18 L. R. A. (N. S.) 1252, though statute provides no ancillary administration may be taken out. **Wis.**—Wallace *v. Chicago, etc., R. Co.*, 122 Wis. 66,

jurisdictions the suit cannot be maintained by the foreign administrator unless ancillary administration is taken out in the *lex fori*.⁸⁹

B. DEFENDANTS. — Actions for death by the wrongful act of another are within the rule permitting the plaintiff to sue any one⁹⁷

99 N. W. 433; *Robertson v. Chicago*, etc., R. Co., 122 Wis. 75, 99 N. W. 1135.

Contra.—U. S.—*Cornell Co. v. Ward*, 168 Fed. 51, 93 C. C. A. 473 (New York statutes); *Maysville St. R. Co. v. Marvin*, 59 Fed. 91, 8 C. C. A. 21, reversing, 49 Fed. 436 (Kentucky rule).

Ky.—*Brown's Admr. v. Louisville & N. R. Co.*, 97 Ky. 228, 30 S. W. 639. N. C.—*Hall v. Southern R. Co.*, 149 N. C. 108, 62 S. E. 899; *Hall v. Southern R. Co.*, 146 N. C. 345, 59 S. E. 879 (because statute forbids giving letters to non-resident); *Limekiller v. Hannibal*, etc., R. Co., 33 Kan. 83, 5 Pac. 401, held that the proper party to sue in Kansas was the one designated by the foreign statute.

In *Wabash*, etc., R. Co. v. Shacklett, 105 Ill. 364, under a statute permitting a foreign administrator to sue in the courts of the state on claims of the estate, the foreign administrator was allowed to enforce the claim for wrongful death arising in Illinois.

Reason for Rule.—The ordinary rule limiting the authority of an administrator to the state of his appointment has been relaxed in actions for causing death on the ground that the personal representative is rather a trustee for the beneficiaries named in the statute than an ordinary administrator; that he is rather a nominal party than the real party in interest, and that his authority is that of a nominal plaintiff. *Southern Pac. Co. v. De Valle Da Costa*, 190 Fed. 689. See also *Boulden v. Pennsylvania R. Co.*, 205 Pa. 264, 54 Atl. 906.

Must Domiciliary Administrator Sue. Administrator in *lex loci delicti* may bring suit though administrator is appointed in domicile of deceased, especially where the domiciliary administrator does not claim the right and his actions indicate a waiver thereof. *Southern R. Co. v. Hawkins*, 35 App. Cas. (D. C.) 313.

86. *Dodge v. North Hudson*, 188 Fed. 489, affirming, 177 Fed. 986 (demurrer sustained because of failure of complaint to allege obtaining of ancillary letters); *Brooks v. Southern Pac. Co.*,

148 Fed. 986; *Hartford & New Haven R. Co. v. Andrews*, 36 Conn. 213.

Though a statute forbids a foreign administrator to intermeddle with the assets of decedent within the state, a personal representative suing for the benefit of designated beneficiaries does not seek to recover the assets of the decedent, nor any money in which the decedent, or those claiming through him, have any interest whatever. He acts not by the authority which the probate court gave, but solely by virtue of the authority vested in him by the statute. Such a statute is therefore not applicable. *Boulden v. Pennsylvania R. Co.*, 205 Pa. 264, 54 Atl. 906.

Liability as Assets for Ancillary Administration.—Either the court of the state where the cause of action accrued, or the courts of decedent's domicile should recognize the right of action for wrongful death as assets for the grant of letters of administration. "If there are no assets save the death claim, it should not be necessary to take out both domiciliary and ancillary administration, and especially should the right of action not be defeated through any inability to secure the appointment of a personal representative." *Southern Pac. R. Co. v. DeValle Da Costa*, 190 Fed. 689, 696, 111 C. C. A. 417. See generally the title "Executors and Administrators."

87. Ind.—*Hoosier Stone Co. v. McCain*, 133 Ind. 231, 234, 31 N. E. 956. Mo.—*Fulwider v. Trenton Gas, etc., Co.*, 216 Mo. 582, 116 S. W. 508. N. Y.—*Maugan v. Hudson River T. Co.*, 50 Misc. 388, 100 N. Y. Supp. 539.

Corporation Defendant.—The action may be brought against a private corporation as it is a person within the meaning and purport of a statute giving an action against any person wrongfully causing the death of another. *Hugo S. & Co. v. Paiz* (Tex.), 141 S. W. 518; *Fleming v. Texas Loan Agency*, 87 Tex. 238, 27 S. W. 126, 26 L. R. A. 250; *Jacksonville Ice & Elec. Co. v. Moses* (Tex. Civ. App.), 134 S. W. 379. See the title "Corporations."

or more than one of several joint tort feasons, as they are jointly and severally liable.⁸⁸

C. JOINDER OF PARTIES.—Under the provisions of some statutes giving but a single cause of action for designated beneficiaries, all the beneficiaries must be made parties plaintiff,⁸⁹ though in some juris-

Municipal Corporation.—A statute making any person or "corporation" liable for death by wrongful act means municipal corporations as well as private corporations. *Keever v. Mankato*, 113 Minn. 55, 129 N. W. 158.

Shooting by City Marshal.—City as Party.—In an action for wrongful death against city marshal and his sureties on his bond by the widow of a man whom he shot, neither the city nor the state need be made parties. *Bolton v. Ayers*, 33 Ky. L. Rep. 591, 110 S. W. 385.

88. U. S.—*Chesapeake, etc. R. Co. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. ed. 121, *affirming* 104 Ky. 608, 47 S. W. 615; *Trauffer v. Detroit, etc. Co.*, 181 Fed. 256 (owners of two colliding vessels both at fault may be joined); *Galeotti v. Diamond Match Co.*, 178 Fed. 127; *Comitez v. Parkerson*, 50 Fed. 170. **Ky.**—*Cincinnati, etc. R. Co. v. Cook's Admrs.*, 113 Ky. 161, 67 S. W. 383; *Winston's Admr. v. Illinois Cent. R. Co.*, 111 Ky. 954, 65 S. W. 13, 55 L. R. A. 603 (joinder of corporation and negligent servant proper). **Mass.**—*D' Almeida v. Boston, etc. R. Co.*, 209 Mass. 81, 95 N. E. 398 (mine owner and railroad furnishing defective cars causing death properly joined); *Oulighan v. Butler*, 189 Mass. 287, 75 N. E. 726. **Mo.**—*Fulwider v. Trenton Gas Co.*, 216 Mo. 582, 116 S. W. 508. **Mont.** *Knuckey v. Butte Elec. Co.*, 41 Mont. 314, 109 Pac. 979, carrier and negligent servant may be joined. **N. Y.**—*Baker v. Bailey*, 16 Barb. 54; *Mangan v. Hudson R. Tel. Co.*, 50 Misc. 388, 100 N. Y. Supp. 539. **N. C.**—*Hough v. Southern R. Co.*, 144 N. C. 692, 57 S. E. 469. **Va.**—*Walton v. Miller's Admx.*, 109 Va. 210, 63 S. E. 458.

Partnership.—Death of Member.—In a suit against a partnership, if one partner dies no amendment is necessary to hold such other parties severally liable. *Rice v. Van Why*, 49 Colo. 7, 111 Pac. 599.

Making City Party—Death by Riot. In an action for death caused by a

mob, it is proper under the general rules of pleading as well as by the civil code of Louisiana to make a city a party with individual defendants for an antecedent default, in that it did not prevent it. *Comitez v. Parkerson*, 50 Fed. 170.

Continuance Because of Dismissal. The dismissal of the action as to one of the parties causing the death does not entitle the other party to a continuance as a matter of right. *Louisville v. Hart's Admr.*, 143 Ky. 171, 136 S. W. 212, 35 L. R. A. (N. S.) 207.

Suing County Commissioners in Official Capacity.—Where the county commissioners negligently fail to keep a county bridge in repair from which a death results, an action may be maintained against the county commissioners in their official capacity. *Rabe v. Board of Comrs.*, 5 Ohio C. C. (N. S.) 97. See generally the title "Public Officers."

89. U. S.—*Missouri, etc. R. Co. v. Foreman*, 174 Fed. 377, 98 C. C. A. 281; *Roberts v. Central of Georgia R. Co.*, 124 Fed. 471 (adult children necessary parties under statute requiring husband and children to sue jointly); *Whelan v. Rio Grande, etc. R. Co.*, 111 Fed. 326 (all heirs necessary parties under Montana statute); *St. Louis, etc. R. Co. v. Needham*, 52 Fed. 371, 3 C. C. A. 129. **Ark.**—*Kansas City So. R. Co. v. Henrie*, 87 Ark. 443, 112 S. W. 967, all heirs who may take under statutes of descent and distribution must join. **Cal.**—*Salmon v. Rathjens*, 152 Cal. 290, 92 Pac. 733, all heirs necessary parties, but objection is waived by failure to object. **Ill.** *Houghland v. Avery, etc. Co.*, 152 Ill. App. 573, *affirmed*, 246 Ill. 609, 93 N. E. 40, all children must join. **Mo.**—*Clark v. Kansas City, etc. Co.*, 219 Mo. 524, 118 S. W. 40. **Tex.**—*San Antonio, etc. R. Co. v. Mertink*, 101 Tex. 165, 105 S. W. 485 (father and one daughter cannot sue where there are four daughters where the action is given to the relatives of deceased); *Ft. Worth, etc. R. Co. v. Wilson*, 85 Tex.

dictions all need not be made parties plaintiff, but the action may be brought by one or more of the beneficiaries without joining the others.⁶⁰

Where the action is given to the widow, if any, and then to the

516, 22 S. W. 578; *East Line R. Co. v. Culberson*, 68 Tex. 664, 5 S. W. 820; *Vernon Cotton Oil Co. v. Catron* (Tex. Civ. App.), 137 S. W. 404. Eng.—*Linden v. Trussed C. S. Co.*, 18 Ont. L. R. 540.

California—Parties Refusing To Join as Plaintiffs.—If the consent of one or more of the necessary parties cannot be obtained he may be joined as a party defendant under the civil code. *Salmon v. Rathjens*, 152 Cal. 290, 92 Pac. 733, by statute.

Right of Defendant.—Even under statutes providing that one or more of the beneficiaries may bring the action on behalf of all, the defendant has the right to have all interested parties made parties plaintiff. *International, etc. R. Co. v. Howell* (Tex. Civ. App.), 105 S. W. 560.

Stay of Proceedings To Add Parties. Where it appears on the trial that an interested party has not been made a party, the defendant is entitled to a stay of proceedings to make him a party plaintiff (*International, etc. R. Co. v. Howell* [Tex. Civ. App.], 105 S. W. 560); but unless defendant shows there are other heirs than plaintiffs who are necessary plaintiffs, the refusal to grant a stay of proceedings until other heirs are made parties is proper (*Salmon v. Rathjens*, 152 Cal. 290, 92 Pac. 733).

Married Daughter Living With Parents.—A married daughter separated from her husband and living with her parents with her children, all keeping house together, is a necessary party plaintiff to an action for the wrongful death of the father. *Vernon Cotton Oil Co. v. Catron* (Tex. Civ. App.), 137 S. W. 404.

A release signed by the parents constitutes no defense to a motion for new trial on the ground that the parents should have been parties to the action. *Ft. Worth, etc. R. Co. v. Wilson*, 85 Tex. 516, 22 S. W. 578, reversing 3 Tex. Civ. App. 583, 24 S. W. 686.

Widow Cannot Dismiss To Bar Children's Recovery.—Where the widow sues alone, but the children are entitled to a recovery, the children may

become parties by their next friend. *Martin v. Smith*, 33 Ky. L. Rep. 582, 110 S. W. 413.

The improper joinder of an infant with the widow, who was given the right of action, is not such error as requires reversal, and will be considered as waived unless raised by demurrer, and unless, if the demurrer is overruled, defendant declines to plead to the merits. *Jones v. Kansas City, etc. R. Co.*, 178 Mo. 528, 77 S. W. 890.

Striking Out Unnecessary Parties. Where the children were improperly joined as parties with the personal representative, their names should be stricken out on motion. *Atlanta, etc. R. Co. v. Wilson*, 119 Ga. 781, 47 S. E. 366 (Tennessee statute).

90. **Ariz.**—*Bouthron v. Phoenix Light, etc. Co.*, 8 Ariz. 129, 71 Pac. 941, 61 L. R. A. 563, by statute either one or more for the benefit of all may sue. **Ill.**—*Consolidated Coal Co. v. Dombroski*, 106 Ill. App. 641. **La.** *Robideaux v. Herbert*, 118 La. 1089, 43 So. 887, 12 L. R. A. (N. S.) 632, in an action by the widow and minor children of a second marriage, the minor children by the first marriage need not be made parties. **Md.**—*Deford v. State*, 30 Md. 179, failure to join all children in action by state not fatal. **Miss.** *Foster v. Hicks*, 93 Miss. 219, 46 So. 533, children need not be made parties in suit by mother though children share in the recovery. **Mo.**—*Jones v. Kansas City, etc. R. Co.*, 178 Mo. 528, 77 S. W. 890, 101 Am. St. Rep. 434 (unnecessary to join child in action by widow, but waived after plea to merits); *Hamman v. Central Coal, etc. Co.*, 156 Mo. 232, 56 S. W. 1091 (widow may sue without joining children under act giving action for death in mines). **N. Y.**—*Johnson v. Phoenix Bridge Co.*, 197 N. Y. 316, 90 N. E. 953. **Pa.** *Huntington, etc. R. Co. v. Decker*, 84 Pa. 419. **Tenn.**—*Collins v. East Tennessee, etc. R. Co.*, 9 Heisk. 841.

Mississippi.—Though recovery is for the benefit of the widow and children, the widow may bring the action without joining the children. *Foster v. Hicks*, 93 Miss. 219, 46 So. 533.

other beneficiaries, it is improper for the widow to join other parties with her as plaintiffs.⁹¹

VII. PLEADING.—A. THE PETITION OR COMPLAINT.—1. **Approved Forms.**⁹²

2. **Necessity for Pleading Statute Creating Right of Action.**

a. *Domestic Statute.*—Since the domestic statute giving the right of action for death from wrongful act is a public act which the court will judicially notice, the petition need not refer to the statute creating such right of action, provided the allegations of the complaint are

91. *Hart v. Penwell Coal M. Co.*, 146 Ill. App. 155, joinder of widow and children improper under statute giving widow, lineal heirs or adopted children a cause of action. See also, *Western, etc., R. Co. v. Harris*, 128 Ga. 394, 57 S. E. 722 (where a joinder of minor children and adult children was held improper where the action is given to minor children only); *Haughey v. Pittsburg R. Co.*, 210 Pa. 367, 59 Atl. 1112.

California.—*Misjoinder.*—A complaint in an action by deceased's mother, his brother and sisters, alleging that "the plaintiff, the mother of deceased, is his sole heir," which is the fact under the law, is sufficient as against a demurrer which fails to specify wherein the misjoinder consists; it merely alleging generally a misjoinder of parties plaintiff. *O'Callaghan v. Bode*, 84 Cal. 489, 24 Pac. 269.

Widow Suing Personally and in Representative Capacity.—Where the statute gives the widow and minor children a right of action, it is a proper joinder of parties for the wife to sue individually and in her representative capacity for the minor children. *Curley v. Illinois, etc., R. Co.*, 40 La. Ann. 810, 6 So. 103.

92. *Form.*—Copy of declaration in *East Tennessee, etc., R. Co. v. Pratt*, 85 Tenn. 9, 1 S. W. 618. "Plaintiff, Francis Caroline Pratt, widow of W. C. Pratt, deceased, sues the defendant, the East Tennessee, Virginia & Georgia Railroad Company, a body politic and corporate, duly in court by summons, for the sum of \$25,000. For that whereas, heretofore, to-wit, on the 14th day of April, 1883, defendant was, and hitherto hath been, and still is, operating, managing and controlling a certain line of railway between Knoxville, Tenn., and the Kentucky state line, having under its care, direction,

control and management divers engines and cars, and in its employ divers and many servants; and on the day and year aforesaid, at, to-wit, on the line of said railway, in the county of Knox, and state aforesaid, defendant wrongfully and negligently run its engine and cars in, upon and against W. C. Pratt, husband to plaintiff aforesaid, whereby, and on account of which, the said W. C. Pratt was wounded, bruised and mangled in body, head, arms and legs, thereby causing great mental and physical pain and suffering, for the space of one hour, when the said W. C. Pratt, on the day and year aforesaid, at, to-wit, in the county of Knox aforesaid, by reason of the wounds and bruises aforesaid, wrongfully and negligently inflicted as aforesaid, then and there died, to plaintiff's damage, \$25,000. Wherefore, she sues and demands a jury to try the issue to be joined. Williams, Attorney."

Forms.—See the following for forms of complaints in actions for death resulting from: fall of electric wires (*Peers v. Nevada Power, etc., Co.*, 119 Fed. 400); injury to passenger while boarding train (*St. Louis, etc., R. Co. v. Watson (Ark.)*, 134 S. W. 949); injury to pedestrian from defective sidewalk (*Storrs v. Grand Rapids*, 110 Mich. 483, 68 N. W. 258); unhitched horses running away (*Pierce v. Conners*, 20 Colo. 178, 37 Pac. 721); injuries at railroad crossing due to running train at high rate of speed, and without signals (*Louisville, etc., R. Co. v. Orr*, 121 Ala. 489, 26 So. 35); shooting of passenger by ear conductor (*O'Brien v. St. Louis T. Co.*, 212 Mo. 59, 110 S. W. 705); injuries while walking on tracks used as pathway (*Erwin v. St. Louis, etc., R. Co.*, 153 Mo. App. 1, 139 S. W. 498); sale of chloroform to minor child (*Meyer v. King*, 72 Miss. 1, 16 So. 245); death

sufficient to bring it within the terms of the statute creating that right of action.⁹³

b. *Foreign Statute*.—Where the right of action for wrongful death is based upon the statute of a state other than that of the forum, the complaint must allege the existence of a statute giving an action for wrongful death in the state where the wrongful act causing death occurred, and must plead the law of such state.⁹⁴ But there is no

of child by motor vehicle (*Fuller v. Inman* (Ga.), 74 S. E. 287).

93. **Ga.**—*Davis v. Waycross* (Ga. App.), 73 S. E. 556. **Mo.**—*McKenzie v. United R. Co.*, 216 Mo. 1, 115 S. W. 13; *White v. Maxey*, 64 Mo. 552; *Kenney v. Pacific R. Co.*, 45 Mo. 255. **N. Y.**—*Brown v. Harmon*, 21 Barb. 508 (time subsequent to enactment should be stated); *Yertore v. Wiswall*, 16 How. Pr. 8, 11. **Vt.**—*Morissey v. Hughes*, 65 Vt. 553, 27 Atl. 205; *Westcott v. Central, etc., R. Co.*, 61 Vt. 438, 17 Atl. 745.

Section of Act Need Not Be Referred to.—A clear and concise statement of the facts bringing it under some section of the damage act is enough. *Erwin v. St. Louis, etc., R. Co.*, 158 Mo. App. 1, 139 S. W. 498, 516; *McKenzie v. United R. Co.*, 216 Mo. 1, 115 S. W. 13.

Petition in State Court Erroneously Reciting Action Brought Under Federal Statute.—Where the complaint in an action in the state court states a cause of action under the state statute, the fact that it alleged that it was brought under the act of congress known as the "Employer's Liability Act" may be waived by the parties. *In re Taylor*, 204 N. Y. 135, 97 N. E. 502, 504.

Where there are two statutes giving a cause of action for death, a general statute giving a right of action for death, and one giving an action for death from the negligence of servants of railroad in operation of trains, locomotives, etc., a petition setting forth a cause of action under the latter statute is sufficient though complainant thought his action was based under the general statute. *Hegberg v. St. Louis, etc., R. Co.* (Mo. App.), 147 S. W. 192.

Amendment.—Where the petition alleges that the cause of action accrued under a foreign statute as well as under the domestic statute, an amendment striking out the former allegations is permissible. *Texas, etc., R.*

Co. v. Gross (Tex. Civ. App.), 128 S. W. 1173.

94. **U. S.**—*St. Louis, etc., R. Co. v. Logmiller*, 193 Fed. 689. **Ala.**—*Louisville, etc., R. Co. v. Williams*, 113 Ala. 402, 21 So. 938; *Kahl v. Memphis, etc., R. Co.*, 95 Ala. 337, 10 So. 661. **Cal.**—*Ryan v. North Alaska Salmon Co.*, 153 Cal. 438, 95 Pac. 862. **Ga.**—*Selma, etc., R. Co. v. Lacy*, 43 Ga. 461. **Ill.**—*Chicago, etc., R. Co. v. Schroeder*, 18 Ill. App. 328. **Ind.**—*Wallace v. Thompson* (Ind. App.), 97 N. E. 26; *Wabash R. Co. v. Hassett*, 170 Ind. 370, 83 N. E. 705; *Jackson v. Pittsburgh, etc., R. Co.*, 140 Ind. 241, 39 N. E. 663, 49 Am. St. Rep. 192. **Ia.**—*Hyde v. Wabash, etc., R. Co.*, 61 Iowa 441, 16 N. W. 351, 47 Am. St. Rep. 820. **Kan.**—*Hamilton v. Hannibal, etc., R. Co.*, 39 Kan. 56, 18 Pac. 57. **Ky.**—*Lemon's Admr. v. Louisville, etc., R. Co.*, 137 Ky. 276, 125 S. W. 701; *Murray's Admx. v. Louisville, etc., R. Co.*, 33 Ky. L. Rep. 545, 110 S. W. 334. **Minn.**—*Stewart v. Great Northern R. Co.*, 103 Minn. 156, 114 N. W. 953; *Myers v. Chicago, etc., R. Co.*, 69 Minn. 476, 72 N. W. 694. **N. J.**—*Rankin v. Central R. of New York*, 71 Atl. 55. **N. Y.**—*Howland v. New York, etc., Co.*, 131 App. Div. 443, 115 N. Y. Supp. 316 (an allegation that such a statute exists in the *lex delicti* and referring to it by title and date of passage is not sufficient); *Storrs v. Northern Pac. R. Co.*, 132 N. Y. Supp. 954; *Gurney v. Grand Trunk R. Co.*, 59 Hun 625, 13 N. Y. Supp. 645 (need not allege the statutes are the same, but simply that it is of similar import and character); *Fagan v. Strong*, 7 N. Y. Supp. 919 (alleging statutes are similar is a mere conclusion and is insufficient). **Ohio**.—*Ott v. Lake Shore, etc., R. Co.*, 10 Ohio Cir. Dec. 85. **R. I.**—*O'Reilly v. New York, etc., R. Co.*, 16 R. I. 388, 17 Atl. 171-906, 19 Atl. 244. **Tenn.**—*Nashville, etc., R. Co. v. Sprayberry*, 9 Heisk. 852. **Tex.**—*Texas, etc., R. Co. v. Miller* (Tex.

Civ. App.), 128 S. W. 1165. **Vt.**—Needham v. Grand Trunk R. Co., 38 Vt. 294. **Va.**—Dowell v. Cox, 108 Va. 460, 62 S. E. 272. **Wis.**—White v. Minneapolis, etc., R. Co., 133 N. W. 148. See generally the title “**Statutes.**”

“It is equally well settled that, not only must the law of the foreign state be pleaded to show that in that forum there existed the right of action sued upon, but also it must be pleaded to show that the action is brought by the person in whom, under the laws of the foreign jurisdiction, the right of action is vested, and this because, as is said in *Dennick v. Railway*, 103 U. S. 11, where this subject is considered, the court which renders the judgment can only do so by virtue of the foreign statute.” *Ryan v. North Alaska S. Co.*, 153 Cal. 438, 95 Pac. 862.

Reason for Rule.—If the law of the foreign state is not pleaded, the common law under which no recovery for death was allowed, would be presumed to be in force in the *lex delicti* and a right of recovery denied (**U. S.**—*St. Louis, etc., R. Co. v. Lougmillier*, 193 Fed. 689, 697. **Ga.**—*Selma R. Co. v. Lacy*, 43 Ga. 461. **Ind.**—*Jackson v. Pittsburg, etc., R. Co.*, 140 Ind. 241, 39 N. E. 663; *Wallace v. Thompson* (Ind. App.), 97 N. E. 26. **Ky.**—*Murray’s Admx. v. Louisville, etc., R. Co.*, 33 Ky. L. Rep. 545, 110 S. W. 334), but when such an averment is made, the presumption in the absence of evidence to the contrary that the foreign law is the same as that of the forum, is simply taken as proof of the averment, but it does not supply the averment as well as the proof (*Texas, etc., R. Co. v. Miller* (Tex. Civ. App.), 128 S. W. 1165, 1171).

The United States courts, in cases properly brought there, as distinguished from cases brought there on writ of error to state courts, take judicial notice of the foreign statute without proving same, and, hence, it need not be alleged. *Southern Pac. Co. v. De Valle Da Costa*, 190 Fed. 689, 697, 111 C. C. A. 417. See generally the title “**Judicial Notice.**”

Pleading Foreign Law in District of Columbia.—In suing on a foreign statute in the District of Columbia, the statute of the foreign state need not be pleaded, as the court is considered a

United States court and will judicially notice the foreign statute. *Moore v. Pywell*, 29 App. Cas. (D. C.) 312, 9 L. R. A. (N. S.) 1078.

Amendment Pleading Foreign Statute.—Where after both sides had rested, defendant insisted upon dismissal because the petition that the death occurred in another state and no similar statute was pleaded as existing in such state, it is proper to allow an amendment as to the statute in the other state and reopen the case therefor. *Lustig v. New York, etc., R. Co.*, 65 Hun 547, 20 N. Y. Supp. 477, 48 N. Y. St. 916. See also, *Storrs v. Northern Pac. R. Co.*, 132 N. Y. Supp. 954. But see *St. Louis, etc., R. Co. v. Longmiller*, 193 Fed. 689, 698; *Boston, etc., R. Co. v. Hurd*, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193; *Kansas City v. Hart*, 60 Kan. 684, 57 Pac. 938; *Fitzhenry v. Cons. T. Co.*, 63 N. J. L. 142, 42 Atl. 416; where it is held that where the complaint did not refer to the foreign statute, it could not be amended after the limitation period so as to show the foreign statute as it would constitute a departure.

Curing Want of Averment.—Failure of plaintiff to plead the foreign statute is cured by pleading the foreign statute in the answer. *Texas, etc., R. Co. v. Miller* (Tex. Civ. App.), 128 S. W. 1165.

Setting Forth Foreign Statute According to Legal Effect Only.—Where an administrator suing on a foreign statute sets forth the foreign statute according to its legal effect and not by reference to the chapter itself by chapter and volume, and not incorporating the terms of the statute in the complaint, and not alleging the recovery would be for the benefit of decedent’s “next of kin” to be distributed in the manner provided by the law of the forum, and not alleging affirmatively “that there are next of kin who would be so entitled,” the court will presume that the recovery would be for the benefit of decedent’s estate, a right not given by the statute of the forum. *Zeikus v. Florida E. C. Co.*, 70 Misc. 339, 128 N. Y. Supp. 931.

The foreign statute need not be set out in haec verba (*St. Louis, etc., Co. v. Haist*, 71 Ark. 258, 72 S. W. 893, 100 Am. St. Rep. 65; *Daniels v. Philadelphia, etc., R. Co.* (Del.), 83 Atl.

necessity for alleging that death occurred in the foreign state,⁹⁵ or that deceased if living could have sued in the foreign state for the injuries.⁹⁶

c. *Federal Employer's Liability Act*.—The federal employer's liability act need not be set out in the petition in an action in the state courts. If facts bringing it within such statute are pleaded it is sufficient.⁹⁷

3. *Averring Capacity as Administrator*.—Where the right of action for wrongful death is given to the administrator, the petition should show that plaintiff sues as administrator or it will be subject to demurrer.⁹⁸

19), though in *Stewart v. Great Northern R. Co.*, 103 Minn. 156, 114 N. W. 953, pleading part of statute without pleading part allowing complainant to sue was held insufficient.

Alleging Facts Alleged Constituted a Cause of Action Under Foreign Statute.—It is not necessary to allege that the facts alleged would have given plaintiff a right of action under the laws of the foreign state. *Lee v. Missouri Pac. R. Co.*, 195 Mo. 400, 92 S. W. 614.

Pleading Fellow Servant Doctrine of Foreign State.—If under the unwritten or common law of the other state "the decedent and those to whose negligence his death is attributed were not fellow servants, it became necessary to plead such law as a fact in order to make a good complaint. Such foreign law, as in case of any other fact, must be pleaded with such distinctness that the court may judge of its effect." Pleading its legal effect is not sufficient. *Wabash R. Co. v. Hassett*, 170 Ind. 370, 83 N. E. 705, 708.

Local Law Not Presumed Similar.—The presumption that the laws of the foreign state are the same as that of the forum will not be applied where the foreign law is not pleaded, as no right of action for death existed at common law. *St. Louis, etc., R. Co. v. Loughmiller*, 193 Fed. 689.

95. Where the petition alleges a wrongful act in the forum causing death in another jurisdiction, it need not be alleged that plaintiff's intestate died in the foreign state. *Moore v. Pywell*, 29 App. Cas. (D. C.) 312, 9 L. R. A. (N. S.) 1078.

96. *Gurney v. Grand Trunk R. Co.*, 13 N. Y. Supp. 645, 37 N. Y. St. 557, *affirmed*, 138 N. Y. 638, 34 N. E. 512,

53 N. Y. St. 929. See also, *Luna, etc., Co. v. Duebler*, 7 Ohio C. C. 185.

97. *St. Louis, etc., R. Co. v. Hesterly* (Ark.), 135 S. W. 874; *Lemon's Admr. v. Louisville, etc., R. Co.*, 137 Ky. 276, 125 S. W. 701.

Alleging Railroad Engaged in Interstate Commerce.—A complaint alleging that "the defendant . . . is and was . . . a railroad corporation operating a line of railroad in the state of Oklahoma, and was in said state of Oklahoma a common carrier of freight and passengers for hire," but containing no allegation that the carrier was engaged in interstate commerce, nor that deceased was injured while employed by such carrier in such commerce is insufficient under the federal employer's liability act. *St. Louis, etc., Co. v. Hesterly* (Ark.), 135 S. W. 874.

98. **U. S.**—*Dodge v. North Hudson*, 188 Fed. 489, *affirming*, 177 Fed. 986. **Ala.**—*Kansas City, etc., R. Co. v. Matthews*, 142 Ala. 298, 39 So. 207; *Louisville, etc., R. Co. v. Trammell*, 93 Ala. 350, 9 So. 870. **Kan.**—*Acheson v. Twine*, 9 Kan. 350. **Ohio.**—*Hardin Co. v. Coffman*, 18 Ohio C. C. 254, 10 Ohio Cir. Dec. 91. **Vt.**—*Westcott v. Central R. Co.*, 61 Vt. 438, 441, 17 Atl. 745.

A direct allegation that plaintiff sues as administrator is unnecessary where it appears by the complaint that plaintiff is the personal representative of the person for whose death damages are claimed. *Louisville, etc., R. Co. v. Trammell*, 93 Ala. 350, 9 So. 870.

Sufficiency of Allegation of Appointment.—A declaration alleging that "W. B. was duly appointed as administrator of the estate of said R. B., deceased," is equivalent to an allegation

4. Compliance With Conditions Precedent.—a. *General Rule.* If certain beneficiaries can sue for wrongful death only if certain conditions exist or do not exist, the existence or non-existence of such matters, as the case may be, must be alleged.⁹⁹

that such administrator was appointed according to law. *Petit v. Coachman*, 51 Fla. 521, 41 So. 401.

Caption Showing Plaintiff's Capacity as Administratrix.—A complaint setting forth in the caption thereof the names of the parties and showing plaintiff sues as "administratrix," and reciting in several of the counts "the plaintiff, as administratrix of the estate of M," and, in other counts, averring "the plaintiff, as aforesaid (*i. e.*, as such administrator) claims" sufficiently shows that plaintiff sues as administratrix. *Kansas City, etc., R. Co. v. Matthews*, 142 Ala. 298, 39 So. 207.

Alleging Ancillary Administration.—In an action by a foreign administrator where ancillary administration is necessary before the foreign administrator can sue, a complaint is demurrable for failure to allege the obtaining of ancillary letters. *Dodge v. North Hudson*, 188 Fed. 489, *affirming*, 177 Fed. 986.

One of Several Counts Not Averring Representative Capacity.—Where several counts aver that the plaintiff sues as administratrix of deceased, and one count avers that "her intestate" was a passenger, etc., and "her intestate" was thrown from the train, it sufficiently avers, in connection with the other counts, that she sues in her representative capacity. *Kansas City, etc., R. Co. v. Matthews*, 142 Ala. 298, 39 So. 207.

Raising Objection Petition Does Not Show Representative Capacity.—That the complaint in an action for wrongful death of an infant, where either the father or the personal representative may sue, is indefinite as to whether plaintiff sues as administrator or in his personal capacity cannot be raised by demurrer but must be raised by a motion to make more definite and certain. *De Amado v. Friedman*, 11 Ariz. 56, 89 Pac. 588.

Misnomer of Deceased.—If the administrator of the estate of "Ferdinand N." A. sues for the death of "Fernando W." A., the defect is fatal and may be raised by demurrer for want of sufficient facts to constitute a

cause of action. *Cleveland, etc., R. Co. v. Pierce*, 34 Ind. App. 188, 72 N. E. 604.

The refusal to allow an amendment showing that plaintiffs had qualified as domiciliary administrators may be raised on writ of error from a judgment of dismissal. *Hodges v. Kimball*, 91 Fed. 845, 34 C. C. A. 103.

99. Necessity for Averring Deceased Was Minor and Unmarried.—If a statute gives the parent the right to sue only when the deceased child is a minor and unmarried, both of these elements must be alleged and proved (*Marshall v. Consolidated Jack M. Co.*, 129 Mo. App. 649, 108 S. W. 573; *Isaac v. Denver, etc., R. Co.*, 12 Daly (N. Y.) 340, *affirmed*, 102 N. Y. 718), and the objection is not waived by pleading over, but is sufficiently saved by demurrer to the evidence or motion in arrest of judgment (*Sparks v. Kansas City, etc., R. Co.*, 31 Mo. App. 111; *Dulaney v. Missouri Pac. R. Co.*, 21 Mo. App. 597).

Alleging Deceased Was Minor.—Special Demurrer.—Where the code provides the action must be brought by the heirs or personal representatives of deceased if deceased was not a minor, but if deceased was a minor his parents must bring the action, a complaint not alleging whether deceased was a minor or major is good against general demurrer. Objection thereto should be taken by special demurrer as the objection does not go to the substantive cause of action. *Palmer v. Utah & N. R. Co.*, 2 Idaho 315, 13 Pac. 425.

Sufficiency of Allegations That Deceased Was Unmarried.—Allegations that A died unmarried, but not proved, A being above the age of consent, raises no presumption that he died unmarried (*Marshall v. Consolidated J. M. Co.*, 129 Mo. App. 649, 108 S. W. 573), but an allegation that deceased was six years of age (*Baird v. Citizens' R. Co.*, 146 Mo. 265, 48 S. W. 78), or thirteen years of age, sufficiently shows he was unmarried under a statute allowing the parent to recover only where deceased child was a minor and un-

b. *Notice*.—In some jurisdictions the giving of the statutory notice of the time, place and cause of injury producing death is a condition precedent to the action for wrongful death and must be alleged in the petition.¹ In other jurisdictions such notice is held to be a condition subsequent cutting off the right, which need not be pleaded by the plaintiff, but may be pleaded and proved by defendant to defeat the action.²

married (*Bellamy v. Whitsell*, 123 Mo. App. 610, 100 S. W. 514).

Motion in Arrest of Judgment.—Where plaintiff has failed to aver that deceased left neither wife nor minor children, and proper objection to evidence that deceased was unmarried was made on the ground that under the pleadings such evidence was incompetent and immaterial, judgment will be arrested on motion, though such evidence was admitted over the objection. *McIntosh v. Missouri Pac. R. Co.*, 103 Mo. 131, 15 S. W. 80.

Availing Non-Residence or Non-Appointment of Administrator.—If certain beneficiaries can sue personally only where deceased was a non-resident, or if a resident where no administrator was appointed, a petition by such beneficiaries should allege one of these facts. *Walker v. O'Connell*, 59 Kan. 306, 52 Pac. 894; *Atchison Water Co. v. Price*, 9 Kan. App. 884, 59 Pac. 677; *Oklahoma Gas. etc., Co. v. Luskert*, 16 Okla. 397, 84 Pac. 1076.

Verdict Curing Want of Averment as to Father's Death.—Where the mother can only sue where the father is dead, or has deserted the family, an averment that the mother is "next of kin" is sufficient after verdict as against the objection that it does not allege the death of the father. *David v. Waters*, 11 Ore. 448, 5 Pac. 748.

Availing Deceased's Right To Sue. Though the administrator cannot sue unless the deceased, if living, had a right of action, this need not be averred. *Luna El. etc., Co. v. Duebler*, 7 Ohio C. C. 185.

1. **U. S.**—*Atchison, etc., R. Co. v. Sowers*, 213 U. S. 55, 29 Sup. Ct. 397, 53 L. ed. 695 (New Mexico statute); *Spinello v. New York, etc., R. Co.*, 183 Fed. 762, 106 C. C. A. 189 (Connecticut statute held to be a condition subsequent, and not a condition precedent); *Denver, etc., R. Co. v. Wagner*, 167 Fed. 75, 92 C. C. A. 527. **la.**—*Sachs v. Sioux City*, 109 Iowa 224,

80 N. W. 336. **Kan.**—*Swisher v. Atchison, etc., Co.*, 76 Kan. 97, 90 Pac. 812, in enforcing New Mexico statute in Kansas, notice as required is condition precedent. **Mass.**—*Herlihy v. Little*, 200 Mass. 284, 86 N. E. 294 (description of injuries in notice is unnecessary); *Jones v. Boston, etc., Co.*, 157 Mass. 51, 31 N. E. 727. **Mo.**—*Philes v. Missouri Pac. R. Co.*, 141 Mo. App. 561, 125 S. W. 553. **N. H.**—*Jewett v. Keene*, 62 N. H. 701. **N. Y.**—*Conway v. New York*, 139 App. Div. 446, 124 N. Y. Supp. 660; *Gmaehle v. Rosenberg*, 83 App. Div. 339, 82 N. Y. Supp. 366. **Tex.**—*El Paso, etc., R. Co. v. Gutierrez* (Tex. Civ. App.), 111 S. W. 159, New Mexico statute. **Wis.**—*Hupfer v. National Distilling Co.*, 119 Wis. 417, 96 N. W. 809. See, *infra*, VIII, A, 4, b.

Amendment Showing Date of Service.—The defendant may require the amendment of the complaint to show the date of service of the statutory notice. *Uss v. Crane Co.*, 138 App. Div. 256, 123 N. Y. Supp. 94.

Federal Court Practice.—A petition in the federal court sitting in another district need not contain the allegation of the giving of the prescribed notice required by the foreign statute giving the cause of action, though required by the practice of the foreign state as the court is governed by the practice prevailing in the district where it sits. *Brown v. New York, etc., R. Co.*, 136 Fed. 700. But see, *contra*, *Denver, etc., R. Co. v. Wagner, supra*.

2. *Spinello v. New York, etc., R. Co.*, 183 Fed. 762, 106 C. C. A. 189 (Connecticut statute); *Bulkley v. Norwich R. Co.*, 81 Conn. 284, 70 Atl. 1021, 129 Am. St. Rep. 212. See, *infra*, VII, B.

Notice is not made necessary by statutory provisions requiring notice to defendants in actions for personal injuries, as actions for death by wrongful act are not actions for personal injuries. **U. S.**—*Missouri Pac. R. Co. v. Larussi*, 161 Fed. 66, 88 C. C. A. 230.

c. *Prior Prosecution for Felony.*—An allegation of a prior criminal prosecution of defendant for the felony causing death before institution of the civil suit for wrongful death is unnecessary,³ unless such a criminal prosecution is required by statute as a condition precedent to the institution of a civil suit for damages for the wrongful death.⁴

5. Averring Existence or Non-Existence of Statutory Beneficiaries.

a. *Averring Existence of Beneficiaries.* (I.) *Where Action Given to Designated Beneficiaries.*—Where the beneficiaries are named in the statute, or where the damages to be awarded are such only as the persons designated in the statute shall have sustained, the petition must allege the existence of one or more of the designated beneficiaries or it will be subject to demurrer.⁵ In a few jurisdictions, however, such allegations are held unnecessary on the theory that the existence

Colo.—*Mitchell v. Colorado, etc., Co.*, 12 Colo. App. 277, 55 Pac. 736, *affirmed*, 26 Colo. 284, 58 Pac. 28. Ill.—*Prouty v. Chicago*, 250 Ill. 222, 95 N. E. 147. Me.—*Perkins v. Oxford*, 66 Me. 545. Minn.—*Senecal v. West St. Paul*, 111 Minn. 253, 126 N. W. 826; *Orth v. Belgrade*, 87 Minn. 237, 91 N. W. 843. Mo.—*Philes v. Missouri Pac. R. Co.*, 141 Mo. App. 561, 125 S. W. 553. N. H.—*Clark v. Manchester*, 62 N. H. 577. Since changed by statute and notice is required. *French v. Mascoma F. Co.*, 66 N. H. 90, 20 Atl. 363. Utah.—*Brown v. Salt Lake City*, 33 Utah 222, 93 Pac. 570, 126 Am. St. Rep. 828, 14 L. R. A. (N. S.) 619. Wis.—*McKeigue v. Janesville*, 68 Wis. 50, 31 N. W. 298.

But see, *Crapo v. Syracuse*, 183 N. Y. 395, 76 N. E. 465, holding a general provision as to notice in personal injury cases makes it a condition precedent to an action for wrongful death.

3. Ga.—*South Carolina R. Co. v. Nix*, 68 Ga. 572, action on foreign statute in Georgia, where prior prosecution was required. Ind.—*Lofton v. Vogles*, 17 Ind. 105. N. Y.—*Wise v. Teerpenning*, 8 N. Y. Leg. Obs. 153, 2 Edm. Sel. Cas. 112.

See generally the title "Homicide."

4. Western, etc., R. Co. v. Sawtell, 65 Ga. 235; *Allen v. Atlanta, etc., R. Co.*, 54 Ga. 503.

See the complaint set out in *Fuller v. Inman (Ga.)*, 74 S. E. 287, in which no such allegation appears.

Such prosecution may be brought before suit, at the time of commencement

of suit, or concurrent therewith, which means *pendente lite*. Western, etc., R. Co. v. Sawtell, 65 Ga. 235.

Plea Admitting Prior Prosecution for Felony.—An allegation of prior prosecution is unnecessary where defendant's plea admits the criminal prosecution. *Weekes v. Cottingham*, 58 Ga. 559.

Amendment.—Failure to allege prior prosecution for felony may be cured by amendment. *Weeks v. Cottingham*, 58 Ga. 559.

5. U. S.—*Louisville, etc., R. Co. v. Summers*, 125 Fed. 719, 60 C. C. A. 487; *Western Union Tel. Co. v. McGill*, 57 Fed. 699, 6 C. C. A. 521; *Peers v. Nevada, etc., Co.*, 119 Fed. 400; *Dandow v. Pennsylvania Co.*, 85 Fed. 943; *Serensen v. Northern Pac. R. Co.*, 45 Fed. 407 (Montana statute). Ark.—*Little Rock, etc., R. Co. v. Townsend*, 41 Ark. 382. Cal.—*Kerrigan v. Market, etc., R. Co.*, 138 Cal. 506, 71 Pac. 621; *Webster v. Norwegian M. Co.*, 137 Cal. 399, 70 Pac. 276, 92 Am. St. Rep. 181; *Knott v. McGilvray*, 124 Cal. 128, 56 Pac. 789. Ill.—*Foster v. St. Luke's Hosp.*, 191 Ill. 94, 60 N. E. 803; *Holton v. Daly*, 106 Ill. 131; *Quincy Coal Co. v. Hood*, 77 Ill. 63; *Chicago, etc., R. Co. v. Kinnare*, 115 Ill. App. 132. Ind.—*Pennsylvania Co. v. Coyer*, 163 Ind. 631, 72 N. E. 875; *Toledo, etc., R. Co. v. Lander (Ind. App.)*, 95 N. E. 319 (alleging survival as his only heirs at law and next of kin, his widow and infant children, sufficiently alleges decedent left a widow and infant children); *Cleveland, etc., Co. v. Starks (Ind. App.)*, 89 N.

E. 602; *Commercial Club v. Helliker*, 20 Ind. App. 239, 50 N. E. 576 (allegation that decedent leaves "heirs and next of kin" sufficient). **Kan.**—*Missouri Pac. R. Co. v. Barber*, 44 Kan. 612, 24 Pac. 969. **Me.**—*Hammond v. Lewiston R. Co.*, 106 Me. 209, 76 Atl. 672, 30 L. R. A. (N. S.) 78. **Mass.**—*Bartley v. Boston, etc., R. Co.*, 193 Mass. 163, 83 N. E. 1093; *Oulighan v. Butler*, 189 Mass. 287, 75 N. E. 726. **Mich.**—*Walker v. Lake, etc., R. Co.*, 104 Mich. 606, 62 N. W. 1032. **Minn.**—*Vander Wegen v. Great Northern R. Co.*, 114 Minn. 118, 130 N. W. 70; *Lanti v. Oliver Iron Min. Co.*, 106 Minn. 241, 118 N. W. 1018; *Anderson v. Fielding*, 92 Minn. 52, 99 N. W. 357, 104 Am. St. Rep. 265; *Sykora v. Case Threshing Mach. Co.*, 59 Minn. 130, 133, 60 N. W. 1008. **Neb.**—*Chicago, etc., R. Co. v. Bond*, 58 Neb. 385, 78 N. W. 710; *Chicago, etc., R. Co. v. Oyster*, 58 Neb. 1, 78 N. W. 359; *Burlington, etc., R. Co. v. Crockett*, 17 Neb. 570, 24 N. W. 219. **N. J.**—*Zipple v. Sanford, etc., Co. (N. J. L.)*, 58 Atl. 176; *McGlone v. New Jersey R. Co.*, 37 N. J. L. 304. **N. Y.**—*Green v. Hudson R. Co.*, 31 Barb. 260, 16 How. Pr. 263; *Frost v. Benedict*, 21 Barb. 247; *Safford v. Drew*, 3 Duer 627; *Pizzi v. Reid*, 36 Misc. 123, 72 N. Y. Supp. 1053. **Ohio.**—*Hartzell v. Shannon*, 6 Ohio Dec. (Reprint) 1093; *Hall v. Crain*, 2 Ohio Dec. (Reprint) 396. **S. C.**—*Nohrden v. Northeastern R. Co.*, 54 S. C. 492, 32 S. E. 524; *Lilly v. R. Co.*, 32 S. C. 142, 10 S. E. 932; *Conlin v. Charleston*, 15 Rich. L. 201. **Tenn.**—*Tennessee, etc., R. Co. v. Brown*, 143 S. W. 1129 (the declaration must allege that the plaintiff brings the action for the use of the statutory beneficiaries); *Southern R. Co. v. Maxwell*, 113 Tenn. 464, 82 S. W. 1137; *Railroad v. Pitt*, 91 Tenn. 86, 18 S. W. 118. **Tex.**—*Gulf, etc., R. Co. v. Younger*, 10 Tex. Civ. App. 141, 29 S. W. 948. **Vt.**—*Geroux's Adm. v. Graves*, 62 Vt. 280, 19 Atl. 987 (defect fatal); *Westcott v. Central, etc., R. Co.*, 61 Vt. 438, 17 Atl. 745 (left widow and next of kin sufficient). **Wash.**—*Northern Pac. R. Co. v. Ellison*, 3 Wash. 225, 28 Pac. 333, 29 Pac. 263. **W. Va.**—*Baltimore, etc., R. Co. v. Gettle*, 3 W. Va. 376. **Wis.**—*Leussen v. Oshkosh, etc., Co.*, 109 Wis. 94, 85 N. W. 124; *Brown v. Chicago, etc., Co.*, 102 Wis. 137, 77 N. W. 748, 78

N. W. 771; *Topping v. St. Lawrence*, 86 Wis. 526, 57 N. W. 365.

Reason of Rule.—"The theory on which allegation and proof of the existence of beneficiaries and the damages sustained by them must be made, is that, as the statute names such persons as beneficiaries, and provides for their compensation, it follows that there must be proof to sustain the requirements of the statute. But where the statute is silent as to such persons, the reason for such allegation and proof no longer exists, since as no persons are named as beneficiaries the statute does not create a cause of action in favor of any designated persons, and as no persons are designated it follows that the damages to be recovered are not such as have been sustained by any particular persons, but are such as have been caused to the estate by reason of the death, to be distributed as provided by law to the persons entitled by law to such estate." *Southern Pac. Co. v. Wilson*, 10 Ariz. 162, 85 Pac. 401.

Presumption Where No Allegation of Beneficiaries.—If there is no allegation of the existence of statutory beneficiaries the court is bound to assume that there are none. *Webster v. Norwegian M. Co.*, 137 Cal. 399, 70 Pac. 276, 92 Am. St. Rep. 181.

Averment of Beneficiaries in One Count Only.—While it is usual to allege the existence of beneficiaries in each count of the complaint, yet it is sufficient if the averment appears in one count thereof. *Chicago, etc., Co. v. Reddick*, 139 Ill. App. 160.

Posthumous Child.—A petition alleging the existence of a widow and unborn child is sufficient to admit evidence as to the birth and death of such child subsequent to the death of plaintiff's intestate. *Preble v. Wabash R. Co.*, 243 Ill. 340, 90 N. E. 716.

Alleging Plaintiffs Are All Deceased's Minor Children.—Where the right of action for wrongful death is in all the minor children, a petition alleging in effect that three minors named were "all" of the children of deceased on the date of the accident, and then alleging that at the date of his death from such injuries he left surviving him "these plaintiffs," sufficiently alleges that plaintiffs are all the children of deceased. *Sharp v.*

of heirs⁶ or next of kin will be presumed as a matter of common knowledge.⁷ But where the existence of kindred entitled to a recovery is alleged, the petition need not negative the existence of relatives other than those named.⁸

Missouri Pac. R. Co., 213 Mo. 517, 111 S. W. 1154.

Alleging Deceased Was Unmarried and Childless.—An allegation that plaintiff, the mother of deceased, is "the sole heir" of deceased is sufficient without alleging that deceased was unmarried and childless, where the statute gives the heirs a cause of action. *Brennan v. Molly, etc., Co.*, 44 Fed. 795.

Naming Ineligible Persons.—The complaint is sufficient where it names some of the beneficiaries, eligible to take, though it names others not eligible to take under the designation "next of kin" (*Clore v. McIntire*, 120 Ind. 262, 22 N. E. 128), as the name of the person ineligible to take may be stricken out on motion (*Reed v. Northeastern Railroad Co.*, 37 S. C. 42, 16 S. E. 289).

Must Complaint Allege for Whose Benefit Action Is Brought.—Though the complaint by an administrator does not allege that the action is brought for the benefit of the widow and children as the statute requires, it is sufficient where they are named in the complaint, as any recovery will inure to their benefit by operation of law. *Archibald v. Lincoln Co.*, 50 Wash. 55, 96 Pac. 831.

An allegation of dependence on deceased is not sufficient, for they might have been dependent and still not come within the persons designated by statute to maintain the action. *Lilly v. Charlotte, etc., R. Co.*, 32 S. C. 142, 10 S. E. 932.

Amendment.—The failure to allege the existence of the statutory beneficiaries may be cured by amendment (*U. S.*—*Davidow v. Pennsylvania R. Co.*, 85 Fed. 943. *Ga.*—*South Carolina R. Co. v. Nix*, 68 Ga. 572. *Ill.*—*Haynie v. Chicago, etc., R. Co.*, 9 Ill. App. 105), even after an exception thereto because stating no cause of action, as long as the petition does not negative the non-existence of beneficiaries (*Blackburn v. Louisiana, etc., Co.*, 128 La. 319, 54 So. 865); or even after the period of limitations has expired (*Hooper v. Atlanta, etc., R. Co.*, 107

Tenn. 712, 65 S. W. 405. But see, *contra*, *Atlanta, etc., R. Co. v. Hooper*, 92 Fed. 820, 35 C. C. A. 24), or after motion in arrest of judgment filed, where such fact was proved at the time (*Tennessee, etc., Co. v. Brown* (Tenn.), 143 S. W. 1129).

Verdict as Curing Want of Averment.—A declaration defective because failing to aver the existence of statutory beneficiaries is not good even after verdict. *U. S.*—*Serensen v. Northern Pac. R. Co.*, 45 Fed. 407, evidence as to existence of beneficiaries admitted over objection. *Ill.*—*Foster v. St. Luke's Hosp.*, 191 Ill. 94, 60 N. E. 803, *affirming*, 86 Ill. App. 282. *Mo.* *McIntosh v. Missouri Pac. R. Co.*, 103 Mo. 131, 15 S. W. 80, judgment should be reversed and cause remanded for want of such averment. But see, *contra*, *Mass.*—*Hicks v. New York, etc., R. Co.*, 164 Mass. 424, 41 N. E. 721, 59 Am. St. Rep. 471 (holding objection cannot be taken for first time on appeal. *S. C.*—*Conlin v. Charleston*, 15 Rich. L. 201. *Tenn.* *Southern R. Co. v. Maxwell*, 113 Tenn. 464, 82 S. W. 1137, holding objection cannot be taken for first time on appeal.

Waiver and Taking Objection to Lack of Averment.—The objection is not necessarily waived by failure to demur (*Serensen v. Northern Pac. R. Co.*, 45 Fed. 407), nor is it waived by pleading over; but it may be taken advantage of by a demurrer to the evidence or by a motion in arrest of judgment (*Sparks v. Kansas City, etc., R. Co.*, 31 Mo. App. 111), but in Texas it must be taken advantage of by a special exception (*March v. Walker*, 48 Tex. 372).

6. *Woodstock, etc., Co. v. Kline*, 149 Ala. 391, 43 So. 36; *Columbus, etc., R. Co. v. Bradford*, 86 Ala. 574, 6 So. 90; *Budd v. Meriden Elec. Co.*, 69 Conn. 272, 37 Atl. 683.

7. *Warner v. Western, etc., R. Co.*, 94 N. C. 250, whoever insists to the contrary is bound to aver and prove the fact.

8. *U. S.*—*Peers v. Nevada, etc., Co.*, 119 Fed. 400. *Kan.*—*Missouri Pac. R.*

(II.) **Manner of Alleging Existence of Beneficiaries.**—A direct averment that deceased left next of kin⁹ or heirs at law in the exact terms

Co. v. Barber, 44 Kan. 612, 24 Pac. 969, alleging existence of plaintiff, the mother, as next of kin sufficient. **Neb.** Chicago, etc., Co. v. Oyster, 58 Neb. 1, 78 N. W. 359. **Tex.**—Southern Cotton Press, etc., Co. v. Bradley, 52 Tex. 587. **Eng.**—Barnes v. Ward, 2 Car. & K. 661, 61 E. C. L. 660, 9 C. B. 392, 14 Jur. 334, 67 E. C. L. 392, 398.

Negating Existence of Others Than Beneficiaries Named.—"Good pleading requires such an averment as will advise defendant of the names of all the surviving kindred who are by the terms of the statute entitled to a distribution of the damages that may be recovered in the action;" but where "the existence of such kindred as authorizes a recovery is positively stated in such a manner as to authorize a recovery for their benefit, it is not necessary that plaintiff should be required to negative the existence of relatives other than those named by him." *Peers v. Nevada, etc., Co.*, 119 Fed. 400.

All the Statutory Beneficiaries Not Alleged.—Though the statute gives a right of action to the personal representative of deceased for the benefit of the widow and minor children, a petition alleging the existence of minor children is good as against demurrer though there is in fact a widow. *Chicago, etc., R. Co. v. Oyster*, 58 Neb. 1, 78 N. W. 359.

Showing Plaintiff Was Sole Beneficiary by Amendment.—Where the right of action is given to the wife, husband, parent, children, or if none of these, to the heirs of deceased, it is proper to require an amendment "by incorporating therein such a statement of facts as would show that the plaintiff was the only person for whose benefit the action could be brought." An allegation that deceased "left surviving him his father" is not sufficient. *Nohrden v. Northeastern R. Co.*, 54 S. C. 492, 32 S. E. 524.

South Carolina.—Father Must Aver Other Beneficiaries Non-Existent.—If action is given to deceased's wife, husband, parent or children, a petition by the father must aver that he is the only person in existence for whose benefit the action could be maintained.

Nohrden v. Northeastern R. Co., 54 S. C. 492, 32 S. E. 524.

Necessity for Alleging Plaintiff Sues on Behalf of All.—As against demurrer a petition showing a right of recovery in plaintiff is sufficient without an averment that plaintiff is the only person entitled to damages under the statute, or an averment that he brings the action on behalf of all entitled and who they were. *Southern Cotton Press, etc., Co. v. Bradley*, 52 Tex. 587.

Amendment.—The petition may be amended at the trial by inserting the names of persons entitled to the proceeds in addition to those named or who are exclusively entitled to the proceeds (*Chicago, etc., R. Co. v. La Porte*, 33 Ind. App. 691, 71 N. E. 166), even after the statute of limitations has run and even after verdict (*McArdle v. Pittsburg, etc., Co.*, 41 Pa. Super. 162).

Failure To Name Beneficiary as Precluding Recovery.—The fact that the administrator intentionally did not name all the beneficiaries in the petition, does not preclude such beneficiaries from recovering their share of the amount recovered (*Duzzan v. Myers*, 30 Ind. App. 227, 65 N. E. 1046, 96 Am. St. Rep. 341; *Gottlieb v. North Jersey, etc., R. Co.*, 72 N. J. L. 480, 63 Atl. 339); though it has been held that if he avers the existence of the father only, plaintiff cannot prove the existence of the father, mother and several brothers and sisters (*Quincy Coal Co. v. Hood*, 77 Ill. 68).

9. *Chicago, etc., R. Co. v. La Porte*, 33 Ind. App. 691, 71 N. E. 166; *Zipple v. Sandford, etc., Co. (N. J.)*, 58 Atl. 176; *Hamilton v. Bordentown El., etc., Co.*, 68 N. J. L. 85, 52 Atl. 290.

Negating Existence of Widow and Children Insufficient.—Where the action is given to the "next of kin," an allegation that deceased left no widow or children, but failing to allege the existence of "next of kin" is insufficient as against demurrer. *Boyle v. Southern R. Co.*, 36 Misc. 289, 73 N. Y. Supp. 465.

When Alleging Existence of Next of Kin Insufficient.—Where the statute provides for a recovery only where deceased leaves a "husband, widow, chil-

of the statute creating the right of action is unnecessary where the allegations raise a necessary inference to this effect.¹⁰

(III.) **Where Right of Action Given to Estate.**—If the statute creating the right of action for wrongful death gives an action to the personal representative of deceased for the benefit of decedent's estate or his heirs, the existence of beneficiaries is not essential to a recovery and therefore need not be alleged.¹¹

(IV.) **Names of Beneficiaries.**—While the existence of the designated beneficiaries must be alleged, the administrator need not allege the names of the beneficiaries,¹² nor the ages nor residences of such

dren or parents," an allegation that he left "next of kin" is insufficient. *Davidow v. Pennsylvania R. Co.*, 85 Fed. 943.

Clerical Mistake.—A petition is not open to the objection that the "next of kin" are not specified, though it calls the intestate the "testatrix" and in referring to the "next of kin" as those of the defendant (administrator) where the pleading as a whole shows the mistakes were but clerical and could not mislead defendant. *Casey v. Auburn Tel. Co.*, 131 N. Y. Supp. 1.

Alleging Existence of Father, Brothers and Sisters.—Alleging the survival as deceased's "only heirs at law" of his father, mother and brothers and sisters is sufficient without alleging that deceased left widow or next or kin surviving him under a statute giving the administrator a right of action where widow, children or "next of kin" survive deceased. *Chicago, etc., R. Co. v. La Porte*, 33 Ind. App. 691, 71 N. E. 166.

10. Though the right of action is given to the "heirs" of deceased, it is not necessary to expressly allege that plaintiff was decedent's heir, but it is sufficient to allege decedent was his wife at the time of death. *Groom v. Bangs*, 153 Cal. 456, 96 Pac. 503. See also, *Knott v. McGilvray*, 124 Cal. 128, 56 Pac. 789.

Necessity for Alleging Relation of Survivor to "Deceased."—A complaint alleging that "deceased left surviving him a certain person as his next of kin and heir of law," where the statute gives the surviving spouse or next of kin a right of action, without stating the relation of this person, or that person, or that the deceased left a widow is good as against general demurrer, though it might be made more definite on motion. *Lahti v. Oliver*

Min. Co., 106 Minn. 241, 118 N. W. 1018.

11. **U. S.**—*Howard v. Delaware, etc., Co.*, 40 Fed. 195, 6 L. R. A. 75; *Harper v. Norfolk, etc., Co.*, 36 Fed. 102; *Roach v. Imperial Min. Co.*, 7 Fed. 698 (Nevada statute). **Ala.**—*James v. Richmond & D. R. Co.*, 92 Ala. 231, 9 So. 335. **Ariz.**—*Southern Pac. Co. v. Wilson*, 10 Ariz. 162, 85 Pac. 401. **Conn.**—*Budd v. Meriden Elec. R. Co.*, 69 Conn. 272, 37 Atl. 683, need not be named either. **Ky.**—*East Tennessee Tel. Co. v. Simms*, 99 Ky. 404, 36 S. W. 171, rule before legislature provided to whom the recovery should belong. **Ore.**—*Perham v. Portland El. Co.*, 33 Ore. 451, 53 Pac. 14, 24, 72 Am. St. Rep. 730, 40 L. R. A. 799. **Va.**—*Baltimore, etc., Co. v. Noell*, 32 Gratt. 394; *Baltimore, etc., Co. v. Wightman*, 29 Gratt. 431, 26 Am. Rep. 384. **W. Va.**—*Madden's Admr. v. Chesapeake, etc., Co.*, 28 W. Va. 610, 57 Am. Rep. 695.

Surplusage.—A complaint averring that the damages accrued to the widow and children of decedent, is not subject to demurrer, as such allegation may be rejected as surplusage. *Searles' Admx. v. Kanawha, etc., R. Co.*, 32 W. Va. 370, 9 S. E. 248.

12. **Conn.**—*Budd v. Meriden Elec. R. Co.*, 69 Conn. 272, 284, 37 Atl. 683, action given to estate. **Ga.**—*Atlanta, etc., R. Co. v. Wilson*, 119 Ga. 781, 47 S. E. 366. **Ind.**—*Pennsylvania Co. v. Coyer*, 163 Ind. 631, 72 N. E. 875, 876; *Jeffersonville, etc., R. Co. v. Hendricks*, 41 Ind. 48 (alleging existence of persons entitled to the recovery sufficient). But in *Indianapolis, etc., R. Co. v. Keeley's Admr.*, 23 Ind. 133, the court says the names of the beneficiaries should be alleged. **N. J.**—*McGlone v. New Jersey, etc., R. Co.*, 37 N. J. L. 304. **N. Y.**—*Keller v. New York*

beneficiaries,¹³ though it is better practice to give their names in the petition.¹⁴

b. *Averring Non-Existence of Prior Class of Beneficiaries.*—Where the statute gives a precedent cause of action to designated beneficiaries, and confers a right upon certain other beneficiaries only where none of the precedent beneficiaries exist, a petition by members of the postponed class of beneficiaries must allege the non-existence of any member of the preferred class of beneficiaries.¹⁵

Cent. R. Co., 24 How. Pr. 172, 2 Abb. Ct. App. Dec. 480, *affirming*, 17 How. Pr. 102 (names of next of kin unnecessary). **Tex.**—Southern Cotton Press, etc., Co. v. Bradley, 52 Tex. 587. **Vt.** Westcott v. Central Vermont R. Co., 61 Vt. 438, 17 Atl. 745.

Where Jury Must Apportion Recovery.—But under a statute requiring the jury to apportion the damages among the beneficiaries, the names of the beneficiaries should be set out or demurrer will lie. Hartzell v. Shannon, 6 Ohio Dec. (Reprint) 1093, 10 Am. L. Dec. 444, 8 Ohio Dec. (Reprint) 1265, 6 Wkly. L. Bul. 756; Hall v. Crain, 2 Ohio Dec. (Reprint) 396, 2 West L. Mont. (Ohio) 593.

Court May Order Specification.—The court may order a specification of such facts if necessary to the defense. Westcott v. Central Vermont R. Co., 61 Vt. 438, 17 Atl. 745. If defendant desires to have the complaint more specific in this respect the proper way is to move to have the complaint made more specific. Keller v. New York Cent. R. Co., 24 How. Pr. (N. Y.) 172, 182, holding this cannot be raised by motion for nonsuit.

Amendment.—Where the beneficiaries are named in the petition by the Christian names of their husbands with the prefix "Mrs.," an amendment giving their own Christian name is allowable. It does not change the cause of action. Grace & Hyde Co. v. Strong, 224 Ill. 630, 79 N. E. 967.

13. Westcott v. Central, etc. R. Co., 61 Vt. 438, 17 Atl. 745.

14. This imposes no hardship on the plaintiff and only requires to be stated in the complaint the facts that must be proved on the trial to justify a recovery. Pennsylvania Co. v. Coyer, 163 Ind. 631, 72 N. E. 875. See also **U. S.**—Peers v. Nevada, etc. Co., 119 Fed. 400, 405. **Ill.**—Holton v. Daly, 106 Ill. 131; Quincy Coal Co. v. Hood, 77 Ill. 68. **Ind.**—Indianapolis, etc. R. Co. v. Keeley's Admr., 23 Ind. 133.

Tenn.—Tennessee, etc. Co. v. Brown, 143 S. W. 1129.

In Pennsylvania where the wife sues on behalf of herself and children, the statute of 1855, §2, provides that the declaration shall state who are the parties entitled in such action (Haughey v. Pittsburg R. Co., 210 Pa. 367, 59 Atl. 1112. See also Shambach v. Middlecreek El. Co. [Pa.], 81 Atl. 802), but if the petition fails to name the beneficiaries their names may be added even after the limitation period (McArdle v. Pittsburg, etc. R. Co., 41 Pa. Super. 162).

15. **U. S.**—Choctaw, etc. Co. v. Jackson, 182 Fed. 342, where heirs can sue only where no personal representative, petition by heirs must allege there was no administration. **Ark.**—St. Louis, etc. R. Co. v. Yocum, 34 Ark. 493, mother suing for child's death must allege father is dead. **Fla.**—Duval v. Hunt, 34 Fla. 85, 15 So. 876. **Ga.** Perry v. Georgia, etc. R. Co., 85 Ga. 193, 11 S. E. 605. **Ind.**—Louisville, etc. R. Co. v. Lohges, 6 Ind. App. 283, 33 N. E. 449, mother suing for child's death must allege death, desertion or imprisonment of father. **Kan.**—Missouri Pac. R. Co. v. Barber, 44 Kan. 612, 24 Pac. 96. **La.**—Blackburn v. Louisiana, etc. Co., 128 La. 319, 54 So. 865. **Mo.**—Hegberg v. St. Louis, etc. R. Co. (Mo. App.), 147 S. W. 192; Jackson v. Lincoln M. Co., 106 Mo. App. 441, 80 S. W. 727. **Mont.**—Martin v. Butte, 34 Mont. 281, 86 Pac. 264, where mother can sue only where father is dead or has deserted the family, either death or desertion must be alleged. **Okla.**—Bartlett v. Chicago, etc. R. Co., 21 Okla. 415, 90 Pac. 468 (action by husband must show absence of children); Oklahoma Gas, etc. Co. v. Lukert, 16 Okla. 397, 84 Pac. 1076 (action by next of kin must show absence of widow). **Ore.**—David v. Waters, 11 Ore. 448, 5 Pac. 748, but an averment that plaintiff, the mother, is next of kin supplies the averment

6. Averring Commencement of Action Within Statutory Period.

after verdict, that the father is dead. *Wis.—Pries v. Ashland H. Tel. Co.*, 143 Wis. 606, 128 N. W. 281, alleging that deceased left a father and mother and two sisters surviving him sufficiently alleges the non-existence of widow and children.

Showing Mother's Right To Recover Instead of Father.—Where a precedent right of action is vested in the father, a petition by the mother not alleging that the plaintiff (the child's mother) is a widow, or that the child was a member of her family, and containing no averments as to her right to recover for loss of services instead of the father, is insufficient. *Perry v. Georgia R. Co.*, 85 Ga. 193, 11 S. E. 605. See also *St. Louis, etc. R. Co. v. Yocum*, 34 Ark. 493; *Louisville, etc. R. Co. v. Lohges*, 6 Ind. App. 288, 33 N. E. 449.

Averring Adoption of Child.—Under a statute giving the father the right to bring the action for death of a child except in case of his "death, desertion or imprisonment" and then providing the mother could bring the action, a mother suing for the death of her adopted child must allege the particulars of his adoption, or his emancipation from his natural parents' control, and the ownership of his services. *Citizens, etc. R. Co. v. Willooby*, 15 Ind. App. 312, 43 N. E. 1058.

Existence of Parents as Averring Non-Existence of Widow and Children. Allegations that deceased's father and mother and two sisters named survive him, negatives the idea that he left a widow or children. *Pries v. Ashland, etc. Co.*, 143 Wis. 606, 128 N. W. 281.

Averring Non-Existence of Minor Children and Widow.—If deceased's mother can only sue in default of minor children and widow, a petition by the mother must negative the non-existence of minor children and widow (*Blackburn v. Louisiana, etc. Co.*, 128 La. 319, 54 So. 865), but where a right of action is given the widow irrespective of whether there are minor children or not, the petition need not negative the existence of minor children (*Davis v. Arkansas Southern R. Co.*, 117 La. 320, 41 So. 587), but allegations that deceased was under the age of twenty-one and unmarried suf-

ficiently avers the non-existence of children (*Jackson v. Lincoln M. Co.*, 106 Mo. App. 441, 80 S. W. 727), though an allegation that deceased was over twenty-one years of age, single and unmarried, does not necessarily mean that deceased was unmarried, but under the liberal rule of construction would probably be construed to mean that he was unmarried and without "natural children," still it is not sufficient where the statute provides that the administrator can sue only where deceased dies without minor children, "natural born or adopted," as it does not state facts from which it would naturally be inferred that he did not leave surviving him an adopted child or children (*Hegberg v. St. Louis, etc. R. Co.* [Mo. App.], 147 S. W. 192).

Widow Suing as Administratrix Where Sole Beneficiary.—If a petition by the administratrix discloses on its face that the plaintiff is the widow and by law administratrix cannot recover where there is a widow, it is subject to demurrer. *Lower v. Segal*, 60 N. J. L. 99, 36 Atl. 777, Pennsylvania statute.

Existence of Next of Kin as Negating Existence of Widow and Children. Though deceased's mother has no right of action if deceased left widow or children, a petition averring the existence of the mother as next of kin is sufficient without alleging that he did not leave widow or children. *Missouri Pac. R. Co. v. Barber*, 44 Kan. 612, 24 Pac. 96.

Amendment.—Where the petition by a mother for wrongful death fails to aver the non-existence of minor children or widow of deceased, the court, in its discretion, may allow an amendment curing the want of such averment (*Blackburn v. Louisiana, etc. R. Co.*, 128 La. 319, 54 So. 865), or a petition may be amended to show deceased left no widow and that the plaintiff children are all the children of deceased surviving him (*Van Pelt v. Chattanooga, etc. R. Co.*, 89 Ga. 706, 15 S. E. 622).

Objection May Be Raised at Any Time.—Where the petition fails to so allege, it is always open to review, at every stage of the case, at any time in any court, whether raised by de-

In some jurisdictions the institution of the suit within a specified period is a condition attached to the right of action for wrongful death and not a limitation of the remedy only, and the petition must aver the commencement of the action within the statutory period after the death for which the action is brought.¹⁶ In other jurisdictions it is unnecessary that plaintiff aver the commencement of the action within the statutory period; it is a defense to be set up by defendant.¹⁷

murrer or not. *Hegberg v. St. Louis, etc. R. Co.* (Mo. App.), 147 S. W. 192, 208.

16. **U. S.**—*Kavanagh v. Folsom*, 181 Fed. 401. **Kan.**—*Hamilton v. Hannibal*, 39 Kan. 56, 18 Pac. 57 (widow must show commencement within six months); *Eureka v. Merrifield*, 9 Kan. App. 579, 58 Pac. 243. **N. J.**—*Seitter v. West Jersey, etc. R. Co.*, 79 N. J. L. 277, 75 Atl. 435; *Lapsley v. Public Service Corp.*, 75 N. J. L. 266, 68 Atl. 1113. **N. Y.**—*Pernisi v. Schmalz's Sons*, 126 N. Y. Supp. 880, 883. **N. C.**—*Bennett v. North Carolina R. Co.*, 74 S. E. 883.

In Illinois it is said that whether or not the commencement of the action within the statutory period is a condition precedent to the action which must be alleged, and not a limitation of the action only, depends upon the special facts surrounding the case. *Heimberger v. Elliott, etc. Co.*, 245 Ill. 448, 92 N. E. 297; *Wall v. Chesapeake, etc. Co.*, 200 Ill. 66, 65 N. E. 632.

Setting forth the date under a *vide licet* "on which the defendant was in the possession, management, and control of the railroad on which the decedent was killed and averring that he was struck and killed 'on the day and year aforesaid' " which date is within the statute of limitations is not sufficient as against demurrer. *Seitter v. West Jersey, etc., Co.*, 79 N. J. L. 277, 75 Atl. 435.

Manner of Alleging Commencement Within Statutory Period.—"If the summons and complaint were intended for service at the same time, plaintiff could plead the date of death, that two years therefrom had not expired, and upon the trial show the date of the service of the summons." *Pernisi v. Schmalz's Sons*, 126 N. Y. Supp. 880.

Lack of Averment as Ground for Judgment on Pleadings.—Where there is no evidence whether the summons

was served with the complaint, and the summons shows by its date that it was not issued within the required time, yet on a motion for judgment on the pleadings, since "the court can consider them only, unless the parties consent to the submission of other matter," it is not ground for granting the motion. *Pernisi v. Schmalz's Sons*, 126 N. Y. Supp. 880.

Missouri—Averring Commencement Within Six Months.—If the statute vests the right of action in the minor children, and the widow does not bring an action for wrongful death within six months, a petition by the widow must aver the commencement of the action within six months from the death. *Hamilton v. Hannibal, etc. Co.*, 39 Kan. 56, 18 Pac. 57.

Pleading Saving Clause.—Where the complaint shows non-commencement of the action within the statutory period, and it is claimed that the limitation has been suspended by the absence of defendant from the state, the question will not be decided where such saving clause is not pleaded. *Dowell v. Cox*, 108 Va. 460, 62 S. E. 272.

Petition Showing Proper Commencement Though Not So Averred.—If the petition shows the commencement of the action within the statutory period, it is sufficient though not so specifically averred. *Brother's Admr. v. Rutland R. Co.*, 71 Vt. 48, 42 Atl. 980; *Hill v. New Haven*, 37 Vt. 501, 88 Am. Dec. 613.

Alleging Date of Death Where Within Statutory Period.—A declaration stating the date of the death which was within two years before the commencement of the action, is sufficient without specifically alleging that it was within two years. *Hill v. New Haven*, 37 Vt. 501, 88 Am. Dec. 613.

17. *Spinello v. New York, etc. R. Co.*, 183 Fed. 762, 106 C. C. A. 189 (statute must be pleaded by defend-

7. Negating Contributory Negligence.—Since deceased's contributory negligence is a matter of defense, it is unnecessary that the complaint negative contributory negligence on the part of deceased,¹⁸ unless the complaint avers facts raising an inference of contributory negligence,¹⁹ except in those jurisdictions where such allegation is necessary in all actions for personal injuries.²⁰

Negating Contributory Negligence of Parent.—Nor is it necessary that the petition negative contributory negligence of the parent of the deceased child.²¹

ant, not by plaintiff); *Chiles v. Drake*, 2 Metc. (Ky.) 146, 74 Am. Dec. 406 (such statute must be specially pleaded by defendant).

18. U. S.—*Washington, etc. R. Co. v. Gladmon*, 15 Wall. 401, 21 L. ed. 114; *Elliott v. Canadian Pac. R. Co.*, 129 Fed. 163, reversed on another point, 137 Fed. 904, 70 C. C. A. 242. **Ala.** *Columbus, etc. R. Co. v. Bradford*, 86 Ala. 574, 6 So. 90. **Ga.**—*Central of Georgia R. Co. v. Brandenburg*, 129 Ga. 115, 118, 58 S. E. 658; *Georgia, etc. R. Co. v. Evans*, 87 Ga. 673, 13 S. E. 580. **Ill.**—*Bradley v. Chicago-Virden Coal Co.*, 231 Ill. 622, 83 N. E. 424 (under Mines Act). **Ind.**—*Dieckman v. Louisville, etc. R. Co.*, 46 Ind. App. 11, 91 N. E. 179, 89 N. E. 909; *Baltimore, etc. R. Co. v. Abegglen*, 41 Ind. App. 603, 84 N. E. 566 (so provided by statute unless facts are averred raising inference of such negligence). **Ky.**—*Davis v. Ohio Valley, etc. Co.*, 127 Ky. 800, 106 S. W. 843, 15 L. R. A. (N. S.) 402; *Lexington, etc. M. Co. v. Stephens*, 20 Ky. L. Rep. 696, 47 S. W. 321. **Miss.**—*Meyer v. King*, 72 Miss. 1, 16 So. 245. **Mo.**—*O'Connor v. Missouri Pac. R. Co.*, 94 Mo. 150, 7 S. W. 106, 4 Am. St. Rep. 364. **N. Y.**—*Hackford v. New York Cent. R. Co.*, 53 N. Y. 654; *Melhado v. Poughkeepsie Transp. Co.*, 27 Hun 99. **Va.** *Baltimore, etc. R. Co. v. Whittington*, 30 Gratt. 805. **W. Va.**—*Unfried v. Baltimore, etc. R. Co.*, 34 W. Va. 260, 12 S. E. 512.

Negating Administrator's Contributory Negligence.—Even where contributory negligence must be negated on the part of decedent, the complaint need not negative it on the part of the administrator who is plaintiff. *Pittsburgh, etc. R. Co. v. Burton*, 139 Ind. 357, 37 N. E. 150, 38 N. E. 594; *In-*

diana Mfg. Co. v. Millican, '87 Ind. 87.

Deceased Child Non Sui Juris. Where the contributory negligence of a child *non sui juris* is not a defense, the question cannot be submitted to the jury where there is no averment that the child was *non sui juris*. *Indianapolis, etc. R. Co. v. Autrobus* (Ind.), 71 N. E. 971.

Negating Contributory Negligence Not Ground for Striking Paragraph. Where the averments of the petition taken as a whole show the deceased was blameless in reference to the transaction causing his death, an allegation in a paragraph of the petition, separate and distinct from those in which it appeared the deceased was blameless, that he was "free from fault" even though a mere conclusion of the pleader, is not inappropriate and furnishes no reason for dismissing the cause or striking that paragraph. *Pierce v. Seaboard Air Line R. Co.*, 122 Ga. 664, 50 S. E. 468.

19. Baltimore, etc. R. Co., v. Abegglen, 41 Ind. App. 603, 84 N. E. 566.

20. Ill.—*Campe v. Chicago, etc. R. Co.*, 155 Ill. App. 539. **Ia.**—*Patterson v. Burlington, etc. R. Co.*, 38 Iowa 279. **Md.**—*State v. Baltimore, etc. R. Co.*, 24 Md. 84.

21. Bottum v. Hawks (Vt.), 79 Atl. 858, 35 L. R. A. (N. S.) 440, because such negligence is not proximate but remote only.

Negating Contributory Negligence of Father.—Where the father sues for the death of a minor son, the declaration need not allege that the father was in the exercise of ordinary care and without fault. *Georgia, etc. R. Co. v. Evans*, 87 Ga. 673, 13 S. E. 580.

8. Alleging Act, Neglect or Default Causing Death.—a. In General.—Since the cause of action consists not merely of the death itself, but also of the wrongful act, neglect or default on the part of defendant, proximately causing death, the declaration must aver such act, neglect or default causing the death of plaintiff's intestate under such circumstances as would have entitled deceased to maintain an action if death had not ensued.²² But it need not specifically al-

22. U. S.—*Rutherford v. Foster*, 125 Fed. 187, 193, 60 C. C. A. 129; *Rosney v. Erie R. Co.*, 124 Fed. 90. **Ala.**—*Whitmore v. Alabama*, etc. Co., 164 Ala. 125, 51 So. 397 (defect in ways, works or plant causing death must be specified); *Kansas City*, etc. R. Co. v. *Matthews*, 142 Ala. 298, 39 So. 207. **Ga.**—*Daly v. Stoddard*, 66 Ga. 145. **Ill.**—*Bahr v. Natl. Safe Deposit Co.*, 234 Ill. 101, 84 N. E. 717, affirming 137 Ill. App. 397; *McAndrews v. Chicago*, etc. Co., 222 Ill. 232, 236, 78 N. E. 603, 605; *Holton v. Daly*, 106 Ill. 131; *Schmalfeld v. Peoria*, etc. R. Co., 156 Ill. App. 1, 5. **Ind.**—*Chicago*, etc. Co. v. *Ginther*, 90 N. E. 911; *Coy v. Indianapolis Gas Co.*, 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535; *Louisville*, etc. R. Co. v. *Thompson*, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357; *Toledo*, etc. R. Co. v. *Lauder* (Ind. App.), 95 N. E. 319; *Commercial Club v. Hilliker*, 20 Ind. App. 239, 50 N. E. 578. **Ky.**—*Lexington v. Lewis*, 10 Bush. 677. **Mo.**—*Barron v. Missouri Lead*, etc. Co., 172 Mo. 228, 72 S. W. 534. **N. J.** *Seitter v. West Jersey*, etc. R. Co., 79 N. J. L. 277, 75 Atl. 435. **N. Y.** *Brown v. Harmon*, 21 Barb. 508. **Tenn.** *Chattanooga C. Co. v. Shamblin*, 101 Tenn. 263, 47 S. W. 496; *Railroad v. Pitt*, 91 Tenn. 86, 18 S. W. 118. **Tex.** *Williams v. Northern Texas Trac. Co.* (Tex. Civ. App.), 107 S. W. 125. **Va.** *Norfolk*, etc. R. Co. v. *Stegall's Admx.*, 105 Va. 538, 54 S. E. 19.

As to sufficiency of allegations as to negligence see the title "Negligence."

In order to recover in an action for wrongful death it is necessary to aver and prove three elements: (1) existence of a duty on the part of the defendant to protect the deceased from the injury which resulted in his death; (2) the failure of the defendant to perform such duty; (3) the death of the deceased resulting from such failure. *Schmalfeld v. Peoria*, etc. R. Co., 156 Ill. App. 1, 5.

Alleging Several Acts in One Count.

All the acts causing death may be alleged in the same count. *Fagg's Admr. v. Louisville*, etc. R. Co., 111 Ky. 30, 63 S. W. 580, 54 L. R. A. 919.

All Acts Alleged Need Not Be Proved.—All the acts alleged need not be proved so long as enough are proved to constitute a cause of action. *Long v. Doney*, 50 Ind. 385.

Proof Restricted to Specific Acts. If specific acts of negligence are alleged, plaintiff can recover, if at all, upon such acts only (*Evans v. Wabash R. Co.*, 222 Mo. 435, 121 S. W. 36; *Clouts v. Laclede Gas Co.*, 144 Mo. App. 582, 129 S. W. 238), and cannot rely upon the maxim *res ipsa loquitur* on failure to prove the alleged acts (*Potter v. Metropolitan St. R. Co.*, 142 Mo. App. 220, 126 S. W. 209).

Alleging Acts Intensified Deceased's Pain and Suffering.—Counts of a complaint in an action for wrongful death not averring that the acts or omissions charged caused the death of intestate, but that they merely aggravated or intensified deceased's pain and suffering are demurrable. *Whitmore v. Alabama*, etc. R. Co., 164 Ala. 125, 51 So. 397.

Attaching Newspaper Accounts as Exhibit.—Where the averments of the petition set out a complete statement of plaintiff's case, it is improper to attach thereto as an exhibit a newspaper account of the death. *Comitez v. Parkerson*, 50 Fed. 170.

Doing of Act Negligently and With Criminal Intent.—Charging the doing of an act causing death "negligently" and with "criminal intent" though objectionable, does not render the complaint inconsistent and contradictory so that the one allegation kills the other rendering it therefore a *felo de se*. *O'Brien v. St. Louis T. Co.*, 212 Mo. 59, 110 S. W. 705.

When General Averment as to Defect Causing Death Sufficient.—Where the precise nature of the defect causing death is peculiarly within defend-

lege that the defendant's negligence was such that, if death had not ensued, deceased would have been entitled to recover for the

ant's knowledge, a complaint pointing out "the general character of the defect correctly, as a defect in the condition of the electric lighting apparatus upon the pole" mentioned, is sufficient. A variance between the act alleged and the proof in such case is immaterial as there is no surprise and an amendment would be allowed. *Wiley v. Boston Elec. L. Co.*, 168 Mass. 40, 46 N. E. 395, 35 L. R. A. 723.

Sufficient Averment of Collision Causing Death.—A petition alleging that deceased received the injuries from which he died by a collision of defendant's trains, through the carelessness of its engineer in charge of one of them is not insufficient in its statement of facts. *Alabama, etc. R. Co. v. Waller*, 48 Ala. 459.

Insufficient Averment of Control of Train.—An averment "that defendant 'suffered and permitted the trains to be propelled across the highway without proper signals and warning' . . . does not amount to an averment that the defendant itself controlled or ran the trains." *Seitter v. West Jersey, etc. R. Co.*, 79 N. J. L. 277, 75 Atl. 435.

Insufficient Averment of Criminal Negligence as to Faulty Platform. An allegation that defendants erected and rented a building having a platform or bridge as its means of egress and ingress, that the tenants had no way of moving their furniture into the building except over such platform, that while in the employment and at the instance of the tenants the husband of the plaintiff was attempting to move an iron safe into the building the platform gave way, and that he was killed, and that this resulted from the improper and faulty construction of such platform by the landlord (the defendants) is insufficient for failure to set out acts showing death was caused by some act of defendant or was due to criminal negligence. *Daly v. Stoddard*, 66 Ga. 145.

Manner of Inflicting Injuries.—An allegation that deceased "was violently thrown from the train" sufficiently alleges the manner of the infliction of the injuries. *Kansas City, etc. R. Co. v. Matthews*, 142 Ala. 298, 39 So. 207.

Variance—Form of Averment.—There is no fatal variance where the complaint alleges that deceased "was violently thrown from the train and so greatly injured" that he died and the proof showed that he voluntarily stepped from the moving train onto the station platform, lost his footing and fell, receiving the alleged injuries. A better form of averment would be "that intestate, through the negligence of defendant's servants, was by the motion of the train, as he attempted to alight, thrown violently to the ground, and thereby so greatly injured, etc., that he died." *Kansas City, etc. R. Co. v. Matthews*, 142 Ala. 298, 39 So. 207.

Amendment as to Acts.—The specific acts of negligence may be varied or added to by amendment during the trial so as to adapt the pleadings to the evidence. *Harris v. Central R., etc. Co.*, 78 Ga. 525, 3 S. E. 355. The mode of committing the homicide may be particularly specified during the trial by amendment without adding a new cause of action. *Central R. Co. v. Kitchens*, 83 Ga. 83, 9 S. E. 827.

Varying Statement of Particulars of Act Allowable.—An amendment striking out an allegation that, "the engineer on said engine was looking not at the track in front, but towards the foreman, who was on the opposite side of the engine," and inserting an allegation that "said engineer could have seen the deceased and lumber, and did see them in time to have stopped before reaching them, but failed to do so, and failed to give any signals before reaching said lumber and the deceased," inserts no new cause of action, but only varied the statement of the particulars of which the cause of action, to wit, the homicide of plaintiff's husband, consisted. *Rome, etc. Co. v. Barnett*, 89 Ga. 718, 15 S. E. 639.

In Pennsylvania an amendment setting up a different theory of negligence, and setting up new grounds and other acts of negligence entirely different cannot be set up. *Martin v. Pittsburg R. Co.*, 227 Pa. 18, 75 Atl. 837, 26 L. R. A. (N. S.) 1221.

injuries caused by defendant's acts, neglect or default.²³

Time of Wrongful Act.—The exact time when the wrongful act causing death occurred need not be alleged.²⁴

The motive of defendant's wrongdoing causing death need not be alleged where the death was due to defendant's negligence.²⁵

Instrument Causing Death.—The petition need not allege the particular instrument causing death.²⁶

Allegations as to Servants Causing Death.—The negligent or careless acts causing death may be alleged to have been done by the corporation,²⁷ or by one of its servants.²⁸

23. Md.—Philadelphia, etc. Co. v. State, 58 Md. 372, 399. N. Y.—Gurney v. Grand Trunk R. Co., 13 N. Y. Supp. 645, 37 N. Y. St. 557, *affirmed*, 138 N. Y. 638, 34 N. E. 512, 53 N. Y. St. 929. Ohio.—Lima, etc. Co. v. Deubler, 3 Ohio Cir. Dec. 720.

Availing Survival of Action.—It is unnecessary to specifically allege that as a result of such killing a right of action had survived. Davis v. Arkansas So. R. Co., 117 La. 320, 41 So. 587.

24. Upon the trial proof of the acts subsequent to the alleged time may be introduced. Bulkley v. Norwith, etc. R. Co., 81 Conn. 284, 70 Atl. 1021, 129 Am. St. Rep. 212. See also International, etc. Co. v. Glover (Tex. Civ. App.), 88 S. W. 515, holding proof need not be confined to date alleged, as long as proof shows the action is not barred.

25. Where the proximate cause of the injury was the negligence of defendant's servants in charge of the train from which deceased was ejected, an allegation of his apparent helpless condition is merely an allegation of fact serving to put the servants on inquiry and notice of the danger of leaving him in the position where they placed him. It is not necessary to allege the cause of the helpless condition of deceased, nor is it necessary specifically to allege the motive influencing the servants in their wrongful act. Macon, etc. R. Co. v. Moore, 125 Ga. 810, 54 S. E. 700.

26. **Allegations as to Instrument.** The particular instrument striking deceased and killing her need not be alleged. A variance between the declaration and proof as to the instrument is immaterial and should be disregarded, especially where the instrument proved is of the like nature to that alleged.

Hanley v. West Virginia, etc. R. Co., 59 W. Va. 419, 53 S. E. 625.

Missile or Object Not Specified.—A petition alleging that defendant's fireman negligently and wantonly threw at plaintiff's son while crossing the tracks causing him to fall on the track in close proximity to the tracks, so that by the exercise of ordinary care he could not have avoided being run over, and that the engine was not stopped by the engineer and fireman, but was ruthlessly run by them over plaintiff's son, causing him to sustain injuries from which he died the following day, is not open to special demurrer because not alleging the missile or object thrown at deceased, or for failure to set out the facts on which plaintiff based the opinion that the fireman's so throwing at her son caused him to fall on the track. Atlantic Coast Line R. Co. v. McDonald, 135 Ga. 635, 70 S. E. 249.

27. **Alleging Negligent Act by Defendant—Servants Doing Act.**—An allegation that the company did the negligent or careless act causing the death or omitted the diligence which would have prevented it is sufficient, and equivalent to an allegation that the co-employees of the decedent were guilty of such negligence. Central R. Co. v. Crosby, 74 Ga. 737. See generally the title "Negligence."

28. Kansas City, etc. R. Co. v. Matthews, 142 Ala. 298, 39 So. 207.

Necessity for Naming Negligent Servants.—If the wrongful act was alleged to be due to the negligence of one of defendant's servants, it need not be alleged who the negligent servants were, or what their particular stations or duties were, or that they were in charge of the train. Kansas City, etc. R. Co. v. Matthews, 142 Ala.

b. *Necessity for Following Statutory Words in Characterizing Acts.*—While if the statute provides for a recovery only in cases of death resulting from wilful acts, the complaint must allege that defendant caused the injury wilfully and purposely,²⁰ yet in characterizing the wrongful acts complained of, the statutory words are not absolutely necessary, but words of like import are sufficient.³⁰

298, 39 So. 207. See also *Coleman v. Kentucky, etc. R. Co.*, 17 Ky. 1145, 33 S. W. 945.

A petition by a widow against a railroad for the homicide of her husband, an employe, setting forth the time when, the place at which, and the circumstances under which the homicide occurred, and alleging it was the result of the negligence of the officers, agents and servants of defendant, is not subject to special demurrer for failure to give the names of such officers, agents and servants. *Pierce v. Seaboard Air-Line R. Co.*, 122 Ga. 664, 50 S. E. 468.

Texas—Exemplary Damages Against Corporation.—But in Texas since a corporation is liable in exemplary damages only for "wilful acts or omissions, or gross negligence," a complaint alleging the "servants and employes of the defendant were grossly negligent and reckless in running and operating the train; in failing to give proper signals, or keep a proper lookout, etc.," but containing "no allegation showing a wilful act, omission, or gross negligence of one representing the defendant in its corporate capacity, as a corporate officer, nor are there any averments of approval or ratification of the acts of the agents of defendant, which are . . . necessary to support a claim for exemplary damages against the principal, arising out of the acts of the agent," is fatally defective. *Winnt v. International, etc. R. Co.*, 74 Tex. 32, 11 S. W. 907, 5 L. R. A. 172.

29. **U. S.**—*Cleveland, etc. R. Co. v. Tartt*, 64 Fed. 823, 12 C. C. A. 618, 24 U. S. App. 489, "gross and reckless and wanton negligence" not sufficient. **Ind.**—*Cincinnati, etc. R. Co. v. Eaton*, 53 Ind. 307, alleging infliction of injuries "recklessly and with gross negligence" insufficient. **Ky.**—*Lexington v. Lewis*, 10 Bush 677.

Wilful Neglect.—Under a statute giving a right of action for death resulting from the "wilful neglect" of an-

other, charging that death was due to "the gross and culpable negligence" of a druggist in filling a prescription is not sufficient (*Handford's Admx. v. Payne*, 11 Bush (Ky.) 380), but the fact that the term "gross" is used with the term "wilful negligence" does not vitiate the petition by stating a less degree of negligence (*Hackett v. Louisville, etc. R. Co.*, 95 Ky. 236, 24 S. W. 871; *Branson's Admr. v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193).

Variance.—Though the petition unnecessarily alleges that the act causing death was wanton or wilful, a recovery is allowed upon proof of negligence. *Guianios v. De Camp, etc. Co.*, 242 Ill. 278, 89 N. E. 1003, affirming 147 Ill. App. 243; *Claxton's Admr. v. Lexington, etc. R. Co.*, 13 Bush (Ky.) 636.

30. *Young v. Young*, 141 Ky. 76, 132 S. W. 155; *Lexington v. Lewis*, 10 Bush (Ky.) 677.

The complaint need not allege in the language of the statute that "the act, neglect or default was such that if death had not occurred the party injured would have had a right to maintain an action and recover damages in respect thereof." *Lima, etc. Co. v. Deubler*, 3 Ohio Cir. Dec. 720.

Careless, Wanton or Malicious Use of Firearms.—If a statute gives certain persons an action for death resulting from the "careless, wanton or malicious use of firearms, not in self-defense," the petition need not follow the language of the statute in characterizing the wrongful act. Allegations to the effect that the killing was unlawful and wrongful and not in apparently necessary self-defense are sufficient. *Young v. Young*, 141 Ky. 76, 132 S. W. 155.

Wanton Negligence.—Under a statute giving an action for death resulting from "wanton negligence" charging that the wrongful acts were "negligently, carelessly and wilfully done" is insufficient. *Southern R. Co. v. Bush*, 122 Ala. 470, 26 So. 168; *Louis-*

c. Necessity for Describing Injuries Causing Death.—Since the damnifying act is the death, beyond showing the causal connection between the wrong and the death, a description of the injuries causing death is unnecessary.³¹

ville & N. R. Co. v. Anchors, 114 Ala. 492, 22 So. 279.

Gross Negligence.—If the statute allows a recovery for death resulting from gross negligence, it is essential to allege that death resulted from gross negligence (*Hicks v. New York*, etc. R. Co., 164 Mass. 424, 41 N. E. 721, 49 Am. St. Rep. 471), but facts showing gross negligence should be alleged. It is not sufficient to aver gross negligence (*Kuehne Preserving Co. v. Allen*, 148 Fed. 666, 78 C. C. A. 418). An allegation that the wrongful acts were negligently and carelessly and willfully done does not charge gross negligence as such allegation is repugnant and that construction most unfavorable to its pleader must be adopted (*Southern R. Co. v. Bush*, 122 Ala. 470, 26 So. 168).

Wanton Acts Charged—Acts Charged Negating Wanton Acts.—A petition alleging a negligent, careless and wanton killing is fatally defective where the specific allegations of the acts distinctly negative any idea of gross or wanton negligence. *Seaboard Air Line R. Co. v. Shigg*, 117 Ga. 454, 43 S. E. 706. The South Carolina statute under which suit was brought required the killing must be due to wanton negligence.

31. *Kansas City*, etc. R. Co. *v. Matthews*, 142 Ala. 298, 39 So. 207, 211; *St. Louis*, etc. R. Co. *v. Sizemore*, 53 Tex. Civ. App. 491, 116 S. W. 403; *Dallas Consol.*, etc. Co. *v. Lytle*, 48 Tex. Civ. App. 107, 106 S. W. 900.

The usual form of averment in this class of cases is that "the intestate was thereby so injured that he died," and the fact that death did not ensue immediately upon the injury being inflicted can have no bearing to require a further description of the injuries. *Kansas City*, etc. R. Co. *v. Matthews*, 142 Ala. 298, 39 So. 207, 211.

Sufficient Averment of Injuries Causing Death.—Allegations that "deceased" then and there received certain bruises, wounds, and contusions, and certain internal injuries, whereby he became immediately so sick, lame,

and disordered as to be unable to help himself, and was so greatly injured that it then and there became necessary for him to be carried to his home, and . . . as the immediate result of the said injuries, continued to be so sick and ill that within a short time thereafter, to wit, in one week, he died," sufficiently avers the injuries as against objection for the first time at the trial. *Storrs v. Grand Rapids*, 110 Mich. 483, 68 N. W. 258.

Specifying Particular Injury Causing Death.—Averment that "such injuries so inflicted consisted chiefly of severe bruises on her left knee, causing inflammation of the joint; both hands bruised and lacerated and torn; her left lung was seriously injured, causing traumatic pneumonia; left foot and ankle seriously sprained, mashed and bruised; displacement and serious injury to her womb; a severe blow on her head, producing concussion of the brain; and a severe blow on the right side of the head and neck, which produced an aneurism of the right carotid artery; her face, head, and forehead were bruised and lacerated; severe nervous shock and serious injuries to all parts of her body, both external and internal—which injuries so inflicted as aforesaid caused the death of the said A. L. as aforesaid" is sufficiently specific as to the injuries causing death. It is not open to the objection of being too general or that it fails to specify which of said injuries caused death, nor that it fails to specify how, when or wherein such injuries caused her death. *Dallas Consol. El. Co. v. Lytle*, 48 Tex. Civ. App. 107, 106 S. W. 900, writ of error refused.

Describing Injuries in Statutory Notice.—Where the notice of the nature of the injury must be given, the "nature" of the injury is sufficiently specified "if it gives a general description which will reasonably apprise the defendants of its general character." *Budd v. Meriden Elec. R. Co.*, 69 Conn. 272, 285, 37 Atl. 683.

General allegations as to internal in-

9. Averments as to Time, Place and Cause of Death.—The petition must show that death proximately resulted from the unlawful act, neglect or default of defendant.³²

Immediate Death.—Under statutes giving a right of action only where deceased died immediately, the petition should contain a specific averment of such immediate death.³³

The place of death in an action for wrongful death under the domestic statute need not be alleged to have been in the state.³⁴

10. Averments as to Suffering by Deceased.—An allegation of suffering on the part of deceased is unnecessary and improper where death is alleged to have been instantaneous, since suffering of deceased is not an element of damages.³⁵

11. Alleging Loss or Damage.—a. *Necessity for Alleging Pecuniary Loss.*—Under statutes restricting the recovery of the beneficiaries to the pecuniary injury suffered, and in those jurisdictions where such construction has been placed upon the statute, the com-

juries though not showing the "character, kind and extent" of the internal injuries stated, are "sufficient to apprise the defendant as to the cause from which death resulted." *St. Louis, etc. R. Co. v. Sizemore*, 53 Tex. Civ. App. 491, 116 S. W. 403, 407.

32. Schmalfeld v. Peoria, etc. R. Co., 156 Ill. App. 1. See *supra*, VIII, A, 8.

Sufficient Averment of Death From Injuries.—An averment that "intestate was so greatly injured, bruised, hurt, and shocked by the injury he sustained from being violently thrown from the train that he never recovered from such injury, but soon thereafter died on account of it," sufficiently avers that he died from the injuries sustained. *Kansas City, etc. R. Co. v. Matthews*, 142 Ala. 298, 39 So. 207, 211.

Misnomer of the deceased is a fatal defect (*Cleveland, etc. R. Co. v. Pierce*, 34 Ind. App. 188, 72 N. E. 604) and may be raised by general demurrer (*Coney Island Co. v. Mitsch*, 3 Ohio N. P. (N. S.) 81).

33. Me.—Carrigan v. Stillwell, 97 Me. 247, 54 Atl. 389, 61 L. R. A. 163; *Conley v. Portland G. Co.*, 96 Me. 281, 52 Atl. 656 (averments that he "died within twenty minutes" and it not appearing whether he became unconscious from his injuries or endured conscious suffering while he survived are insufficient; *Sawyer v. Perry*, 88 Me. 42, 33 Atl. 660. **Mass.**—*Herlihy v. Little*, 200 Mass. 284, 86 N. E. 294, Rev. Laws, 1902, ch. 106, §73. **Miss.**

Beekman v. Georgia Pac. R. Co. (Miss.), 12 So. 956.

Instantaneous Death as Defeating Action.—Where the statute gives a right of action to the personal representative, "in the same manner deceased might have sued had death not ensued," a petition alleging that death was instantaneous is fatally defective, as no cause of action accrued to the deceased. *Belding v. Black Hills, etc. Co.*, 3 S. D. 369, 53 N. W. 750.

An averment of immediate death in the exact terms of the statute is unnecessary, if it necessarily appears that the death of deceased was immediate. An allegation that deceased by reason of the failure of defendant to provide and maintain suitable fire escapes upon his building "was then and there burned to death and consumed by said fire, and then and thereby lost her life" is sufficient. *Carrigan v. Stillwell*, 97 Me. 247, 54 Atl. 389, 61 L. R. A. 163.

Surplusage.—An averment of instantaneous death does not affect the complaint where deceased may recover, whether the death was instantaneous or not. *Roach v. Imperial Min. Co.*, 7 Fed. 698.

34. Lawton v. Maratta, 2 Cin. Rep. (Ohio) 82 (it is sufficient if the evidence shows this fact); *Hobbs v. Memphis, etc. Co.*, 12 Heisk. (Tenn.) 526.

35. Davis v. Arkansas, etc. R. Co., 117 La. 320, 41 So. 587. See also *O'Donnell v. North Attleborough* (Mass.), 98 N. E. 1084, 1086.

plaint must aver facts showing actual pecuniary loss resulting from the death to the beneficiaries named in the statute.³⁶ But in those

36. **U. S.**—*Western Union T. Co. v. McGill*, 57 Fed. 699, 6 C. C. A. 521, 21 L. R. A. 818; *Roach v. Imperial Min. Co.*, 7 Fed. 698. **Ala.**—*Louisville R. Co. v. Orr*, 8 So. 363. **D. C.**—District of Columbia *v. Wilcox*, 4 App. Cas. 90. **Mich.**—*Rouse v. Detroit El. R. Co.*, 128 Mich. 149, 87 N. W. 63; *Charlebois v. Gogebic, etc. Co.*, 91 Mich. 59, 51 N. W. 812 (general allegation sufficient); *Hurst v. Detroit City R. Co.*, 84 Mich. 539, 43 N. W. 44. **Neb.**—*Greenwood v. King*, 82 Neb. 17, 116 N. W. 1128; *Tucker v. Draper*, 62 Neb. 66, 86 N. W. 917, 54 L. R. A. 321; *Orgall v. Chicago Burlington, etc. R. Co.*, 46 Neb. 4, 64 N. W. 450; *Kearney El. Co. v. Laughlin*, 45 Neb. 390, 395, 63 N. W. 941 (alleging beneficiaries were wholly dependent upon deceased for support and maintenance sufficient). **Tex.**—*San Antonio, etc. Co. v. Long*, 87 Tex. 148, 27 S. W. 113, 47 Am. St. Rep. 87, 24 L. R. A. 637; *Winnt v. International, etc. R. Co.*, 74 Tex. 32, 11 S. W. 907, 5 L. R. A. 172 (injuries to adult son). **Wis.**—*Leussen v. Oshkosh El. L., etc. Co.*, 109 Wis. 94, 85 N. W. 124; *Regan v. Chicago, etc. R. Co.*, 51 Wis. 599, 8 N. W. 292 (facts showing present or prospective pecuniary loss should be averred).

Words Damage and Loss Unnecessary.—"It is not absolutely necessary . . . that the petition should contain the words, 'damage, injury, or loss.' It is sufficient, in that respect, if it appears from the petition that by reason of the death of intestate a pecuniary loss has resulted to the wife and next of kin." *Kearney El. Co. v. Laughlin*, 45 Neb. 390, 395, 63 N. W. 941.

Reasonable Ground for Expectancy of Financial Aid.—A complaint alleging "plaintiff would show to the court that he is a poor man, and has a large family of children, and that his said son was a bright, active, industrious, and energetic boy, and a faithful and dutiful son, and that he was deeply interested in plaintiff's welfare and in the welfare of the family, and that had he not died he would have continued for many years to contribute out of his earnings to the sup-

port of plaintiff and his mother; that his said son at the time of his injury and death was earning a salary of \$35 per month, all of which he was contributing, and would have continued to contribute, to their support, at least for the rest of his minority, and that his salary and earning capacity would have increased as he got older, and that plaintiff and his wife had a reasonable expectation of receiving contributions from his said son for many years after he reached his majority," is not subject to an exceptions that allegations of the poverty of the plaintiff and the size of his family are immaterial and improper, nor that they fail to show reasonable ground for the expectancy of financial aid from deceased on the part of plaintiff. *St. Louis, etc. R. Co. v. Langston* (Tex. Civ. App.), 125 S. W. 334, writ of error refused.

Sufficient Averments of Pecuniary Loss.—An allegation that the deceased child was capable of earning \$3 per week and that plaintiff, the parents, suffered damage to the amount of \$10,000 is sufficient (*Kansas City v. Siese*, 71 Kan. 283, 80 Pac. 626); but though damage is not specifically alleged, when plaintiff alleges that the defendant owed her \$10,000 for the reasons thereafter stated, and prays judgment against defendant for that amount, he substantially and practically alleges that he suffered damage to that amount (*Davis v. Arkansas, etc. Co.*, 117 La. 320, 41 So. 587).

Alleging Loss of Services and Earnings.—A petition alleging that plaintiffs have lost deceased's "services and earnings" and alleging his death, his character, his relation to the plaintiffs, and their ages, concluding "with the averment that 'by reason of the premises' plaintiffs have been damaged in the sum of \$40,000" is sufficient for the recovery of all damages legally recoverable, and includes "such as the law allows for the loss of the assistance, care, and nurture of husband and father." *Houston, etc. R. Co. v. Davenport*, 102 Tex. 369, 117 S. W. 790.

Relation of Father and Son.—In an action by the father for the death of

jurisdictions where pecuniary damages to the beneficiaries are necessarily implied and nominal damages may be recovered, it is not necessary to allege actual pecuniary damage to the beneficiaries,³⁷ especially where the beneficiaries are close relations to the deceased, as widow and children, as damage to them will be presumed. In such case it will be sufficient to allege the survival of such persons.³⁸ But

his seventeen-year-old son, allegations that the deceased was in good health, unmarried and capable of earning considerable money, implied damage. *Luesen v. Oshkosh, etc. Co.*, 109 Wis. 94, 85 N. W. 124.

Alleging Receipt of Previous Pecuniary Benefits.—It is not necessary for plaintiffs to allege that they had theretofore received pecuniary benefits from deceased, since they could recover if they had been likely to receive benefits from his existence. *Louisville, etc. Co. v. Summers*, 125 Fed. 719, 60 C. C. A. 487.

Alleging Child Lived at Home.—A complaint in an action for the death of a child need not allege the child lived at home, but is sufficient if it alleges that the child was capable of earning a specified sum per week and alleges damage to a certain amount. *Kansas City v. Siese*, 71 Kan. 283, '80 Pac. 626.

37. U. S.—*Thompson v. Chicago, etc. Co.*, 104 Fed. 845; *Serensen v. Northern Pac. R. Co.*, 45 Fed. 407 (Montana statute); *Barron v. Illinois Cent. R. Co.*, 1 Biss. 412, 2 Fed. Cas. No. 1,052 (Illinois statute). **Ill.** *Rhoads v. Chicago, etc. R. Co.*, 227 Ill. 328, 81 N. E. 371. **Ind.**—*Cleveland, etc. R. Co. v. Starks*, 174 Ind. 345, 92 N. E. 54; *Pennsylvania Co. v. Coyer*, 163 Ind. 631, 72 N. E. 875; *Chicago, etc. R. Co. v. Thomas*, 155 Ind. 634, 58 N. E. 1040; *Korraday v. Lake Shore, etc. R. Co.*, 131 Ind. 261, 29 N. E. 1069. **Kan.**—*Atchison, etc. R. Co. v. Weber*, 33 Kan. 543, 6 Pac. 877, 52 Am. Rep. 543; *Erb v. Morasch*, 8 Kan. App. 61, 54 Pac. 323. **Minn.**—*Johnson v. St. Paul, etc. R. Co.*, 31 Minn. 283, 17 N. W. 622; *Barnum v. Chicago, etc. R. Co.*, 30 Minn. 461, 16 N. W. 364. **N. Y.**—*Keller v. New York Cent. R. Co.*, 24 How. Pr. 172; *Yertore v. Wiswall*, 16 How. Pr. 8; *Kenney v. New York Cent. R. Co.*, 49 Hun 535, 2 N. Y. Supp. 512. **N. D.**—*Haug v. Great Northern R. Co.*, 8 N. D. 23, 77 N. W. 97, 73 Am. St. Rep. 727, 42 L. R. A.

364. **Ohio.**—*Lyon's Admr. v. Cleveland, etc. R. Co.*, 7 Ohio St. 336, 70 Am. Dec. 75; *Jackson Knife, etc. Co. v. Hathaway*, 7 Ohio C. C. (N. S.) 242. **Wash.**—*Atrops v. Costello*, 8 Wash. 149, 35 Pac. 620. **Eng.**—*Chapman v. Rothwell, El. Bl. & El.* 168, 96 E. C. L. 168, 4 Jur. N. S. 1180.

In **New York** actual damages need not be alleged, as, the right being statutory, the law implies nominal damages. *Pizzi v. Reid*, 72 App. Div. 162, 76 N. Y. Supp. 306; *Kenney v. New York Cent. R. Co.*, 49 Hun 535, 2 N. Y. Supp. 512, 18 N. Y. St. 441, *distinguishing* *Parkhurst v. Wolf*, 15 Jones & S. 320.

38. U. S.—*Peden v. American Bridge Co.*, 120 Fed. 523, Illinois case. Averment of damage to plaintiff as administrator sufficient. **Ind.**—*Cleveland, etc. R. Co. v. Starks*, 174 Ind. 345, 92 N. E. 542, *reversing* 89 N. E. 602; *Korraday v. Lake Shore, etc. R. Co.*, 131 Ind. 261, 29 N. E. 1069. See also *Pennsylvania Co. v. Coyer*, 163 Ind. 631, 72 N. E. 875; *Chicago, etc. R. Co. v. Thomas*, 155 Ind. 634, 58 N. E. 1040; *Salem, etc. Co. v. Hobbs*, 11 Ind. App. 27, 38 N. E. 538. **Minn.**—*Johnson v. St. Paul, etc. R. Co.*, 31 Minn. 283, 17 N. W. 622; *Barnum v. Chicago, etc. R. Co.*, 30 Minn. 461, 16 N. W. 364. **Neb.**—*Omaha, etc. Co. v. Crow*, 54 Neb. 747, 74 N. W. 1066, 69 Am. St. Rep. 741; *Friend v. Burleigh*, 53 Neb. 674, 74 N. W. 50. **Vt.**—*Westcott v. Central Vt. R. Co.*, 61 Vt. 438, 17 Atl. 745, alleging existence of widow and next of kin alleges damage.

Actual Damage to Parents and Sisters Need Not Be Alleged.—A petition alleging the existence of father and mother, a brother and sister, but not averring damage to them is sufficient as damage to the next of kin will be presumed. *Jackson, etc. Co. v. Hathaway*, 7 Ohio C. C. (N. S.) 242.

Relation of Mother and Son.—A pecuniary loss is presumed from relation of mother and son and need not be alleged. *Nordhaus v. Vandalia R.*

in the case of collaterals or others not legally dependent upon the deceased for support, at least where they are not heirs at law, facts must be pleaded showing an actual pecuniary interest in deceased's life, in other words, special damages must be alleged in order to recover substantial damages.³⁹

b. *Manner of Pleading Damages.*—(I.) *In General.*—Though it is necessary to allege damages on the part of the beneficiaries, the various elements of damages suffered need not be specially pleaded, a general allegation of damage to the beneficiaries named in the statute being usually held sufficient,⁴⁰ unless special damages are also

Co., 147 Ill. App. 274, *affirmed*, 242 Ill. 166, 89 N. E. 974.

Availing Father's Control Over Child.—In an action by the father of an infant who had been living with the grandfather, the petition is not demurrable for failure to allege that the father had the care, control and custody of the child. *Elwood, etc. R. Co. v. Ross*, 26 Ind. App. 258, 58 N. E. 535.

Texas—Adult Children.—While in the case of a minor child, damage will be presumed from its wrongful death to its parents, where the deceased child is above the age of twenty-one, damage is not presumed, and it must appear by appropriate averments that the deceased child supported or contributed to the support of the parent, or that there was some expectation of benefit of a pecuniary character to be derived by the plaintiff from the services of his son. *Winnt v. International, etc. R. Co.*, 74 Tex. 32, 11 S. W. 907.

39. **U. S.**—*Thompson v. Chicago, etc. Co.*, 104 Fed. 845, Nebraska statute. **Cal.**—*Burke v. Arcata, etc. Co.*, 125 Cal. 364, 57 Pac. 1065. **Ill.**—*United Breweries Co. v. O'Donnell*, 221 Ill. 334, 77 N. E. 547; *Chicago, etc. R. Co. v. Beaver*, 199 Ill. 34, 65 N. E. 144; *North Chicago, etc. Co. v. Brodie*, 156 Ill. 317, 40 N. E. 942; *Holton v. Daly*, 106 Ill. 131; *St. Luke's Hospital v. Foster*, 86 Ill. App. 282, *affirmed*, 191 Ill. 94, 60 N. E. 803. **Neb.**—*Chicago, etc. R. Co. v. Young*, 58 Neb. 678, 79 N. W. 556; *Chicago, etc. R. Co. v. Bond*, 58 Neb. 385, 78 N. W. 710; *Chicago, etc. R. Co. v. Van Buskirk*, 58 Neb. 252, 78 N. W. 514. **Tex.**—*Winnt v. International, etc. R. Co.*, 74 Tex. 32, 11 S. W. 907, 5 L. R. A. 172, death of adult son—an allegation that plaintiff

is the sole surviving parent is not sufficient.

Loss of Legal Services as Pecuniary Loss.—Next of kin (brothers and sisters) making "no proof entitling them to recover, except heirship, and except the proof as to gratuitous legal services by deceased," and this proof of legal services being vague, indefinite and uncertain, fail to show pecuniary loss and entitles them to nominal damages only. *Rhoads v. Chicago, etc. R. Co.*, 227 Ill. 328, 81 N. E. 371.

A petition alleging a contract by deceased to support the "next of kin" is not demurrable for failure to allege that deceased's estate was not sufficient for that purpose. *Union Pac. R. Co. v. Roeser*, 69 Neb. 62, 95 N. W. 68.

Loss of Support.—Where it is pleaded that the "next of kin" sustains such a relationship to the deceased that the law imposes upon him a duty to support them, and that practical ability existed to enable him to perform the duty, a pecuniary interest is pleaded. The allegations of good health, that he was engaged in business and that he left a widow and children are sufficient. *Friend v. Burleigh*, 53 Neb. 674, 74 N. W. 50.

40. **U. S.**—*Peden v. American Bridge Co.*, 120 Fed. 523; *Barron v. Illinois Cent. R. Co.*, 1 Biss. 412, 2 Fed. Cas. No. 1,052. **Cal.**—*Peters v. Southern Pac. Co.*, 160 Cal. 48, 116 Pac. 400 (need not allege loss of future wages); *Bond v. United R. Co.*, 159 Cal. 270, 113 Pac. 366 (loss of society, comfort, protection or services need not be specially alleged). **Colo.**—*Orman v. Mannix*, 17 Colo. 564, 30 Pac. 1037, 31 Am. St. Rep. 340, 17 L. R. A. 602. **Del.**—*Wilcox v. Wilmington City R. Co.*, 2 Penne. 157, 44 Atl. 686 (need not allege wife received money inde-

pendent of her husband). **D. C.**—District of Columbia *v. Wilcox*, 4 App. Cas. 90. **Fla.**—Seaboard Air-Line R. Co. *v. Moseley*, 60 Fla. 186, 53 So. 718. **Ill.**—Chicago *v. Schlotten*, 75 Ill. 468; Chicago, etc. R. Co. *v. Swett*, 45 Ill. 197, 92 Am. Dec. 206. **Ind.**—Cleveland, etc. R. Co. *v. Henry*, 170 Ind. 94, 83 N. E. 710; Louisville, etc. R. Co. *v. Buck*, 116 Ind. 566, 19 N. E. 453, 9 Am. St. Rep. 883, 2 L. R. A. 520 (widow and child surviving); Cleveland, etc. Co. *v. Starks* (Ind. App.), 89 N. E. 602. **Kan.**—Atchison, etc. R. Co. *v. Weber*, 33 Kan. 543, 6 Pac. 877, 52 Am. Rep. 543; *Erb v. Morasch*, 8 Kan. App. 61, 54 Pac. 323. **Minn.**—Johnson *v. St. Paul*, etc. R. Co., 31 Minn. 283, 17 N. W. 622; *Barnum v. Chicago*, etc. R. Co., 30 Minn. 461, 16 N. W. 364. **Mo.**—Nagel *v. Missouri Pac. R. Co.*, 75 Mo. 653, 42 Am. Rep. 418. **N. Y.**—Ihl *v. Forty Second St. R. Co.*, 47 N. Y. 317, 7 Am. Rep. 450. **N. D.**—Haug *v. Great Northern R. Co.*, 8 N. D. 23, 77 N. W. 97, 73 Am. St. Rep. 727, 42 L. R. A. 664. **Ohio.**—Lyon's Admr's *v. Cleveland*, etc. Co., 7 Ohio St. 336, 70 Am. Dec. 75. **Tex.**—International, etc. Co. *v. Knight*, 91 Tex. 660, 45 S. W. 556, reversing 45 S. W. 167, may prove value of son's services, though value not alleged. **Va.**—Norfolk, etc. Co. *v. Stevens*, 97 Va. 631, 34 S. E. 525, 46 L. R. A. 367 (special damages recoverable due to physical condition of beneficiary recoverable thereunder. **Eng.**—Chapman *v. Rothwell*, El. Bl. & El. 168, 96 E. C. L. 168.

Where the statute specifies the elements of damages, the petition need not set them forth. *Seaboard*, etc. R. Co. *v. Moseley*, 60 Fla. 186, 53 So. 718.

All Facts Affecting Damage Need Not Be Alleged.—Every fact which tends to affect the amount of damages to which plaintiff is entitled need not be alleged. It is not necessary to set forth the residence of the beneficiary, the extent of his dependence or his age. An allegation that intestate left widow, next of kin, etc., as required by the statute, and that they were living at the commencement of the suit is sufficient. *Westcott v. Central Vermont R. Co.*, 61 Vt. 438, 17 Atl. 745.

Sufficient Averment of Pecuniary Loss.—While the petition must show a pecuniary injury to the widow and

next of kin, an allegation that "by reason of the death of the said Harry Draper, the plaintiff has been damaged by reason of the loss of the service and society and fellowship of the said Harry Draper in the sum of \$5000" is good as against a general demurrer. *Tucker v. Draper*, 62 Neb. 166, 86 N. W. 917, 54 L. R. A. 321.

Damage to Administrator Averred. Where the administrator sues for the benefit of certain named beneficiaries, an allegation that plaintiff, "as administrator of the estate of W, 'hath sustained damage,' etc." is not objectionable as it follows approved forms (1 *Estee Pl.* §1841) and must be construed as having precisely the same meaning as if the words "hath sustained damage" had been left out, and in lieu thereof the words, "brings this action to recover from defendant \$40,000 damages for the death of the deceased." *Peers v. Nevada*, etc. Co., 119 Fed. 400, 404.

Averring Damage to Administrator. A complaint alleging the appointment of plaintiff as administrator and the names of the children of intestate, will be considered as brought by plaintiff as administrator, though he alleges "he is damaged." *Clove v. McIntire*, 120 Ind. 262, 22 N. E. 128.

Damage to Beneficiaries Averred—Action for Estate.—But where the recovery was for the benefit of the estate, an allegation of damage to the widow and children of deceased and not to the estate, is insufficient. *Belding v. Black Hills*, etc. Co., 3 S. D. 369, 53 N. W. 750.

Damage to Estate Instead of Beneficiaries Charged.—Where the complaint sufficiently states a cause of action under the statute, the addition of the statement that by reason of decedent's death "his estate was damaged" in a certain sum does not make it an action for recovery of damages for the benefit of the estate. *Lounsbury v. Davis*, 124 Wis. 432, 102 N. W. 941.

Alleging Recovery for Benefit of Persons Not Named in Statute.—An allegation that defendant became liable to plaintiff as administrator of F, "for the benefit of his parents," where the statute did not provide to whom the recovery should go, is not a fatal departure from the statute as the allegation "for the benefit of his parents"

claimed by complainant as part of his recovery.⁴¹

Punitive Damages.—The rules of pleading and evidence in respect of a demand for exemplary damages, where allowed, that apply in case the injured person survives and sues, likewise apply in an action for wrongful death under the statute. Exemplary damages need not be demanded in the complaint by name; it is sufficient to make out a case by the pleadings and proof upon the trial which, under the law, will entitle plaintiff to exemplary damages.⁴²

(II.) **Alleging Loss of Services.**—A declaration by a parent to recover for the death of a minor child should also allege a pecuniary loss to plaintiff of the child's services where the only right of action given a parent for the killing of a minor child is for the loss of services of such child.⁴³

is mere surplusage. *Free v. Southern R. Co.*, 78 S. C. 57, 58 S. E. 952.

41. Loss of Business.—In the absence of any special averment, no recovery could be had for any injury to the business of deceased, and the recovery could only be for the general value of the life of the individual, growing out of the situation of those who were dependent on him. *McClardy v. Chandler*, 3 Ohio Dec. (Reprint) 1.

Wife's Services of Peculiar Value. If "the services of the wife for which recovery is sought were valuable to the husband in some peculiar way, or the services were of a character peculiar to the husband, and not such as is usually performed by a wife, they should be averred and proven." *Gulf, etc. R. Co. v. Younger* (Tex. Civ. App.), 40 S. W. 423.

Funeral expenses as an element of damages are not recoverable when allowed by statute, when not alleged. *Cal.*—*Gay v. Winter*, 34 Cal. 153. *Del.* *Baldwin v. People's R. Co.*, 7 Del. 81, 76 Atl. 1088, *affirming*, 72 Atl. 979. *Minn.*—*Sykora v. Case Threshing, etc. Co.*, 59 Minn. 130, 60 N. W. 1008, amount must be alleged.

See also *James v. Central of Ga. R. Co.* (Ga.), 75 S. E. 431, holding a demurrer to the petition would be sustained unless complainant amended his petition setting out in detail the expenses incurred.

Medical expenses need not be alleged to be reasonable in order to recover for same. *International, etc. Co. v. Boykin*, 32 Tex. Civ. App. 72, 74 S. W. 93. See also *Roeder v. Ormsby*, 22 How. Pr. (N. Y.) 270.

42. Kuehne, etc. Co. v. Allen, 148 Fed. 666, 78 C. C. A. 418; *Peers v. Nevada Power, etc. Co.*, 119 Fed. 400, 403. But see *Gilfillan v. McCrillies*, 84 Mo. App. 576, and *Campbell v. Houston, etc. R. Co.*, 2 Tex. Unrep. Cas. 473, holding that punitive damages must be specially pleaded in order to recover same.

The true practice when both actual and exemplary damages are sought for death by wrongful act is that they should be claimed by proper allegations, in the nature of two distinct counts on different causes of action, with averments respectively appropriate to each remedy, these being essentially different in the facts necessary to be alleged and proven. *Galveston, etc. R. Co. v. Le Gierse*, 51 Tex. 189.

43. Ga.—*Perry v. Georgia R. & B. Co.*, 85 Ga. 193, 11 S. E. 605, averment that plaintiff sues for financial value of the life of her said son is not sufficient. *Ind.*—*Pennsylvania Co. v. Lilly*, 73 Ind. 252. *Mich.*—*Hurst v. Detroit, etc. R. Co.*, 84 Mich. 539, 43 N. W. 44. *Mo.*—*Hennesey v. Bavarian Brg. Co.*, 63 Mo. App. 111, allegation that plaintiff was sole surviving parent of deceased child is insufficient.

Contra, *Morgan v. Southern Pac. Co.*, 95 Cal. 510, 30 Pac. 603, 29 Am. St. Rep. 143, 17 L. R. A. 71.

Sufficient Allegation of Loss of Services.—In *Luessen v. Oshkosh El. L. Co.*, 109 Wis. 94, 85 N. W. 124, it was held that allegations that deceased was seventeen years old, intelligent, in good health and capable of earning considerable money, and that he left a father surviving, were sufficient.

Loss of Services by Adopting Par-

(III.) **Alleging Dependence Upon Deceased.**—The petition in an action for wrongful death need not allege the dependence of the beneficiaries upon deceased for support,⁴⁴ unless a statute specifically makes dependence a prerequisite to a recovery for wrongful death.⁴⁵

ent.—Where the mother can sue only in case of the death, desertion or imprisonment of the father, the foster mother must allege the ownership of the child's services, his adoption, and emancipation from his natural parents. *Citizens, etc. R. Co. v. Willoeby*, 15 Ind. App. 312, 43 N. E. 1058.

Cannot Be Cured by Amendment.—If it fails to so allege it is not maintainable and is not amendable, as no cause of action is set out. So held where the declaration merely alleged that the minor child of plaintiff had been killed by the carelessness and negligence of the agents of a railroad company whereby the plaintiff was damaged. *Bell v. Central R.*, 73 Ga. 520.

Loss of Future Services Not Alleged. A petition alleging that plaintiff had suffered great mental pain and anguish from the child's death, that he had been deprived of the happiness and comfort of his child's society, and had thereby suffered great damage sets forth an action for damages accruing for loss of services up to commencement of action, but not for loss of future services. *Pennsylvania Co. v. Lilly*, 73 Ind. 252.

That the father would have been entitled to the services of a deceased minor child—had she lived, need not be alleged in an action by the father for the death of his infant child as the law would imply that. *Elwood Elec., etc. Co. v. Ross*, 26 Ind. App. 258, 58 N. E. 535.

Amendment as to Value of Services. A declaration in an action brought by the father to recover "for the services" during minority of a minor child negligently killed by defendant, alleging that "as she advanced in years her services would have become of great value to him," though not distinctly averring that at the time of the killing the child was capable of rendering services of any value, is amendable by alleging that the child was old enough to render, and did render, certain specified services, and that the same were, at the time of her

death, of a stated value per month. *Sugarman v. Atlantic Cons. R. Co.*, 94 Ga. 604, 21 S. E. 581.

The legitimacy of the deceased child need not be alleged as this is a matter of defense. *Louisiana, etc. R. Co. v. Thomas*, 87 Miss. 600, 40 So. 257.

44. *Brennan v. Gibson Consol., etc. Co.*, 44 Fed. 795; *Pittsburg, etc. R. Co. v. Brown (Ind.)*, 97 N. E. 145.

45. *Augusta, etc. R. Co. v. Glover*, 92 Ga. 132, 18 S. E. 406; *Allen v. Atlanta, etc. R. Co.*, 54 Ga. 503; *Bell v. Wooten*, 53 Ga. 684.

A general allegation of dependence upon deceased is sufficient without alleging in what way plaintiff was dependent upon deceased, or that he had ever worked or earned money. *Atlantic, etc. R. Co. v. McDonald*, 135 Ga. 635, 10 S. E. 249; *Augusta R. Co. v. Glover*, 92 Ga. 132, 142, 18 S. E. 406.

Necessity for Alleging Means of Livelihood.—Allegations that plaintiff was dependent on decedent for support, and that he contributed to her support and alleging in a separate paragraph that he contributed to plaintiff's support from 25 to 50 cents a day from his earnings, were not defective because not alleging how, or by what business or work decedent earned the money with which he so contributed to plaintiff's support. *Atlantic Coast Line R. Co. v. McDonald*, 135 Ga. 635, 70 S. E. 249.

Amendment.—Where it is essential to recovery by the mother for the death of her son that she be dependent on the son for support, a failure to so allege may be cured by amendment. *Ellison v. Georgia R. Co.*, 87 Ga. 691, 13 S. E. 809.

Dependence of Family Instead of Plaintiffs Alleged.—Where it is necessary to sustain a suit by the father that he be dependent or received support from the minor child who was killed, an allegation that petitioner had been and is unable to earn a support for his family without the assistance of his deceased child may be amended by striking out the words

12. Actions for Penalties.—Under a statute providing for a statutory penalty of a specified amount, a complaint failing to sue for the full amount of the penalty is fatally defective.⁴⁶

13. Joinder of Causes.—a. *In General.*—Unless authorized by statute⁴⁷ an action for damages on account of death cannot be joined with an action for the conscious suffering of deceased from the injuries.⁴⁸ In many jurisdictions, however, such joinder is held proper though there is no statute authorizing it.⁴⁹

"his family" and inserting the word "himself." *Central of Georgia R. Co. v. Henson*, 121 Ga. 462, 49 S. E. 278.

Under the Code of Washington the "dependence" of the parents of deceased upon him for support is a condition precedent to the action. *Kanton v. Kelly* (Wash.), 118 Pac. 890; *Bortle v. Northern Pac. R. Co.*, 60 Wash. 552, 111 Pac. 788.

46. *Casey v. St. Louis, etc. Transit Co.*, 205 Mo. 721, 103 S. W. 1146, *reversing* 116 Mo. App. 235, 91 S. W. 419 on another point (statute provided for a penalty of \$5000 for death resulting from the negligence of a servant operating any locomotive, train of cars, steamboat, its machinery, stage, coach or other public conveyance); *Gormley v. St. Louis T. Co.*, 126 Mo. App. 405, 103 S. W. 1147; *Casey v. St. Louis, etc. Co.*, 116 Mo. App. 235, 91 S. W. 419. But see *contra* *Marsh v. Kansas City, etc. R. Co.*, 104 Mo. App. 577, 78 S. W. 284, *disapproved* on this point in *Casey v. St. Louis, etc. Co.*, *supra*.

Surplusage.—Where the petition shows it was framed under a statute providing for a statutory penalty of \$5000 for wrongful death, the "fact that plaintiff in her prayer alleges her damages of \$5000 resulted from loss of the care, maintenance and support of her husband" does not render the petition bad after verdict, as these words may be rejected as surplusage. *McKenzie v. United R. Co.*, 216 Mo. 1, 115 S. W. 13, 17.

Amendment.—Failure to demand the full statutory penalty, where the plaintiffs relied on a decision of one of the appellate courts sanctioning it, may be cured by amendment. *Casey v. St. Louis, etc. R. Co.*, 205 Mo. 721, 103 S. W. 1146.

47. *Howard v. Fall River Iron W. Co.*, 203 Mass. 273, 89 N. E. 615 (such statute is retroactive); *Dulligan v. Bar-*

ber Asphalt Co., 201 Mass. 227, 87 N. E. 567 (error to require an election in such case).

48. Ill.—*Thomas v. Star, etc. Co.*, 104 Ill. App. 110; *Merrihew v. Chicago, etc. R. Co.*, 92 Ill. App. 346. Ia.—*Frink & Co. v. Taylor*, 4 G. Gr. 196, actions accrued to wife in different capacities. Ky.—*Hendricks v. American Exp. Co.*, 138 Ky. 704, 128 S. W. 1089, 32 L. R. A. (N. S.) 867; *Lewis v. Taylor, etc. Co.*, 112 Ky. 845, 66 S. W. 1044; *Railway Co. v. McElwain*, 98 Ky. 700, 34 S. W. 236, 56 Am. St. Rep. 385, 34 L. R. A. 788. Mass.—*Brennan v. Standard Oil Co.*, 187 Mass. 376, 73 N. E. 472; *Daley v. Boston, etc. R. Co.*, 147 Mass. 101, 16 N. E. 690. Miss. *McVey v. Illinois, etc. R. Co.*, 73 Miss. 487, 19 So. 209.

Curing Misjoinder.—And where the statutory action for death by wrongful act has been improperly stated and joined with an action for the conscious suffering of deceased, the complaint may be amended so as to state the statutory cause of action for death properly, and he may strike out the count for conscious suffering of deceased. *Daley v. Boston, etc. R. Co.*, 147 Mass. 101, 16 N. E. 690.

Action Is Sui Generis.—It may be properly designated an action on the case, without regard to the nature of the wrongful act or omission causing death. The personal representative may join causes of action which decedent would have had to declare on in trespass, with one which he would have to declare on in case, had he survived. *Buckalew v. Tennessee, etc. Co.*, 112 Ala. 146, 156, 20 So. 606.

49. Tenn.—*Davidson, etc. Co. v. Severson*, 109 Tenn. 572, 72 S. W. 967. Tex.—*St. Louis, etc. R. Co. v. Hengst*, 36 Tex. Civ. App. 217, 81 S. W. 832. Vt.—*McDuffee's Admr. v. Boston, etc. R. Co.*, 81 Vt. 52, 69 Atl. 124, 130 Am. St. Rep. 1019; *Preston v. St. Johns-*

Nor can a parent join with an action for the wrongful death of his child, an action for the funeral expenses of deceased,⁵⁰ or an action for personal injuries to himself resulting from the same negligent act.⁵¹

But a cause of action for the benefit of the widow and next of kin may be joined with one for the benefit of his estate, where two causes of action for death are given by statute.⁵²

Causes of action arising under different sections of the damage act may be united, but they must be separately stated.⁵³

A complaint alleging in one count several distinct acts or omissions together causing the death sets forth but one cause of action.⁵⁴

bury, etc. Co., 64 Vt. 280, 25 Atl. 486; Ranney v. St. Johnsbury, etc. Co., 64 Vt. 277, 24 Atl. 1053. Wis.—Johnson v. Eau Claire, 135 N. W. 481; Nemecek v. Filer, etc. Co., 126 Wis. 225, 105 N. W. 225 (administrator sued as such in both cases).

Michigan.—In *Carbary v. Detroit United R. Co.*, 157 Mich. 683, 122 N. W. 367, it was held proper for the administrator to join counts under the survival act with one under the death act, as the existence of the one was entirely inconsistent with the existence of the other and it was necessary to meet the exigency of varying testimony. But see *Contra*, *Hurst v. Detroit City R. Co.*, 84 Mich. 539, 48 N. W. 44.

Vermont.—The principal objection at common law to such joinder was the general verdict and the inability to apportion the recovery, but the statute allowing the apportionment of damages by the jury under each count separately has obviated this objection. *Ranney v. St. Johnsbury, etc. Co.*, 64 Vt. 277, 24 Atl. 1053.

50. *Johnson v. Seattle El. Co.*, 39 Wash. 211, 81 Pac. 705.

In Texas, however, it was held that an action for the death of the wife could be joined with one for the expenses incident to the treatment of the injuries before death. *Gulf, etc. R. Co. v. Farmer*, 102 Tex. 235, 115 S. W. 260.

51. *Cincinnati, etc. R. Co. v. Chester*, 57 Ind. 297.

Physician Abandoning Woman in Childbirth.—An action against a physician for injuries resulting to the mother by his abandonment of her during confinement, cannot be joined with one for the death of the child by rea-

son of the abandonment. *Lathrope v. Flood*, 135 Cal. 458, 67 Pac. 683, 57 L. R. A. 215.

52. *Tillar v. Reynolds*, 96 Ark. 358, 131 S. W. 969. See also *Callison v. Brake*, 129 Fed. 196, 63 C. C. A. 354, *affirming* 122 Fed. 722 (Florida statute).

53. *Casey v. St. Louis, etc. Transit Co.*, 205 Mo. 721, 103 S. W. 1146, *reversing* 116 Mo. App. 235, 91 S. W. 419 on another point.

54. "It frequently happens that the general charge of negligence is predicated on several different acts, either of commission or omission, and it has never been supposed that each distinct act, so relied upon, constitutes an independent cause of action, and should be pleaded in separate counts. On the contrary, it is the common and correct practice to set forth in the same count all of the concurrent acts, whether of commission or omission, which are relied upon to establish the charge of negligence." *Smith v. Missouri Pac. R. Co.*, 56 Fed. 458, 5 C. C. A. 557, *reversing* 50 Fed. 760.

See generally the title "Negligence."

Wilful Act and Negligent Acts as Distinct Causes of Action.—"The transaction or occurrence resulting in death may consist of a number of co-operating acts and omissions, some of which may be wilful or intentional, and others merely failures to observe the necessary care;" and a complaint alleging the entire transaction or occurrence causing death does not state more than one cause of action though the facts set forth belong to the two previous classes. *Schweinfurth v. Cleveland, etc. Railway Co.*, 60 Ohio St. 215, 231, 54 N. E. 89.

Under the Iowa code a cause of action for death arising under the Federal Employer's Liability Act may be joined with one under the state statute.⁵⁵

Suing for Simultaneous Death of Both Parents.—Complainant may join in the one suit actions for the death of both parents simultaneously killed in the same accident, but the causes of action should be stated in separate counts.⁵⁶

Death Action and Action To Set Aside Fraudulent Judgment.—Under the Texas practice an action for wrongful death may be joined with one to set aside a fraudulent judgment in an action for the wrongful death to which complainant was made a party without his knowledge or consent.⁵⁷

b. *Separating Counts.*—Where plaintiff declares on two distinct statutes giving a cause of action for wrongful death, the causes of action are distinct and the petition should state them in separate counts.⁵⁸ Likewise a party cannot combine in one count a claim under the death act, and a claim under the survival act, though such joinder is allowed by statute.⁵⁹

Several Counts.—While complainant may set forth his cause of action for death in several counts, it is better practice to set it out but in one count.⁶⁰

14. Bill of Particulars.—The rule that the granting or refusing of a bill of particulars rests in the sound discretion of the trial court, whose conclusion will not be disturbed except for abuse of discretion,

55. *Bankson v. Illinois Cent. R. Co.*, 196 Fed. 171.

56. In *Aley v. Missouri Pac. R. Co.*, 211 Mo. 460, 111 S. W. 102, it was assumed that minor children could sue for the simultaneous death of both parents in one suit, but that it would be better to state them in separate counts. Judgment for \$5000, the maximum amount of recovery, for the death of each person, was held not reversible error, where no objection was made to joinder of two causes in one count.

57. *De Garcia v. San Antonio, etc. R. Co.* (Tex. Civ. App.), 77 S. W. 275.

58. *Bankson v. Illinois Cent. R. Co.*, 196 Fed. 171 (motion to separate granted); *Peters v. St. Louis, etc. R. Co.*, 150 Mo. App. 721, 131 S. W. 917 (one statute giving cause of action for death by negligence of co-employee and general statute giving action for death by wrongful act).

There is but one cause of action in such case, and the court may properly instruct the jury that "if they find for plaintiff on one of these counts they

must find for defendant on the other," as it would not be proper to find for plaintiff on both counts and assess damages accordingly; but though the jury found for defendant on the second count, and complainant did not appeal therefrom, on reversal the plaintiff is not precluded from trying the case on both counts. *Peters v. St. Louis, etc. R. Co.*, *supra*.

Waiver of Misjoinder in One Count. Where the petition improperly unites in one count a cause of action for wrongful death of a co-employee with one under the general statute giving an action for wrongful death, the objection is waived by a plea to the merits. A motion to elect after commencement of the trial was then too late. *Jordan v. St. Louis Transit Co.*, 202 Mo. 418, 101 S. W. 11.

59. *Verlinde v. Michigan Cent. R. Co.*, 165 Mich. 371, 130 N. W. 317; *Uss v. Crane Co.*, 138 App. Div. 256, 123 N. Y. Supp. 94.

60. *Dickens v. New York Cent. R. Co.*, 13 How. Pr. (N. Y.) 228. See also *Hammer v. Chicago, etc. R. Co.*, 61 Iowa 56, 15 N. W. 597.

is peculiarly applicable where the suit is by the heirs or personal representative of a deceased person.⁶¹ But in some jurisdictions a bill of particulars is required by statute to be served with the summons and complaint in action for death by wrongful act.⁶²

15. Amendments.⁶³ — a. *Amending Action for Injuries Into Action for Death.* — A common law right of action for damages for personal injuries cannot be amended into a statutory action for death,⁶⁴

61. *Donahue v. Meares*, 65 Hun 620, 19 N. Y. Supp. 585; *Neal v. Phoenix Lumb. Co.*, 64 Wash. 523, 117 Pac. 267. See generally the title "Bills of Particulars," Vol. 4, p. 372.

Particulars of Construction of Machinery Not Required. — In an action for the death of a millwright in the wheel pit, where it was alleged the construction of the pen stock was negligent, unscientific, and improper in its original design and its construction, in that it was not built so as to resist the force of the waters from without when the river was high, and the penstock empty, it was not an abuse of discretion to refuse to require plaintiff to furnish a bill of particulars showing in what respect the penstock was negligently or improperly or unscientifically constructed. *Neal v. Phoenix Lumb. Co.*, 64 Wash. 523, 117 Pac. 267.

New York. — **Examination of Defendant To Make Complaint More Certain.** Where the complaint contains general and indefinite charges as to the acts causing death, it is no answer to a motion for a bill of particulars that the plaintiff cannot be specific, because she has no information to enable her to be specific. But if the defendant desires the complaint be made more specific it should consent to an examination for the purpose of eliciting the information. Otherwise a bill of particulars will be refused. *Rosney v. Erie R. Co.*, 124 Fed. 90.

62. In some jurisdictions the statute requires plaintiff to give defendant or his attorney with his declaration full particulars of the persons for whom and in whose behalf the action is brought, and the nature of the claim in respect of which damages are sought, but the failure to give this does not affect the right of action which existed before the declaration was filed, and if defendant failed to request it, he waives it. *Philadelphia,*

etc. R. Co. v. State, 58 Md. 372. See also *Murphy v. Logan*, 10 Ir. C. L. 87, where defendant pleaded the failure to give the bill of particulars in bar, but on demurrer to the plea in bar the court said it was a requirement which could be waived by failure to request it and sustained the demurrer.

The failure to serve the particulars with the complaint is not ground for setting aside the writ itself, but is ground for setting aside the service thereof. *McCabe v. Guinness*, 9 Irish Rep. C. L. 510.

63. Whether the want of particular averments is amendable is treated under the particular averment. See also the title "Amendments and Jeofails."

64. *Groom v. Bangs*, 153 Cal. 456, 96 Pac. 503 (objection cannot be made by demurrer, but must be made by motion to strike amended complaint from file); *Anderson v. Wetter*, 103 Me. 257, 69 Atl. 105, 15 L. R. A. (N. S.) 1003. See *McCray v. Moweaqua Coal, etc. Co.*, 149 Ill. App. 565; *Fournier v. Detroit United R. Co.*, 157 Mich. 589, 122 N. W. 299; *Walker v. Lansing, etc. R. Co.*, 144 Mich. 685, 103 N. W. 90.

But in Texas plaintiff may abandon the action for injuries and amend and set up a new cause of action for the death, subject to the payment of costs. But the question as to whether defendant should have been required to answer without further service became immaterial in view of the disposition of the case on appeal. *International, etc. R. Co. v. Boykin*, 32 Tex. Civ. App. 72, 74 S. W. 93. And in Texas, *etc. R. Co. v. Gross* (Tex. Civ. App.), 128 S. W. 1173, the petition alleging the right to recover by survival, the damages suffered by deceased, was held amendable so as to include damages sustained by plaintiffs from the death.

See *infra*, cases cited to amending action from one in individual capacity into one by administrator.

especially after the statute of limitations has expired, as the amendment is a new and different cause of action.⁶⁵

b. *As to Parties.* — *Adding Necessary Parties.* — Where all persons entitled to a recovery are not made parties plaintiff, they may be made parties by amendment,⁶⁶ even after limitations has expired,⁶⁷ or after verdict,⁶⁸ or on the second trial of the cause after a reversal.⁶⁹ Likewise, where the wife sues as next of kin, the complaint may be amended by inserting deceased's mother's name, the evidence showing that complainant was not deceased's wife.⁷⁰

Changing Capacity in Which Suing. — Where an action for death by wrongful act was commenced by decedent's administrator, instead of by the beneficiary personally as provided by the statute, an amendment substituting the beneficiary's name for that of the administrator wherever it appeared in the complaint does not set up a new cause of action and is allowable, as the court looks rather to the real than to nominal parties.⁷¹ Such amendment is permissible even after the

Massachusetts. — In *O'Donnell v. North Attleborough (Mass.)*, 98 N. E. 1084, it is said *obiter* but not decided that an action framed under the death act might be amended so as to bring the action within a statute allowing recovery for injuries received through defects in streets.

Where the petition states both a common law action for injuries to deceased, and a statutory action for death though improperly, the court may allow an amendment perfecting the action for death, and since the actions may not be properly joined, strike out the count as to the common law action. *Daley v. Boston, etc. R. Co.*, 147 Mass. 101, 16 N. E. 690.

65. **U. S.** — *Union Pac. R. Co. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. ed. 983; *Boston, etc. R. Co. v. Hurd*, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193. **Ill.** — *Bradley v. Chicago-Virden Coal Co.*, 231 Ill. 622, 83 N. E. 424. **Kan.** — *Kansas City v. Hart*, 60 Kan. 684, 57 Pac. 938.

66. **Ill.** — *Houglan v. Avery Coal, etc. Co.*, 152 Ill. App. 573. **Ind.** — *Chicago, etc. R. Co. v. La Porte*, 33 Ind. App. 691, 71 N. E. 166. **Mo.** — *Cytron v. St. Louis Tran. Co.*, 205 Mo. 692, 104 S. W. 109; *Buel v. St. Louis T. Co.*, 45 Mo. 562. **Pa.** — *Holmes v. Pennsylvania R. Co.*, 220 Pa. 189, 69 Atl. 597, 123 Am. St. Rep. 685; *Waltz v. Pennsylvania R. Co.*, 216 Pa. 165, 65 Atl. 401. **Tex.** — *International, etc. R. Co. v. Howell (Tex. Civ. App.)*, 105 S. W. 560, mother made party by

amendment, though amendment did not allege she was living.

67. **Ill.** — *Houglan v. Avery Coal, etc. Co.*, 246 Ill. 609, 93 N. E. 40, affirming 152 Ill. App. 573. **Mo.** — *Cytron v. St. Louis Tran. Co.*, 205 Mo. 692, 104 S. W. 109. **Pa.** — *Sontum v. Mahoning, etc. Co.*, 226 Pa. 230, 75 Atl. 189; *Holmes v. Pennsylvania R. Co.*, 220 Pa. 189, 69 Atl. 597.

Texas. — In *Paris, etc. R. Co. v. Robinson (Tex. Civ. App.)*, 127 S. W. 294, it was held that an amendment adding the mother's name in addition to that of the wife and children suing, was not permissible after the period of limitations. See also *East Line, etc. R. Co. v. Culberson*, 72 Tex. 375, 10 S. W. 703, 3 L. R. A. 567.

68. *Bracken v. Pennsylvania R. Co.*, 222 Pa. 410, 71 Atl. 926.

69. *Bracken v. Pennsylvania R. Co.*, 222 Pa. 410, 71 Atl. 926.

70. *St. Louis, etc. R. Co. v. Block*, 79 Ark. 179, 95 S. W. 155.

71. **U. S.** — *Van Doren v. Pennsylvania R. Co.*, 93 Fed. 260, 268, 35 C. C. A. 282; *St. Louis, etc. R. Co. v. Herr*, 193 Fed. 950 (administrator sole heir — point raised after verdict); *Leman v. Baltimore, etc. R. Co.*, 128 Fed. 191 (action under Pennsylvania statute). **Ga.** — *Atlanta, etc. R. Co. v. Smith*, 1 Ga. App. 162, 58 S. E. 106, even after limitation period. **Ill.** — *Litchfield Coal Co. v. Taylor*, 81 Ill. 590; *McCray v. Moweaqua Coal, etc. Co.*, 149 Ill. App. 565. **Mass.** — *Upson v. Boston, etc. R. Co.*, 98 N. E. 32; *Her-*

expiration of the period of limitations prescribed by the statute.⁷² Likewise where the beneficiaries sue personally instead of as administrator or personal representative as required by the statute, an amendment making the administrator plaintiff is allowable in some jurisdictions,⁷³ but it is held in some jurisdictions to add a different and new cause of action by amendment and is not permissible,⁷⁴ especially after the statute of limitations has expired.⁷⁵

B. THE ANSWER.⁷⁶—Though a release by a former administra-

lity *v. Little*, 200 Mass. 284, 86 N. E. 294; *Silva v. New England B. Co.*, 185 Mass. 151, 69 N. E. 1054. **N. Y.** *Johnson v. Phoenix Bridge Co.*, 197 N. Y. 316, 90 N. E. 953, *reversing* 133 App. Div. 807, 118 N. Y. Supp. 88.

But the contrary is held in New Jersey (*Rankin v. Central R. of New Jersey*, 77 N. J. L. 175, 71 Atl. 55; *Lower v. Segal*, 60 N. J. L. 99, 36 Atl. 777).

In Missouri, etc. *R. Co. v. Wulf*, 192 Fed. 919, the court says that where the plaintiff was the sole beneficiary and entitled to all the damages resulting from the negligent killing of her son, in the absence of objection made *in limine*, it is immaterial whether the suit was brought by her individually or as administrator, or in both capacities.

Guardian.—An amendment making the minor children of deceased plaintiffs, as required by the statute, instead of the guardian as the action was commenced, is allowable. *Weber v. Hannibal*, 83 Mo. 262.

72. Atlanta, etc. *R. Co. v. Smith*, 1 Ga. App. 162, 58 S. E. 106; *Johnson v. Phoenix Bridge Co.*, 197 N. Y. 316, 90 N. E. 953, *reversing* 133 App. Div. 807, 118 N. Y. Supp. 88.

North Carolina.—**Ancillary Administration.**—Where the foreign administrator commenced an action and then qualified as domestic administrator, and was admitted as a party by amendment after the period of limitation was elapsed, his suit was barred. *Hall v. Southern R. Co.*, 149 N. C. 108, 32 S. E. 899. In this state a foreign administrator cannot sue without taking out ancillary administration. See *supra*, VI.

73. U. S.—*Reardon v. Balaklala*, etc. Co., 193 Fed. 189; *Missouri, etc. R. Co. v. Wulf*, 192 Fed. 919; *Hall v. Louisville, etc. R. Co.*, 157 Fed. 464 (allowed under federal practice and that of Florida). **Kan.**—*Atchison v.*

Twine, 9 Kan. 350. **Utah.**—*Sargent v. Union F. Co.*, 37 Utah 392, 108 Pac. 928; *Pugmire v. Diamond Coal, etc. Co.*, 26 Utah 115, 72 Pac. 385.

Amendment After Verdict.—Where right is given to administrator and suit is brought by a next friend of the infant plaintiff, an amendment after verdict substituting deceased's administrator as plaintiff cannot be allowed. *Baltimore, etc. R. Co. v. Gillard*, 34 Ind. App. 339, 71 N. E. 58. See also *Weidner v. Rankin*, 26 Ohio St. 522. But in *Patton v. Pittsburgh, etc. R. Co.*, 96 Pa. 169, where the beneficiaries sued under the West Virginia statute when the suit should have been brought by the personal representative, an amendment making the personal representative plaintiff after verdict was permitted.

74. Ill.—*Staunton Coal Co. v. Fischer*, 119 Ill. App. 284. **Mich.**—*Walker v. Lansing, etc. Co.*, 144 Mich. 685, 108 N. W. 90. **N. J.**—*Fitzhenry v. Consolidated T. Co.*, 63 N. J. L. 142, 42 Atl. 416; *Lower v. Segal*, 60 N. J. L. 99, 36 Atl. 777. **N. C.**—*Bennett v. North Carolina R. Co.*, 74 S. E. 883.

75. Ill.—*Staunton Coal Co. v. Fischer*, 119 Ill. App. 284. **N. J.**—*Fitzhenry v. Consolidated T. Co.*, 63 N. J. L. 142, 42 Atl. 416. **Pa.**—*La Bar v. New York, etc. R. Co.*, 218 Pa. 261, 67 Atl. 413. **Tenn.**—*Flatley v. Memphis, etc. R. Co.*, 9 Heisk. 230.

An amendment after the statute has run changing the capacity in which the plaintiff sues from widow under the state statute to administratrix under the Federal Employers' Liability Act, sets up a new cause of action and is not permissible. *Hall v. Louisville, etc. R. Co.*, 157 Fed. 464, 468.

76. Plea of Shooting To Prevent Escape of Felon.—As to sufficiency of such a plea, see *Richards v. Burgin*, 159 Ala. 282, 49 So. 294.

tor,⁷⁷ or that the death was caused by other agencies than the injuries,⁷⁸ or the invalidity of the marriage, where the widow sues, is not pleaded in the answer, it may be raised under the general issue.⁷⁹

The general issue also puts in issue the existence or non-existence of the designated beneficiaries, where their existence is essential to the maintenance of the action.⁸⁰

An answer which denies that the act alleged was wrongfully or illegally done admits its performance, and raises no issue of fact for trial.⁸¹

The illegitimacy of a deceased child is a defense to be averred by defendant.⁸²

Self-Defense.⁸³

Contributory Negligence. — While it is held in some jurisdictions that the contributory negligence of deceased cannot be availed of by the defendant unless specifically averred in the answer,⁸⁴ in other juris-

77. May be admitted in evidence under the general issue (*Balsewicz v. Chicago, etc. R. Co.*, 240 Ill. 238, 88 N. E. 734, reversing 144 Ill. App. 219), but in *Linden v. Anchor M. Co.*, 20 Utah 134, 58 Pac. 355, it was held error to admit evidence under the general issue as to defendant having taken up a collection for deceased wife, no payment or release being pleaded in the answer.

78. *Wetherell v. Chicago City R. Co.*, 104 Ill. App. 357.

79. *Galveston, etc. Co. v. Cook* (Tex. Civ. App.), 25 S. W. 455.

Proving Prior Marriage.—If the answer specially denies the validity of plaintiff's marriage to deceased because she knew deceased was married at the time to another, it is proper to allow defendant to prove prior marriage. *Albinest v. Yazoo, etc. R. Co.*, 107 La. 133, 31 So. 675.

80. *Conant v. Griffin*, 48 Ill. 410; *Toledo, etc. R. Co. v. Lander* (Ind. App.), 95 N. E. 319.

Where the recovery is given for the benefit of the widow and children only, an answer denying the existence of either widow or child of deceased is sufficient. *Cincinnati, etc. R. Co. v. Privitt's Admr.*, 92 Ky. 223, 17 S. W. 484.

81. *Rutherford v. Foster*, 125 Fed. 187, 193, 60 C. C. A. 129.

82. *Louisville, etc. R. Co. v. Thomas*, 87 Miss. 600, 40 So. 257, plaintiff need not allege the legitimacy.

83. **Negating Self-Defense.** — An answer denying that the defendant,

"not in his self-defense, carelessly and wantonly" shot and killed plaintiff's husband, "with a pistol loaded with powder and ball," etc., sufficiently alleges self-defense, as the words "not in self-defense" qualifies everything that follows them, including the words "carelessly and wantonly" and the words "at all." *Hollingsworth v. Warnock*, 20 Ky. L. Rep. 883, 47 S. W. 770.

84. *Alabama, etc. R. Co. v. McWhorter*, 56 Ala. 269, 47 So. 84 (it is error not to limit deceased's contributory negligence to that which was pleaded); *De Amado v. Friedman*, 11 Ariz. 56, 89 Pac. 588.

North Carolina.—Under the rule of liberal construction prevailing here, where the father as administrator sues for the death of his minor child, an answer charging plaintiff with contributory negligence will be considered as charging the father with contributory negligence. *Davis v. Seaboard Air-Line R. Co.*, 136 N. C. 115, 48 S. E. 591.

Contributory Negligence of Minor Child.—A plea setting up the contributory negligence of the deceased child in an action by the administrator is not demurrable because not alleging "plaintiff" had sufficient discretion. *Chambers v. Milner, etc. Co.*, 143 Ala. 255, 39 So. 170.

Amendment.—It is not error to refuse to allow an amended answer after the conclusion of plaintiff's evidence setting up the contributory negligence of deceased to conform to the evidence.

dictions the contributory negligence of decedent is admissible under the general denial.⁸⁵

Capacity of Personal Representative.—Where the administrator is suing, the legality of his appointment cannot be raised under the general denial, but must be specifically denied in the answer in order to take advantage thereof.⁸⁶

Pleading Non-Commencement of Action Within Prescribed Time.—If the statute gives a right of action for wrongful death to be brought within a specified time from the death of intestate, this is not a statute of limitations but a condition annexed to the cause of action, so that defendant need not specially plead non-commencement of the action within the specified time in order to take advantage thereof.⁸⁷ In

Louisville, etc. R. Co. *v.* Stewart, 131 Ky. 665, 115 S. W. 775.

85. Pittsburg, etc. R. Co. *v.* Rogers, 45 Ind. App. 230, 87 N. E. 28.

86. Ala.—Louisville, etc. R. Co. *v.* Trammell, 93 Ala. 350, 9 So. 870. Ill. Hughes *v.* Richter, 161 Ill. 409, 43 N. E. 1066, affirming 60 Ill. App. 616; Chicago, etc. R. Co. *v.* Smith, 77 Ill. App. 492, affirmed, 180 Ill. 453, 54 N. E. 325 (legality of administrator's appointment cannot be raised under the general issue); Union, etc. R. Co. *v.* Shacklet, 119 Ill. 232, 10 N. E. 896. Ind.—Pittsburg, etc. R. Co. *v.* Brown, 97 N. E. 145. Ky.—Louisville *v.* Hart's Admx., 143 Ky. 171, 136 S. W. 212. Ohio.—Archdeacon *v.* Cincinnati Gas, etc. Co., 76 Ohio St. 97, 81 N. E. 152 (required by statute); Coney Island Co. *v.* Mitsch, 3 Ohio N. P. (N. S.) 81, objection must be made by demurrer for want of capacity or by a special denial. W. Va.—Hanley *v.* West Virginia, etc. R. Co., 59 W. Va. 419, 53 S. E. 625. Wis.—Ewen *v.* Chicago, etc. R. Co., 38 Wis. 613.

Raising Invalidity of Appointment. The invalidity of the appointment of the administrator suing cannot be raised by a motion to dismiss, but should be raised by pleading the objections to the appointment. Louisville *v.* Hart's Admr., 143 Ky. 171, 136 S. W. 212.

The revocation of authority of the administrator after suit brought is not put in issue by a general denial of authority to maintain the action, but must be specially pleaded by defendant. Burlington, etc. R. Co. *v.* Crockett, 17 Neb. 570, 24 N. W. 219.

Amendment.—The answer cannot be amended after the limitation period so

as to deny the due appointment and qualification of the administrator, for the purpose of interposing the bar of the statute, the answer having previously admitted the due appointment and qualification, as such leave is not in the furtherance of justice. Archdeacon *v.* Cincinnati Gas, etc. Co., 76 Ohio 97, 81 N. E. 152.

Special Plea of Ne Unques Administrator.—In Denver, etc. R. Co. *v.* Woodward, 4 Colo. 1, it was held necessary to raise the issue of the administrator's appointment by a special plea of *ne unques administrator*.

Allegation Not Admitted by Lack of Denial.—Under a statute providing allegations of any appointment or authority, duly verified, not denied by a verified answer are admitted an allegation as to there being no administrator appointed on the estate of a resident (which allegation is necessary to enable the widow to sue) is not admitted by an unverified denial, as it is neither an appointment or an authority. On the contrary it is an averment of the non-existence of an appointment or an authority. Vaughn *v.* Kansas City, etc. R. Co., 65 Kan. 685, 70 Pac. 602.

87. U. S.—The Harrisburg, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. ed. 358 (the defense was admitted, but the report does not show whether it was pleaded or not); Stern *v.* La Compagnie, 110 Fed. 996. Ark.—Earnest *v.* St. Louis M. & S. E. R. Co., 87 Ark. 65, 112 S. W. 141. Conn.—Radezky *v.* Sargent, 77 Conn. 110, 58 Atl. 709, demurrer. Ind.—Hanna *v.* Jeffersonville R. Co., 32 Ind. 113. Minn.—Rugland *v.* Anderson, 30 Minn. 386, 15 N. W. 676, motion for judgment on pleadings. Mo.—Barker *v.* Hannibal,

some jurisdictions, however, it must be specially pleaded.⁸⁸

Failure to give the statutory notice, where required, cannot be pleaded in bar, as it may be waived by failure to require it.⁸⁹

VIII. QUESTIONS OF LAW AND FACT.—The question as to what was the proximate cause of death is ordinarily a question for the jury, to be determined as a fact, in view of the circumstances of fact attending the injury.⁹⁰ Likewise the question of defendant's

etc. R. Co., 91 Mo. 86, 14 S. W. 280. **N. H.**—Poff v. New England Tel. Co., 72 N. H. 164, 55 Atl. 891. **N. Y.**—Colell v. Delaware, etc. R. Co., 80 App. Div. 342, 80 N. Y. Supp. 675 (allowing amendment of answer as to same); Cavanagh v. Ocean Steam Nav. Co., 13 N. Y. Supp. 540. **N. C.**—Bennett v. North Carolina R. Co., 74 S. E. 883; Gulleddge v. Seaboard, etc. Co., 147 N. C. 234, 60 S. E. 1134, 125 Am. St. Rep. 544, rehearing denied, 148 N. C. 567, 62 S. E. 732, motion to dismiss after evidence is all in. **Ohio.**—Pittsburg, etc. R. Co. v. Hine, 25 Ohio St. 629. **Pa.**—Martin v. Pittsburg R. Co., 227 Pa. 18, 75 Atl. 837, 26 L. R. A. (N. S.) 1221, statute provided only plea should be not guilty and hence could be raised under plea of general issue. **Vt.**—Hill v. New Haven, 37 Vt. 501, 88 Am. Dec. 613. **Va.**—Dowell v. Cox, 108 Va. 460, 62 S. E. 272. **W. Va.**—Lambert v. Ensign Mfg. Co., 42 W. Va. 813, 26 S. E. 431. **Wis.**—George v. Chicago, etc. R. Co., 51 Wis. 603, 8 N. W. 374, demurrer.

Manner of Taking Objection.—In most jurisdictions where the complaint shows on its face that the action has not been commenced within the period prescribed by the statute, the objection may be taken by demurrer (**Ark.**—Earnest v. St. Louis, etc. R. Co., 87 Ark. 65, 112 S. W. 141. **Ind.**—Hanna v. Jeffersonville R. Co., 32 Ind. 113. **N. J.**—Bretthauer v. Jacobson, 79 N. J. L. 223, 75 Atl. 560. **Va.**—Dowell v. Cox, 108 Va. 460, 62 S. E. 272. **W. Va.**—Lambert v. Ensign Mfg. Co., 42 W. Va. 813, 26 S. E. 431. **Wis.**—George v. Chicago, etc. R. Co., 51 Wis. 603, 8 N. W. 374), though objection may be taken thereto by a plea in bar (**County v. Pacific Coast B. Co.**, 67 N. J. L. 48, 50 Atl. 906).

88. Heimberger v. Elliott Frog, etc. Co., 245 Ill. 448, 92 N. E. 297; Wall v. Chesapeake & O. R. Co., 200 Ill. 66, 65 N. E. 632, reversing 101 Ill. App.

431 (so as to enable plaintiff if possible to reply that the case is within some exception to the statute); Chiles v. Drake, 2 Metc. (Ky.) 146.

89. Philadelphia, etc. R. Co. v. State, 58 Md. 372; Murphy v. Logan, 10 Irish C. L. 87. See *supra*, VII, A, 4, b.

90. **U. S.**—Wabash, etc. Co. v. Black, 126 Fed. 721, 61 C. C. A. 639. **Cal.**—Kerrigan v. Market St. R. Co., 138 Cal. 506, 71 Pac. 621. **D. C.**—Guenther v. Metropolitan, etc. Co., 23 App. Cas. 493. **Ga.**—Southern Georgia R. Co. v. Niles, 131 Ga. 599, 62 S. E. 1042. **Idaho.**—Pilmer v. Boise Trac. Co., 14 Idaho 327, 94 Pac. 432, 15 L. R. A. (N. S.) 254. **Ill.**—Blakeslee's Ex. & Van Co. v. Ford, 215 Ill. 230, 74 N. E. 135; Chicago, etc. R. Co. v. Huston, 196 Ill. 480, 63 N. E. 1023, affirming 95 Ill. App. 350; Martin v. Chicago, etc. R. Co., 194 Ill. 138, 62 N. E. 599; Toledo, etc. Co. v. Smart, 116 Ill. App. 523. **Ia.**—Hopkinson v. Knapp, etc. Co., 92 Iowa 328, 60 N. W. 653. **Ky.**—McCabe's Admr. v. Maysville, etc. R. Co., 28 Ky. L. Rep. 536, 89 S. W. 683; Madisonville v. Pemberton's Admx., 25 Ky. L. Rep. 347, 75 S. W. 229. **Mass.**—Knight v. Overman W. Co., 174 Mass. 455, 54 N. E. 890; Tully v. Fitchburg R. Co., 134 Mass. 499 (whether deceased survived his injuries for the jury, where evidence is conflicting). **Mich.**—Little v. Bousfield, 154 Mich. 369, 117 N. W. 903. **Mo.**—Powell v. St. Louis, etc. R. Co., 229 Mo. 246, 129 S. W. 963; O'Brien v. St. Louis, etc. Co., 185 Mo. 263, 84 S. W. 939, 105 Am. St. Rep. 592; Wiese v. Remme, 140 Mo. 289, 41 S. W. 797. **Neb.**—Brotherton v. Manhattan, etc. Co., 48 Neb. 563, 67 N. W. 479, 58 Am. St. Rep. 709, 33 L. R. A. 598. **N. H.**—Boucher v. Larochele, 74 N. H. 433, 63 Atl. 870, 15 L. R. A. (N. S.) 416, death while undergoing operation from lack of care in administering anesthetic. **N. J.**—Barton v. Public Service Corp., 75 N. J. L.

negligence,⁹¹ the degree of negligence,⁹² the sufficiency of defendant's evidence to sustain the issue of self-defense,⁹³ as well as the question of the contributory negligence of the beneficiary,⁹⁴ or of decedent,

857, 69 Atl. 164, 127 Am. St. Rep. 855, 18 L. R. A. (N. S.) 640. **N. Y.** McCahill v. New York Transp. Co., 135 App. Div. 322, 120 N. Y. Supp. 1, *affirmed*, 201 N. Y. 221, 94 N. E. 616 (whether negligent injury produced delirium tremens causing death, for jury); *Shortsleeve v. Stebbins*, 77 App. Div. 588, 79 N. Y. Supp. 40; *Purcell v. Lauer*, 14 App. Div. 33, 43 N. Y. Supp. 988; *McCormick v. Rochester R. Co.*, 117 N. Y. Supp. 1110. **N. C.**—*Plemmons v. Southern R. Co.*, 140 N. C. 286, 52 S. E. 953; *Powell v. Southern R. Co.*, 125 N. C. 370, 34 S. E. 530. **Ohio.**—*Cameron v. Heister*, 10 Ohio Dec. (Reprint) 651. **Pa.**—*Lena-han v. Crescent Coal Min. Co.*, 225 Pa. 218, 74 Atl. 58; *Brashear v. Philadelphia, etc. Co.*, 180 Pa. 392, 36 Atl. 914; *Hoehle v. Allegheny H. Co.*, 5 Pa. Super. 21. **Tex.**—*Gulf, etc. R. Co. v. Boyce*, 39 Tex. Civ. App. 195, 87 S. W. 395; *Klatt v. Houston El. R. Co.* (Tex. Civ. App.), 57 S. W. 1112. **Utah.** *Stone v. Union Pac. R. Co.*, 32 Utah 185, 89 Pac. 715.

The fact that the death does not occur for several days afterwards and that there was no direct evidence as to its cause, but circumstances from which it might be inferred that death occurred from the cause alleged does not make it a question for the court. *O'Brien v. St. Louis Transit Co.*, 185 Mo. 263, 84 S. W. 939, 105 Am. St. Rep. 592.

Where the facts are undisputed, the question as to what was the proximate cause of death is for the court. *Brown v. American, etc. Co.*, 43 Ind. App. 560, 88 N. E. 80.

91. **U. S.**—*Troxell v. Delaware, etc. R. Co.*, 180 Fed. 871; *Coppock v. Baltimore, etc. R. Co.*, 174 Fed. 264; *Garner v. Trumbull*, 94 Fed. 321, 36 C. C. A. 361. **Ala.**—*Alabama, etc. R. Co. v. Hanbury*, 161 Ala. 358, 49 So. 467. **Ark.** *Warren, etc. R. Co. v. Waldrop*, 123 S. W. 792. **Colo.**—*Colorado, etc. Co. v. Gardner*, 121 Pac. 680. **Ind.**—*Indianapolis, etc. T. Co. v. Newby*, 45 Ind. App. 540, 90 N. E. 29, 91 N. E. 36. **Ia.** *Herr v. Green*, 136 N. W. 511; *Streicher v. Davenport, etc. Co.*, 124 N. W. 327.

Ky.—*Davis v. Ohio Valley, etc. Co.*, 127 Ky. 800, 106 S. W. 843; *Paducah, etc. Co. v. Letcher*, 5 Ky. L. Rep. 153. **Md.**—*Philadelphia, etc. R. Co. v. State*, 58 Md. 372. **Mass.**—*Prince v. Lowell El. Co.*, 201 Mass. 276, 87 N. E. 558. **Minn.**—*Balder v. Zenith Furnace Co.*, 103 Minn. 345, 114 N. W. 948. **Mo.** *Overby v. Mears M. Co.*, 144 Mo. App. 363, 128 S. W. 813. **N. H.**—*Piper v. Boston, etc. R. Co.*, 75 N. H. 435, 75 Atl. 1041. **Pa.**—*Haughey v. Pittsburg R. Co.*, 210 Pa. 367, 59 Atl. 1112. **R. I.**—*La Belle v. Rhode Island Co.*, 73 Atl. 306. **S. C.**—*Turbyfill v. Atlanta, etc. R. Co.*, 86 S. C. 379, 68 S. E. 687. See generally the title "**Negligence.**"

When a Question of Law.—It cannot be treated as one of law unless the facts and the inferences to be drawn from them are free from doubt. *Haughey v. Pittsburg R. Co.*, 210 Pa. 367, 59 Atl. 1112.

The court properly directs a verdict for defendants where the cause of the injury or that it was due to defendant's wrongful act or neglect is not shown. *Pearson v. Wilcox*, 109 Iowa 123, 80 N. W. 228.

92. *Paducah, etc. Co. v. Letcher*, 5 Ky. L. Rep. 153; *Claxton v. Lexington*, 13 Bush (Ky.) 636 (wilful negligence); *Evensen v. Lexington, etc. R. Co.*, 187 Mass. 77, 72 N. E. 353 (recovery allowed for grossly negligent acts).

93. *Brinkman v. Gottenstroeter*, 153 Mo. App. 351, 134 S. W. 584, *affirmed*, 140 S. W. 1194.

When Self-Defense for Court.—Where the plaintiff's evidence shows plaintiff brought on the altercation, used the first offensive language and struck the first blow, and then pursued deceased and killed him while he was defenseless and trying to escape, it is not error to refuse to submit the issue of self-defense though there might be a witness whose testimony raised the issue of self-defense. *Morgan v. Barnhill*, 118 Fed. 24, 55 C. C. A. 1.

94. **U. S.**—*Garner v. Trumbull*, 94 Fed. 321, 36 C. C. A. 361. **Ark.**—*St. Louis, etc. R. Co. v. Dawson*, 68 Ark.

is ordinarily a question of fact for the determination of the jury.⁹⁵

1, 56 S. W. 46. **Colo.**—Colorado, etc. R. Co. v. Gardner, 121 Pac. 680. **Ill.** True v. Woda, 201 Ill. 315, 66 N. E. 369; McNulta v. Jenkins, 91 Ill. App. 309. **Mass.**—Walsh v. Loorem, 180 Mass. 18, 61 N. E. 222, 91 Am. St. Rep. 263; Butler v. New York, etc. R. Co., 177 Mass. 191, 58 N. E. 592; Hewitt v. Taunton, etc. Co., 167 Mass. 483, 46 N. E. 106. **Mo.**—McGee v. Wabash R. Co., 214 Mo. 530, 114 S. W. 33; Howard v. Searritt Est. Co. (Mo. App.), 144 S. W. 185. **N. Y.**—Kaplan v. Metropolitan, etc. Co., 98 App. Div. 133, 90 N. Y. Supp. 585. **Pa.**—Del Rossi v. Cooney, 208 Pa. 233, 57 Atl. 514; Thompson v. Delaware, etc. R. Co., 41 Pa. Super. 617. **Vt.**—Lindsay v. Canadian Pac. R. Co., 68 Vt. 556, 35 Atl. 513. **Va.**—Newport News v. Scott's Admx., 103 Va. 794, 50 S. E. 266. **Wash.**—Tecker v. Seattle, etc. R. Co., 60 Wash. 570, 111 Pac. 971; Archibald v. Lincoln Co., 50 Wash. 55, 96 Pac. 831. **W. Va.**—Bias v. Chesapeake, etc. Co., 46 W. Va. 349, 33 S. E. 240. **Wis.**—O'Brien v. Wisconsin Cent. R. Co., 119 Wis. 7, 96 N. W. 424; Decker v. McSorley, 111 Wis. 91, 86 N. W. 554.

95. **U. S.**—Sandidge v. Atchison, etc. R. Co., 193 Fed. 867. **Ark.**—Nashville Lumb. Co. v. Busbee, 139 S. W. 301. **Cal.**—Clark v. Tulare, etc. Co., 14 Cal. App. 414, 112 Pac. 564; Foley v. No. Calif. P. Co., 14 Cal. App. 401, 112 Pac. 467. **Colo.**—Denver, etc. Co. v. Parker, 123 Pac. 680. **Ga.**—McLarty v. Southern R. Co., 127 Ga. 161, 56 S. E. 297; Williams v. Southern R. Co., 126 Ga. 710, 55 S. E. 948; Griffin v. Brunswick, etc. Co., 113 Ga. 642, 38 S. E. 968; Richmond, etc. R. Co. v. Johnston, 89 Ga. 560, 15 S. E. 908; Mandeville Mills v. Dale, 2 Ga. App. 607, 58 S. E. 1060. **Ill.**—Bonato v. Peabody Coal Co., 156 Ill. App. 196; Wells v. Baltimore, etc. R. Co., 153 Ill. App. 23; United Brew. Co. v. O'Donnell, 124 Ill. App. 24. **Ind.**—Cleveland, etc. R. Co. v. Clark, 97 N. E. 822; Indianapolis, etc. R. Co. v. Newby, 45 Ind. App. 540, 90 N. E. 29, 91 N. E. 36. **Ia.**—Gray v. Chicago, etc. R. Co., 143 Iowa 268, 121 N. W. 1097. **Ky.**—Owensboro v. York's Admr., 117 Ky. 294, 77 S. W. 1130; McCabe v. Maysville, etc. R. Co., 28 Ky. L. Rep. 536, 89 S. W. 683. **Me.**

Anderson v. Wetter, 103 Me. 257, 69 Atl. 105. **Mass.**—Lundergan v. New York, etc. R. Co., 203 Mass. 460, 89 N. E. 625; Slattery v. New York, etc. R. Co., 203 Mass. 453, 89 N. E. 622. **Mich.**—Green v. Chicago, etc. Co., 110 Mich. 648, 68 N. W. 988; McClellan v. Ft. Wayne, etc. Co., 105 Mich. 101, 62 N. W. 1025. **Minn.**—Gilbert v. Tracy, 115 Minn. 443, 132 N. W. 752; Peterson v. Merchants Elev. Co., 111 Minn. 105, 126 N. W. 534. **Miss.**—New Orleans & N. E. R. Co. v. Brooks, 85 Miss. 269, 38 So. 40. **Mo.**—Green v. United Rys. Co. (Mo. App.), 145 S. W. 861; Powell v. St. Louis, etc. R. Co., 229 Mo. 246, 129 S. W. 963; Day v. Consolidated, etc. Co., 136 Mo. App. 274, 117 S. W. 81. **Neb.**—Holmes v. Chicago, etc. Co., 73 Neb. 489, 103 N. W. 77. **N. Y.**—Brown v. Buffalo, etc. Co., 200 N. Y. 484, 94 N. E. 206 (jury allowed greater latitude in determining contributory negligence where party is dead); Lamb v. Union R. Co., 195 N. Y. 260, 88 N. E. 371; Storrs v. Northern Pac. R. Co., 132 N. Y. Supp. 954; Boyce v. New York City R. Co., 126 App. Div. 248, 110 N. Y. Supp. 393; Boyle v. Degnon-McLean, etc. Co., 47 App. Div. 311, 61 N. Y. Supp. 1043. **N. C.**—Cogdell v. Wilmington, etc. Co., 124 N. C. 302, 32 S. E. 706. **N. D.**—Kunkel v. Minneapolis, etc. R. Co., 18 N. D. 367, 121 N. W. 830. **Pa.**—Haughey v. Pittsburg, etc. R. Co., 210 Pa. 367, 59 Atl. 1112; Davis v. Pennsylvania R. Co., 34 Pa. Super. 388. **S. D.**—Whaley v. Vidal, 132 N. W. 248. **Tex.**—Missouri R. Co. v. Butts (Tex. Civ. App.), 132 S. W. 88; St. Louis, etc. R. Co. v. Bolen (Tex. Civ. App.), 129 S. W. 860; Gulf, etc. R. Co. v. Boyce, 39 Tex. Civ. App. 195, 87 S. W. 395. **Utah.**—Christensen v. Oregon Short Line R. Co., 29 Utah 192, 80 Pac. 746. **Wash.**—Tecker v. Seattle, etc. Co., 111 Pac. 791; Archibald v. Lincoln County, 50 Wash. 55, 96 Pac. 831. **Wis.**—O'Brien v. Wisconsin, etc. R. Co., 119 Wis. 7, 96 N. W. 424; Wells v. Remington, 118 Wis. 573, 95 N. W. 1094.

When Question of Law.—The question of decedent's due care is a question of law, "which a court can determine adversely to plaintiff, only when no other conclusion can reasonably be drawn from uncontradicted facts and from the evidence favorable

The amount of damages to be allowed the beneficiaries,⁹⁶ the expectancy of life of deceased,⁹⁷ and whether or not certain persons

to plaintiff" (*Stack v. East St. Louis*, etc. R. Co., 245 Ill. 308, 92 N. E. 241; *Pittsburg*, etc. R. Co. *v. Sudhoff*, 173 Ind. 314, 90 N. E. 467), and may charge the jury to ignore deceased's contributory negligence where the evidence is sufficient to support it (*Atchison*, etc. R. Co. *v. Phillips*, 176 Fed. 663, 100 C. C. A. 215).

The presumption of due care by deceased is one of fact and it becomes a question for the jury as to whether such presumption has been overcome by other evidence. *Gray v. Chicago*, etc. R. Co., 143 Iowa 268, 121 N. W. 1097.

96. U. S.—*Chesapeake*, etc. R. Co. *v. Hawkins*, 174 Fed. 597, 98 C. C. A. 443; *Hirschowitz v. Pennsylvania R. Co.*, 138 Fed. 438. **Ala.**—*Louisville*, etc. R. Co. *v. Street*, 51 So. 306; *Richmond*, etc. R. Co. *v. Freeman*, 97 Ala. 289, 11 So. 800. **Ark.**—*St. Louis*, etc. Co. *v. Mathias*, 76 Ark. 184, 91 S. W. 763, 113 Am. St. Rep. 85. **Cal.**—*Valente v. Sierra*, etc. R. Co., 151 Cal. 534, 91 Pac. 481; *s. c.*, 158 Cal. 412, 111 Pac. 95; *McKeever v. Market St. R. Co.*, 59 Cal. 294; *Clark v. Tulare*, etc. Co., 14 Cal. App. 414, 112 Pac. 564; *Bowen v. Sierra L. Co.*, 3 Cal. App. 312, 84 Pac. 1010. **Conn.**—*Howey v. New England Nav. Co.*, 83 Conn. 278, 76 Atl. 469. **Idaho.**—*Golden v. Spokane*, etc. R. Co., 20 Idaho 526, 118 Pac. 1076. **Ill.**—*Lake Shore*, etc. Co. *v. Parker*, 131 Ill. 557, 23 N. E. 237; *Chicago*, etc. R. Co. *v. Reddick*, 139 Ill. App. 160; *Terminal R. Assn. v. Condon*, 128 Ill. App. 335. **Ia.**—*McMarshall v. Chicago*, etc. R. Co., 80 Iowa 757, 45 N. W. 1065. **Kan.**—*Union Pac. R. Co. v. Dunden*, 37 Kan. 1, 14 Pac. 501. **Ky.** *Chesapeake*, etc. R. Co. *v. Ward's Admr.*, 145 Ky. 733, 141 S. W. 72. **La.**—*Dobyns v. Yazoo*, etc. Co., 119 La. 72, 43 So. 934. **Mich.**—*Ingersoll v. Detroit*, etc. R. Co., 163 Mich. 268, 128 N. W. 227, 32 L. R. A. (N. S.) 362. **Minn.**—*Thomas v. Chicago*, etc. R. Co., 112 Minn. 360, 128 N. W. 297; *Gunderson v. Northwestern*, etc. Co., 47 Minn. 161, 49 N. W. 694. **Mo.** *Ellis v. Metropolitan*, etc. R. Co., 234 Mo. 657, 138 S. W. 23; *Potter v. St. Louis*, etc. R. Co., 136 Mo. App. 125, 117 S. W. 593. **Mont.**—*Gilman v. G. W. Dart Hdw. Co.*, 42 Mont. 96, 111

Pac. 550; *Neary v. Northern Pac. R. Co.*, 41 Mont. 480, 110 Pac. 226; *Hollingsworth v. Davis*, *Daly Co.*, 38 Mont. 143, 99 Pac. 142. **Neb.**—*Johnson v. Missouri Pac. R. Co.*, 18 Neb. 690, 26 N. W. 347. **Nev.**—*Christensen v. Floriston*, etc. Co., 29 Nev. 552, 92 Pac. 210. **N. J.**—*Batton v. Public Service Corp.*, 75 N. J. L. 857, 69 Atl. 164. **N. Y.**—*Houghkirk v. Delaware*, etc. R. Co., 92 N. Y. 219, 44 Am. Rep. 370; *Howell v. Rochester R. Co.*, 24 App. Div. 502, 49 N. Y. Supp. 17; *Gorham v. New York*, etc. R. Co., 23 Hun 449. **Tenn.**—*Illinois Cent. R. Co. v. Spence*, 93 Tenn. 173, 23 S. W. 211. **Tex.**—*St. Louis*, etc. R. Co. *v. Bolen* (Tex. Civ. App.), 129 S. W. 860; *Gulf*, etc. R. Co. *v. Farmer* (Tex. Civ. App.), 108 S. W. 729; *Cole v. Parker*, 27 Tex. Civ. App. 563, 66 S. W. 135; *Houston*, etc. R. Co. *v. Loeffler* (Tex. Civ. App.), 51 S. W. 536. **Utah.**—*Utah*, etc. Co. *v. Diamond Coal*, etc. Co., 26 Utah 299, 73 Pac. 524. **Va.**—*Norfolk*, etc. R. Co. *v. Stevens*, 97 Va. 631, 34 S. E. 525, 46 L. R. A. 367. **Wash.**—*Cox v. Wilkeson*, etc. Co., 61 Wash. 343, 112 Pac. 231.

Whether deceased's wife pursued an independent occupation so as to entitle husband to damages is for the jury. *Myers v. Chicago*, etc. R. Co. (Iowa), 131 N. W. 770.

97. U. S.—*Kountz v. Toledo*, etc. R. Co., 189 Fed. 494, mortality tables not binding on jury. **Ala.**—*Cobb v. Owen*, 150 Ala. 410, 43 So. 826; *Decatur Car Wheel Co. v. Mehaffey*, 128 Ala. 242, 29 So. 646, 651; *Alabama*, etc. Co. *v. Jones*, 114 Ala. 519, 21 So. 507, 62 Am. St. Rep. 121. **Cal.**—*Harrison v. Sutter*, etc. Co., 116 Cal. 156, 47 Pac. 1019; *Redfield v. Oakland*, etc. Co., 110 Cal. 277, 42 Pac. 822. **Ga.**—*Western*, etc. Co. *v. Clark*, 117 Ga. 548, 44 S. E. 1, to state damages were to be assessed upon the basis of a thirty-three year expectancy as shown by the tables is error, especially where he is employed in a dangerous occupation. **Ill.**—*Chicago*, etc. R. Co. *v. Kelly*, 182 Ill. 267, 54 N. E. 979. **Ind.**—*Pittsburg*, etc. R. Co. *v. Sudhoff*, 173 Ind. 314, 90 N. E. 467. **Ia.**—*Farrell v. Chicago*, etc. R. Co., 123 Iowa 690, 99 N. W. 578. **Ky.**—*Louisville Water Co. v. Phillips*,

suffered pecuniary damage by decedent's death, are ordinarily questions for the jury where plaintiff proves his right to damages.⁹⁸

IX. INSTRUCTIONS. — GIVING ELEMENTS IN INSTRUCTIONS. — Where the damages recoverable are such as will compensate plaintiffs for the pecuniary injury necessarily resulting to them from the death, the court, in instructing the jury as to the measure of damages, should give the jury the various elements to be considered by the jury in arriving at their verdict,⁹⁹ as disclosed by the evidence

28 Ky. L. Rep. 557, 89 S. W. 700; Louisville, etc. R. Co. v. Kelly's Admr., 100 Ky. 421, 38 S. W. 852, 40 S. W. 452. **Md.**—Baltimore, etc. R. Co. v. State, 71 Md. 573, 18 Atl. 884. **Mich.** Jones v. McMillan, 129 Mich. 86, 88 N. W. 206; Nelson v. Lake Shore, etc. R. Co., 104 Mich. 582, 62 N. W. 993 (error to instruct they were not controlling where other evidence not given). **Minn.**—Johnson v. Smith, 99 Minn. 343, 109 N. W. 810 (tables not conclusive); Diesen v. Chicago, etc. R., 43 Minn. 454, 45 N. W. 864. **N. Y.** O'Doherty v. Postal Tel., etc. Co., 134 App. Div. 298, 118 N. Y. Supp. 871. **N. C.**—Russell v. Windsor St. Co., 126 N. C. 961, 36 S. E. 191. **Pa.**—Waechter v. Second Ave. T. Co., 198 Pa. 129, 47 Atl. 967. **Tex.**—Missouri Pac. R. Co. v. Lee, 70 Tex. 496, 7 S. W. 857; Texas, etc. R. Co. v. Higgins, 44 Tex. Civ. App. 523, 99 S. W. 200. **Wis.** Hackett v. Wisconsin, etc. R. Co., 141 Wis. 464, 124 N. W. 1018.

98. Ark.—St. Louis, etc. R. Co. v. Davis, 55 Ark. 462, 18 S. W. 628. See also Kansas City So. R. Co. v. Frost, 93 Ark. 183, 124 S. W. 748; Fuller v. Inman, 74 S. W. 287 (whether mother suffered pecuniary damage from six year old child's death, for jury). **Ga.** Central of Georgia, etc. Co. v. Motz, 130 Ga. 414, 61 S. E. 1 (nine year old child); Crawford v. Southern R. Co., 106 Ga. 870, 33 S. E. 826 (four and a half year old child). **Mass.**—Welch v. New York, etc. Co., 176 Mass. 393, 57 N. E. 668, 79 Am. St. Rep. 309, 54 L. R. A. 934. **Mich.**—Ingersoll v. Detroit, etc. R. Co., 163 Mich. 268, 128 N. W. 227. **Mont.**—Gilman v. Dart Hdw. Co., 42 Mont. 96, 111 Pac. 550. **Tex.**—Houston, etc. R. Co. v. Bryant (Tex. Civ. App.), 72 S. W. 885, whether wife deserting husband suffered damage from husband's death for jury.

When Question for Court.—But where dependence of plaintiff upon deceased

is made an essential to recovery, the court will take judicial notice that a child two years old was incapable of rendering valuable services so that plaintiff could not be dependent upon him. Southern R. Co. v. Covenia, 100 Ga. 46, 29 S. E. 219, 62 Am. St. Rep. 312, 40 L. R. A. 253. See also Atlantic R. Co. v. Arnold, 100 Ga. 566, 28 S. E. 224, two and a half to three year old child.

99. U. S.—Memphis Consol., etc. Co. v. Letson, 135 Fed. 969, 68 C. C. A. 453; Hunt v. Kile, 98 Fed. 49, 38 C. C. A. 641. **Ill.**—Illinois Cent. R. Co. v. Johnson, 221 Ill. 42, 77 N. E. 592, affirming 123 Ill. App. 300; Dady v. Condit, 188 Ill. 234, 58 N. E. 900; North Chicago, etc. R. Co. v. Morrissey, 111 Ill. 646; Chicago, etc. R. Co. v. Sweet, 45 Ill. 197, 92 Am. Dec. 206. **Ia.**—Coates v. Burlington, etc. R. Co., 62 Iowa 486, 17 N. W. 760. **Mo.**—McGowan v. St. Louis, etc. Co., 109 Mo. 518, 19 S. W. 199; Schaub v. Hannibal, etc. Co., 106 Mo. 74, 16 S. W. 924; Coleman v. Himmelberger-Harrison, etc. Co., 105 Mo. App. 254, 79 S. W. 981. **Pa.**—Pennsylvania R. Co. v. Butler, 57 Pa. 335. **Tenn.**—Illinois Cent. R. Co. v. Spence, 93 Tenn. 173, 23 S. W. 211, but it is erroneous to give a mathematical rule for figuring the damages. **Tex.** Gulf, etc. R. Co. v. Farmer (Tex. Civ. App.), 115 S. W. 260, reversing (Tex. Civ. App.), 108 S. W. 729; Galveston, etc. R. Co. v. Power (Tex. Civ. App.), 54 S. W. 629; De Palacios v. Rio Grande, etc. R. Co. (Tex. Civ. App.), 45 S. W. 612.

Instruction Too Broad.—"It is error to submit such cases with the general instruction that the jury may find such damages as they believe the plaintiff ought to recover," leaving it to their individual notions of right and wrong unguided by any legal rule as to elements. Muren Coal, etc. Co. v. Howell, 204 Ill. 515, 68 N. E. 456;

only.¹ An instruction, however, informing the jury that they might give a verdict for such "pecuniary" damages as will fairly com-

Waldron v. Marcier, 82 Ill. 550 (instruction should be to give "such damages as she has sustained"); *McGowan v. St. Louis, etc. R. Co. (Mo.)*, 16 S. W. 236, *affirmed*, 109 Mo. 518, 19 S. W. 199. See also *Pittsburg, etc. R. Co. v. Sudhoff*, 173 Ind. 314, 90 N. E. 467, harmless error.

Damage to Married Woman.—Since part of a married woman's time is necessarily devoted to her family, an instruction that the jury should estimate the damages to her estate as if she were unmarried is erroneous. *Stulhmiller v. Cloughly*, 58 Iowa 738, 13 N. W. 55.

In Georgia the attention of the jury should be directed to the fact that in deceased's declining years his ability and earning capacity might decrease and that this should be taken into account in arriving at their verdict. *Western, etc. R. Co. v. Moore*, 94 Ga. 457, 20 S. E. 640; *Central R. Co. v. Thompson*, 76 Ga. 770.

Measuring Damage With Precision. An instruction that the jury need not estimate the damages with precision and nicety is erroneous (*Green v. Hudson River R. Co.*, 32 Barb. (N. Y.) 25. See also *Steinbrunner v. Pittsburg, etc. R. Co.*, 146 Pa. 504, 23 Atl. 239, 28 Am. St. Rep. 806), although it is proper to state much is left, and much must always be left, to your sound discretion (*Pennsylvania R. Co. v. Ogier*, 35 Pa. 60, 78 Am. Dec. 322).

Excluding Damage to Other Beneficiaries.—Where deceased's husband had recovered in a separate suit, in a suit by children whose mother was killed by defendant an instruction should be given that the jury should not consider any damages to the husband in arriving at their verdict, should they find plaintiff entitled to a recovery. *Galveston, etc. R. Co. v. Kutae*, 72 Tex. 643, 11 S. W. 127.

Considering Sole Support.—An instruction that the jury might consider the fact that deceased was the sole support of the family, though improper is not ground for reversal. *Kerrigan v. Market St. R. Co.*, 138 Cal. 506, 71 Pac. 621.

Prescribing Mathematical Rule Improper.—An instruction that the widow can only recover such sum as would represent "the present worth" of the probable amount which deceased would have contributed to her support had he lived is objectionable in that it prescribes a mathematical rule by which to ascertain what a given sum would be worth at the time of the trial. *Merchants, etc. Co. v. Burns*, 96 Tex. 573, 74 S. W. 758.

Taking Into Account Personal Expenses of Deceased.—The failure to instruct the jury that the necessary or probable personal expenses of deceased should be taken into consideration in arriving at the verdict is not reversible error (*Southern R. Co. v. Evans*, 23 Ky. L. Rep. 568, 63 S. W. 445), where no instruction covering this point was requested (*Neal v. Sheffield, etc. Co.*, 151 Iowa 690, 130 N. W. 398). But the refusal to so instruct, when so requested, is reversible error; *Galveston, etc. R. Co. v. Olds* (Tex. Civ. App.), 112 S. W. 787.

1. *Pate v. Gus Blair, etc., Coal Co.*, 158 Ill. App. 573; *Texas, etc. R. Co. v. Gullett* (Tex. Civ. App.), 134 S. W. 262.

Referring to Evidence as Basis for Recovery.—The judge should also require the jury to determine the liability from the evidence and from that alone, and an instruction which would permit them to enter into an open field of investigation cannot be sustained. *Freeport v. Isbell*, 83 Ill. 440, *approved* in *Muren Coal, etc. Co. v. Howell*, 204 Ill. 515, 523, 68 N. E. 456.

Doctor's Bills.—An instruction allowing recovery for the doctor's bill is erroneous where there is no evidence as to the payment of doctor's bills. *Portsmouth, etc. R. Co. v. Feed*, 102 Va. 662, 47 S. E. 850.

Future Prospects.—The jury should not be instructed to consider decedent's prospects for the future or his expectancy of life, where no evidence is submitted as to these elements. *Alabama, etc. R. Co. v. Overstreet*, 85 Miss. 78, 37 So. 819.

pensate plaintiffs is good, in the absence of a request for a more specific instruction.²

Pecuniary Loss.—Since the only damages recoverable are such pecuniary benefits as the plaintiff had a reasonable expectation of receiving from the deceased had he lived, the instructions should require the jury to limit the assessment of damages to the actual "pecuniary damages" sustained as shown by the evidence.³ But if the statute restricts the recovery to a penalty within specified amounts, it is error to instruct the jury to limit the recovery to plaintiff's pecuniary loss.⁴

If there is no evidence of actual pecuniary loss to collaterals, as to whom pecuniary loss is not presumed, it is error to instruct the jury to consider the loss arising to such collaterals,⁵ and on request the jury should be instructed that only nominal damages should be given in such case.⁶

Measure of Damages as Effected by Life Expectancy of Beneficiary.—Where the widow sues for the death of her husband, the failure to instruct

2. **Ark.**—*Warren & O. v. R. Co. v. Waldrop*, 93 Ark. 127, 123 S. W. 792; *Bodeaw Lumb. Co. v. Ford*, 82 Ark. 555, 102 S. W. 896. **Colo.**—*Moffatt v. Tenney*, 17 Colo. 189, 30 Pac. 348, 351. **Ga.**—*Central of Ga. R. Co. v. Newman*, 74 S. E. 1077. **Ill.**—*Chicago, etc. R. Co. v. Louderback*, 125 Ill. App. 323 (though not referring jury to evidence in assessing same); *Chicago, etc. R. Co. v. Kneirim*, 48 Ill. App. 243. **Ind.**—*Malott v. Shimer*, 153 Ind. 35, 54 N. E. 101, 74 Am. St. Rep. 278; *Indianapolis, etc. Tract. Co. v. Newby*, 45 Ind. App. 540, 90 N. E. 29, 91 N. E. 36. **Ia.**—*Grace v. Minneapolis, etc. R. Co.*, 133 N. W. 672; *Andrews v. Chicago, etc. R. Co.*, 86 Iowa 677, 53 N. W. 399. **Ky.**—*Louisville & N. R. Co. v. Simrall*, 127 Ky. 55, 104 S. W. 1011. **Mo.**—*Geismann v. Missouri Ed. El. Co.*, 173 Mo. 654, 73 S. W. 654; *Browning v. Wabash, etc. R. Co.*, 124 Mo. 55, 27 S. W. 644, *affirming* 24 S. W. 731; *Downs v. Missouri, etc. R. Co. (Mo. App.)*, 143 S. W. 889, 892; *Voelker v. Hill-O'Meara, etc. Co.*, 153 Mo. App. 1, 131 S. W. 907. **Tex.**—*Gonzales v. Galveston, etc. R. Co. (Tex. Civ. App.)*, 107 S. W. 896; *San Antonio, etc. R. Co. v. Brock*, 35 Tex. Civ. App. 155, 80 S. W. 422; *Galveston, etc. R. Co. v. Worthy (Tex. Civ. App.)*, 27 S. W. 426.

3. *Fowler v. Chicago, etc. R. Co.*, 234 Ill. 619, 85 N. E. 298, *reversing* 138 Ill. App. 352; *Galveston, etc. R.*

Co. v. Worthy, 87 Tex. 459, 29 S. W. 376.

Though the court instructed the jury that "such damages are not limited to the actual pecuniary damage sustained by the plaintiff by reason of loss of services of deceased," it is not reversible error where the instructions as a whole lay down the correct rule that actual pecuniary damage is alone to be considered. *Peters v. Southern Pac. Co.*, 160 Cal. 48, 69, 116 Pac. 400.

The court should not instruct the jury that the administratrix, the nominal plaintiff, "could recover for loss of comforts and protection." Such language, however, may be non-prejudicial where the rule of damages is otherwise correctly stated. *Cerrillos, etc. R. Co. v. Deserant*, 9 N. M. 49, 67, 49 Pac. 807.

As to instructions fully setting out the general rule as to damages, see *Burk v. Arcata, etc. R. Co.*, 125 Cal. 364, 365, 57 Pac. 1065.

4. *Ervin v. St. Louis, etc. R. Co.*, 158 Mo. App. 1, 139 S. W. 498; *Childress v. Southwest N. R. Co.*, 141 Mo. App. 667, 126 S. W. 169.

5. *Colesar v. Star Coal Co.*, 160 Ill. App. 251.

6. *Burk v. Arcata, etc. R. Co.*, 125 Cal. 364, 57 Pac. 1065, no presumption as to pecuniary loss by adult collateral heirs.

the jury that the measure of damages was effected by her expectancy is prejudicial.⁷

Contributing to Cause Death Instead of Causing Death.—An instruction that the jury should find for plaintiffs if they found the defendant's negligent acts or omissions complained of "directly contributed to cause" the death, instead of that such acts and omissions caused the death is reversible error.⁸

Contributory Negligence.—An instruction that by contributory negligence is meant the negligence of the plaintiff is erroneous as it excludes the contributory negligence on the part of the deceased.⁹

Mitigating Circumstances.—If any circumstances exist which will aggravate or mitigate the wrong they should be pointed out by appropriate instructions. The jury should not be left to grope their way unaided through the testimony to find the circumstances of mitigation or aggravation.¹⁰

Excluding Improper Elements.—An instruction pointing out but one improper element of damages that compensation for grief suffered by the beneficiaries is not a proper element of damages is misleading in that it does not exclude other improper elements as loss of society.¹¹

Beneficiaries.—An instruction tending to mislead the jury as to the real beneficiary under the statute is reversible error.¹²

X. PRESUMPTIONS AND BURDEN OF PROOF.—A. As to WRONGFUL ACT, NEGLIGENCE OR DEFAULT.—In an action for wrongful death the burden is upon plaintiff in the first instance not only to prove a wrongful act, neglect or default on defendant's part,¹³ but

7. *Helena Gas Co. v. Rogers* (Ark.), 147 S. W. 473, where action is for benefit of the estate, such instruction unnecessary.

8. *Green v. United Rys. Co.* (Mo. App.), 145 S. W. 861.

9. *Albrecht v. Morris* (Neb.), 136 N. W. 48. See generally the title "Negligence."

10. *Rains v. St. Louis, etc. R. Co.*, 71 Mo. 164, 36 Am. Rep. 459. See also *Cerrillos, etc. R. Co. v. Deserant*, 9 N. M. 49, 69, 49 Pac. 807.

An instruction that mitigating or aggravating circumstances should be taken into consideration was held sufficient without pointing out each and every mitigating or aggravating circumstance to be considered (*Hayes v. Williams*, 17 Colo. 465, 30 Pac. 352), where no fuller instructions are requested (*Downs v. Missouri, etc. R. Co.* (Mo.), 143 S. W. 889).

Meaning of Mitigating or Aggravating Circumstances.—Under the peculiar wording of the Colorado statute it was held in *Moffatt v. Tenney*, 17 Colo.

189, 30 Pac. 348, 351, that the words "mitigating and aggravating circumstances attending such wrongful act" taken in connection with the preceding language of the statute referred to circumstances not relating to the wrongful act itself, but such as affect the actual damages suffered by the surviving party entitled to sue, either by way of diminishing or enhancing the same.

11. *International, etc. R. Co. v. McVey*, 99 Tex. 28, 87 S. W. 328.

It is error to refuse to instruct upon request that no recovery could be had for mental suffering, sorrow and distress of mind. *Gulf, etc. Co. v. Farmer*, 102 Tex. 235, 115 S. W. 260.

12. *Steel v. Kurtz*, 28 Ohio St. 191, 198.

13. **U. S.**—*Perkins v. Northern Pac. R. Co.*, 193 Fed. 219; *Southern Pac. R. Co. v. De Valle da Costa* (C. C. A.), 190 Fed. 689; *Rutherford v. Foster*, 125 Fed. 187, 60 C. C. A. 129; *Baker v. Philadelphia, etc. R. Co.*, 149 Fed. 882. **Ala.**—*Suwell v. Derricott*, 161 Ala. 259,

also to prove that the death was the proximate result of plaintiff's act, neglect or default.¹⁴ But he is not required to exclude all pos-

49 So. 895, 23 L. R. A. (N. S.) 996. **Ark.**—*St. Louis, etc. Co. v. Townsend*, 69 Ark. 380, 63 S. W. 994. **Ind.**—*Pittsburg, etc. R. Co. v. Rogers*, 45 Ind. App. 230, 87 N. E. 28. **Md.**—*United El., etc. Co. v. State*, 100 Md. 634, 60 Atl. 248. **Mass.**—*Manning v. Conway*, 192 Mass. 122, 78 N. E. 401. **Mich.**—*Powers v. Pere Marquette R. Co.*, 143 Mich. 379, 106 N. W. 1117. **Mo.**—*McGee v. Wabash R. Co.*, 214 Mo. 530, 114 S. W. 33; *Warner v. St. Louis, etc. R. Co.*, 178 Mo. 125, 77 S. W. 67; *Murray v. Missouri, etc. R. Co.*, 101 Mo. 236, 13 S. W. 817, 20 Am. St. Rep. 601. **N. H.**—*Piper v. Boston, etc. R. Co.*, 75 N. H. 435, 75 Atl. 1041, preponderance of evidence sufficient. **N. Y.**—*Wieland v. Delaware, etc. Co.*, 167 N. Y. 19, 60 N. E. 234; *Causullo v. Lenox Const. Co.*, 122 App. Div. 672, 107 N. Y. Supp. 431; *McConnell v. New York, etc. Co.*, 63 App. Div. 545, 71 N. Y. Supp. 616. **N. C.**—*Pegram v. Seaboard, etc. Co.*, 139 N. C. 303, 51 S. E. 975. **R. I.**—*Wilson v. New York, etc. R. Co.*, 29 R. I. 146, 69 Atl. 364. **Tex.**—*International, etc. R. Co. v. Catron* (Tex. Civ. App.), 137 S. W. 404, 406; *International, etc. R. Co. v. Knight* (Tex. Civ. App.), 52 S. W. 640. **W. Va.**—*Hanley v. West Virginia, etc. Co.*, 59 W. Va. 419, 53 S. E. 625.

See generally the title "Negligence."

The inability of deceased to testify as to the manner in which the injury causing death occurred, raises no presumption either for or against the action. *Weatherby v. Nashville, etc. R. Co.*, 166 Ala. 575, 51 So. 959; *Mississippi, etc. Co. v. Smith*, 95 Miss. 528, 48 So. 735.

Railroad Need Not Prove It Was Not Negligent.—The burden is not upon the railroad to prove affirmatively that it was not negligent where a trespasser was killed. *Sommers v. Mississippi, etc. R. Co.*, 7 Lea (Tenn.) 201.

Hotel Fire.—No presumption of negligence causing death of plaintiff's intestate arises from death from hotel fire. *Weeks v. McNulty*, 101 Tenn. 495, 48 S. W. 809, 43 L. R. A. 185.

In Georgia a statute provides that if death result to an employee from any injury, a presumption of negligence arises. But this act is not retroactive.

Wallace v. Southern R. Co. (Ga. App.), 72 S. E. 606.

14. **U. S.**—*Perkins v. Northern Pac. R. Co.*, 193 Fed. 219; *Southern Pac. R. Co. v. De Valle da Costa* (C. C. A.), 190 Fed. 689; *Illinois Cent. R. Co. v. O'Neill*, 177 Fed. 328, 100 C. C. A. 658; *Baker v. Philadelphia, etc. R. Co.*, 149 Fed. 882. **Del.**—*Gismondi v. Peoples Ry. Co.*, 83 Atl. 136. **Mich.**—*Powers v. Pere Marquette R. Co.*, 143 Mich. 379, 106 N. W. 1117. **Miss.**—*Mississippi Cotton Oil Co. v. Smith*, 95 Miss. 528, 48 So. 735. **Mo.**—*Warner v. St. Louis, etc. Co.*, 178 Mo. 125, 77 S. W. 67; *Herke v. St. Louis, etc. Co.*, 141 Mo. App. 613, 125 S. W. 822. **N. H.**—*Piper v. Boston, etc. R. Co.*, 75 N. H. 435, 75 Atl. 1041. **N. J.**—*Chester v. Cape May, etc. Co.*, 78 N. J. L. 131, 73 Atl. 836, evidence failed to show which of two causes resulted in death where defendant was liable for one cause only. **N. Y.**—*Baxter v. Auburn, etc. R. Co.*, 190 N. Y. 439, 83 N. E. 469; *Levy v. Mott Iron Wks.*, 143 App. Div. 7, 127 N. Y. Supp. 506. **N. C.**—*Haynie v. North Carolina El. R. Co.*, 73 S. E. 198; *Pegram v. Seaboard Air Line R. Co.*, 139 N. C. 303, 51 S. E. 975. **Pa.**—*McCafferty v. Pennsylvania R. Co.*, 193 Pa. 339, 44 Atl. 435, 74 Am. St. Rep. 690. **Tex.**—*International, etc. R. Co. v. Knight* (Tex. Civ. App.), 52 S. W. 640. **Va.**—*Milton's Admx. v. Norfolk, etc. R. Co.*, 108 Va. 752, 62 S. E. 960.

Plaintiff must not only show an injury causing death but he must also show that it was due to defendant's negligence and how it occurred. *Mississippi, etc. Co. v. Smith*, 95 Miss. 528, 48 So. 735.

If death might have resulted from either of two causes, plaintiff has the burden of proving with reasonable certainty not only that death might have resulted from defendant's wrongful act, but that death did result therefrom. *Herke v. St. Louis, etc. R. Co.*, 141 Mo. App. 613, 125 S. W. 822. This burden is not sustained "by showing merely that it was due either to the negligence of the master or of a fellow servant. He may, however, establish his case by proof of the master's negligence adequate to produce an injury without negating all possible

sibility of death from other causes.¹⁵ But when plaintiff has produced the proof of an adequate cause, the burden rests upon the defendant to prove other facts which would show either that the injury was due to causes for which the master was not responsible or that the actual cause of the injury causing death was so uncertain that the master's negligence did not appear with reasonable certainty to have been the cause.¹⁶

B. AS TO DEATH.—While the burden of proof on the question of death where issue is taken thereon is upon the plaintiff,¹⁷ the death is presumed to be the result of an injury sufficient to cause it, though there is evidence to prove that it might have been otherwise produced, but none that it was.¹⁸ But if the surroundings do not indicate how the deceased came to be where found, the presumption will be that the death was without design, not that he committed suicide.¹⁹

C. AS TO KNOWLEDGE OF DEFECTS CAUSING DEATH.—The burden of proving deceased's knowledge of defects which produced the injury causing death is upon defendant.²⁰

D. AS TO COMMENCEMENT WITHIN STATUTORY PERIOD.—Where the limitation as to the time of bringing the action provided in the statute is a condition precedent to plaintiff's right to maintain the action, the burden is upon plaintiff to prove the commencement within the time specified.²¹

E. AS TO CONTRIBUTORY NEGLIGENCE.—In view of the natural instinct of self-preservation the presumption, in the absence of evidence, is that deceased was in the exercise of due care at the time of the occurrence of the wrongful act causing death, and therefore the burden of proving the contributory negligence of deceased is upon the defendant,²² unless plaintiff's evidence discloses contributory neg-

suggestions of the existence of other causes." *Southern Pac. Co. v. De Valle da Costa* (C. C. A.), 190 Fed. 689, 700.

15. *Herke v. St. Louis, etc. R. Co.*, 141 Mo. App. 613, 125 S. W. 822.

16. *Southern Pac. Co. v. De Valle da Costa* (C. C. A.), 190 Fed. 689, 700; *McGee v. Wabash R. Co.*, 214 Mo. 530, 114 S. W. 33.

17. *Northern Pac. R. Co. v. King*, 181 Fed. 913, 104 C. C. A. 351.

18. *Santer v. New York Cent. R. Co.*, 66 N. Y. 50, 23 Am. Rep. 18, affirming 6 Hun 446.

Where deceased survived the injuries ten days there is no presumption of death therefrom. *Northern Pac. R. Co. v. King*, 181 Fed. 913, 104 C. C. A. 351.

19. *Voelker v. Hill-O'Meara Const. Co.*, 153 Mo. App. 1, 131 S. W. 907. See also *Ill.—Devine v. National Safe Dep. Co.*, 240 Ill. 369, 88 N. E. 804; *Collison v. Illinois, etc. R. Co.*, 239

Ill. 532, 88 N. E. 251. **Kan.**—*Hart v. St. Louis, etc. R. Co.*, 80 Kan. 699, 102 Pac. 1101. **Wis.**—*Sorenson v. Menasha, etc. Co.*, 56 Wis. 338, 14 N. W. 446.

20. *Swift Co. v. Gaylord*, 126 Ill. App. 281, this is a matter of defense. See generally the title "**Master and Servant.**"

21. *Louisville, etc. R. Co. v. Chamblee* (Ala.), 54 So. 681; *Poff v. Northeastern, etc. Co.*, 72 N. H. 164, 55 Atl. 891.

22. **U. S.**—*Rothe v. Pennsylvania Co.*, 195 Fed. 21; *Deninger v. American Loc. Co.*, 185 Fed. 22, 107 C. C. A. 126; *Illinois Cent. R. Co. v. O'Neill*, 177 Fed. 328, 100 C. C. A. 658; *Wabash R. Co. v. De Tar*, 141 Fed. 932, 73 C. C. A. 166, 4 L. R. A. (N. S.) 352 (not entitled to probative force of affirmative evidence). **Ala.**—*Mobile, etc. Co. v. Bromberg*, 141 Ala. 258, 37 So. 395; *Alabama, etc. Co. v. Frazier*, 93 Ala. 45, 9 So. 303, 30 Am. St. Rep. 28. **Ariz.**

DeAmado *v.* Friedman, 11 Ariz. 56, 89 Pac. 588. **Ark.**—Little Rock, etc. R. Co. *v.* Everett, 48 Ark. 333, 3 S. W. 50, 3 Am. St. Rep. 230. **Cal.**—Schneider *v.* Market St. R. Co., 134 Cal. 482, 66 Pac. 734; Heckle *v.* Southern Pac. Co., 123 Cal. 441, 56 Pac. 56; Clark *v.* Tularc, etc. Co., 14 Cal. App. 414, 112 Pac. 564; Foley *v.* Northern Cal. P. Co., 14 Cal. App. 401, 112 Pac. 467; Williams *v.* San Francisco, etc. R. Co., 6 Cal. App. 715, 93 Pac. 122. **Colo.** Denver, etc. Co. *v.* Parker, 123 Pac. 680, 688, entitled to some probative force. **Del.**—Wood *v.* Philadelphia, etc. R. Co., 76 Atl. 613. **Fla.** Jacksonville El. Co. *v.* Sloan, 52 Fla. 257, 42 So. 516. **Idaho.**—Pilmer *v.* Boise Trac. Co., 14 Idaho 327, 94 Pac. 432, 15 L. R. A. (N. S.) 254. **Ill.**—Brennen *v.* Chicago, etc. R. Co., 147 Ill. App. 263, *affirmed*, 241 Ill. 610, 89 N. E. 756. **Ind.**—Chicago, etc. R. Co. *v.* Ginther, 90 N. E. 911 (by statute); Cleveland, etc. R. Co. *v.* Starks, 89 N. E. 602; Pittsburgh, etc. R. Co. *v.* Rogers, 87 N. E. 28 (direct evidence necessary where plaintiff's evidence shows contributory negligence). **Ia.** Wilson *v.* Illinois Cent. R. Co., 150 Iowa 33, 129 N. W. 340 (rule has no application where there are eye witnesses); Korab *v.* Chicago, etc. R. Co., 149 Iowa 711, 128 N. W. 529; Gray *v.* Chicago, etc. R. Co., 143 Iowa 263, 121 N. W. 1097; Brown *v.* West Riverside Coal Co., 143 Iowa 662, 120 N. W. 732. **Ky.**—Johnson *v.* Westernfield's Admr., 143 Ky. 10, 135 S. W. 425; Cincinnati, etc. R. Co. *v.* Yocum's Admr., 137 Ky. 117, 123 S. W. 247; Warren's Admr. *v.* Jeunesse, 122 S. W. 862. **Mich.**—Gates *v.* Beebe, 135 N. W. 934; Gilbert *v.* Ann Arbor R. Co., 161 Mich. 73, 125 N. W. 745 (where no eye witnesses only). **Minn.**—Gilbert *v.* Tracy, 115 Minn. 443, 132 N. W. 752; Lewis *v.* Chicago, etc. R. Co., 111 Minn. 509, 127 N. W. 180. **Mo.**—Ryan *v.* St. Louis, etc. R. Co., 190 Mo. 621, 89 S. W. 865, 2 L. R. A. (N. S.) 777; Schmidt *v.* St. Louis, etc. R. Co., 149 Mo. 269, 50 S. W. 921, 73 Am. St. Rep. 380; Newton *v.* Wabash R. Co., 152 Mo. App. 167, 132 S. W. 1195; Richter *v.* United R. Co. (Mo. App.), 129 S. W. 1055; Heine *v.* St. Louis, etc. R. Co., 144 Mo. App. 443, 129 S. W. 421. **Neb.**—Albrecht *v.* Morris, 136 N. W. 48. **N. C.**—Cogdell *v.* Wilmington, etc. Co., 132 N. C. 852, 44 S. E.

618. **N. D.**—Kunkel *v.* Minneapolis, etc. Co., 18 N. D. 367, 121 N. W. 830; Cameron *v.* Great Northern R. Co., 8 N. D. 124, 77 N. W. 1016 (where no eye witnesses to accident). **Ohio.** Jackson, etc. Co. *v.* Hathaway, 27 Ohio C. C. 745, 7 Ohio C. C. (N. S.) 242. **Pa.**—Pennsylvania Tel. Co. *v.* Varnau, 15 Atl. 624. **S. D.**—Whaley *v.* Vidal, 132 N. W. 248. **Tex.**—Houston, etc. R. Co. *v.* Davenport, 102 Tex. 369, 117 S. W. 790; Houston, etc. R. Co. *v.* Davenport (Tex. Civ. App.), 110 S. W. 150; Texas, etc. Co. *v.* Huber, 16 Tex. Civ. App. 154, 95 S. W. 568. **Vt.**—Hill *v.* New Haven, 37 Vt. 501, 88 Am. Dec. 613. **Va.**—Norfolk, etc. Co. *v.* Gilman's Admr., 88 Va. 239, 13 S. E. 475. **Wash.**—Tecker *v.* Seattle, etc. R. Co., 60 Wash. 570, 111 Pac. 791.

The presumption of the exercise of care is inapplicable where the surrounding facts and circumstances conclusively establish his contributory negligence. Rich *v.* Chicago, etc. R. Co., 149 Fed. 79, 78 C. C. A. 663.

Deceased Presumed To Have Seen What Could Be Seen.—Chicago, etc. R. Co. *v.* Ginther (Ind. App.), 90 N. E. 911.

Negligence Must Be Proved Notwithstanding Presumption.—This presumption of due care does not allow a recovery without proof of the negligence of defendant. Powers *v.* Pere Marquette R. Co., 143 Mich. 379, 106 N. W. 1117.

Where Eye Witnesses, Rule Not Applicable.—The presumption of due care has no application where there is direct evidence as to the circumstances surrounding the death (Ames *v.* Waterloo, etc. Co., 120 Iowa 640, 95 N. W. 161) that is, where there are eye witnesses (Casper *v.* Illinois Cent. R. Co., 149 Ill. App. 588; Illinois Cent. R. Co. *v.* Kief, 111 Ill. App. 354; Wilson *v.* Illinois Cent. R. Co., 150 Iowa 33, 129 N. W. 340).

"It is a presumption of fact, not of law, and, like other presumptions arising from the ordinary or usual conduct of men, rather than from what is invariable or universal, it is disputable, and cannot exist where it is incompatible with the conduct of the person to whom it is sought to apply it. . . . It is thus plainly and authoritatively settled not only that the presumption of the exercise of reasonable care is a rebuttable inference of fact, but also

ligence or that the accident could not have occurred without the contributory fault of decedent.²³ In a few jurisdictions, however, the burden is upon plaintiff, as a part of his case, to prove that deceased was in the exercise of ordinary care at the time of the injury causing death.²⁴

that it does not have any probative force or weight in a case where the surrounding circumstances are shown to have been such that, had the injured person taken reasonable precautions for his safety, the injury would not have occurred." *Wabash R. Co. v. De Tar*, 141 Fed. 932, 73 C. C. A. 166, 4 L. R. A. (N. S.) 352, cited with approval in *Rothe v. Pennsylvania R. Co.*, 195 Fed. 21, 26.

23. *Cal.*—*Williams v. San Francisco, etc. Co.*, 6 Cal. App. 715, 93 Pac. 122. *Ind.*—*Pittsburg, etc. R. Co. v. Rogers*, 45 Ind. App. 230, 87 N. E. 28. *Tex.* *Huber v. Texas, etc. R. Co.* (Tex. Civ. App.), 113 S. W. 984. *Va.*—*Norfolk, etc. R. Co. v. Gilman's Admr.*, 88 Va. 239, 13 S. E. 475.

Death of Party Does Not Change Rule.—If the circumstances indicate contributory negligence of deceased, the fact that the person is deceased does not change the rule placing the burden of showing excuse upon the injured party. The party suing must then show matter of excuse. *Pennsylvania Co. v. Mahoney*, 22 Ohio C. C. 469, 12 Ohio Cir. Dec. 366.

Defendant Need Not Prove Contributory Negligence by Own Evidence. While the burden of proving the contributory negligence of deceased is upon the defendant, he is not required to prove it by his own evidence, "if the evidence introduced by the plaintiff show that the deceased might, by the use of ordinary care and diligence, have avoided the injury, then in such case he was guilty of contributory negligence which prevents a recovery." *Pittsburg, etc. R. Co. v. Rogers*, 45 Ind. App. 230, 87 N. E. 28, 35.

Contributory Negligence Not Presumed.—"Where a person is killed by the negligence of another, it cannot be inferred that he was guilty of contributory negligence, unless the undisputed evidence clearly and fully rebuts the presumption that he exercised due care for his safety." *La Pray v. Lavis Chem. Co.* (Minn.), 134 N. W. 313, per curiam.

24. *Conn.*—*Bartram v. Sharon*, 71 Conn. 686, 43 Atl. 143, 71 Am. St. Rep. 225; *Ryan v. Bristol*, 63 Conn. 26, 27 Atl. 309. *Ill.*—*Stack v. East St. Louis, etc. Co.*, 245 Ill. 308, 92 N. E. 241; *Stollery v. Cicero, etc. Co.*, 243 Ill. 290, 90 N. E. 709; *Casey v. Adams*, 137 Ill. App. 404, affirmed, 234 Ill. 350, 84 N. E. 933. *Me.*—*McDonough v. Grand Trunk R. Co.*, 98 Me. 304, 56 Atl. 913. *Md.*—*State v. Baltimore, etc. R. Co.*, 24 Md. 84, 87 Am. Dec. 600. *Mass.*—*Haynes v. Boston El. R. Co.*, 204 Mass. 249, 90 N. E. 419; *Hamma v. Haverhill G. Co.*, 203 Mass. 572, 89 N. E. 1043; *French v. Sabin*, 202 Mass. 240, 88 N. E. 845; *Prince v. Lowell Elec. Light Corp.*, 201 Mass. 276, 87 N. E. 558. *N. Y.*—*Clancy v. New York, etc. R. Co.*, 201 N. Y. 235, 94 N. E. 867; *Lamb v. Union R. Co.*, 195 N. Y. 260, 88 N. E. 371, reversing 125 App. Div. 286, 109 N. Y. Supp. 97 (where defendant's negligence does not excuse plaintiff's contributory negligence); *Baxter v. Auburn, etc. Co.*, 190 N. Y. 439, 83 N. E. 469, reversing 118 App. Div. 919, 103 N. Y. Supp. 1116; *Perez v. Sandrowitz*, 180 N. Y. 397, 73 N. E. 228 (case should not be submitted to jury because of failure to prove freedom from contributory negligence); *Zaun v. Long Island R. Co.*, 139 App. Div. 719, 124 N. Y. Supp. 511, affirmed, 201 N. Y. 599, 95 N. E. 1142; *Nichols v. Searle Mfg. Co.*, 134 App. Div. 62, 118 N. Y. Supp. 651; *Gallagher v. New York City R. Co.*, 109 N. Y. Supp. 515 (applicable to both adults and children). *Ohio.*—*Wolf v. Lake Erie, etc. Co.*, 55 Ohio St. 517, 45 N. E. 708, 36 L. R. A. 812.

Degree of Proof.—The strict proof required in personal injury cases is not required of the personal representative in an action for the death of his intestate. *Zaun v. Long Island R. Co.*, 139 App. Div. 719, 124 N. Y. Supp. 511, affirmed, 201 N. Y. 599, 95 N. E. 1142; *Charters v. Palmer*, 98 N. Y. Supp. 887.

When Burden Not Sustained.—The burden of showing freedom from con-

F. AS TO PECUNIARY LOSS.—Upon the death of a minor leaving a parent or parents,²⁵ or a husband or wife leaving the other or children surviving, a presumption of pecuniary loss arises therefrom in some jurisdictions, and evidence as to pecuniary loss on the beneficiaries' part need not be given, as plaintiff will be entitled to nominal damages though no other damage be proved.²⁶ But the presumption

tributary negligence upon deceased's part is not sustained where there is no direct evidence, and no inferential evidence of any care for his own safety. *Gallagher v. New York, etc. R. Co.*, 109 N. Y. Supp. 515.

Showing Deceased Was Habitually Careful.—A showing that plaintiff was habitually careful does not raise the presumption of deceased's negligence where the evidence shows the accident happened in a certain way. *Casey v. Adams*, 137 Ill. App. 404, *affirmed*, 234 Ill. 350, 84 N. E. 933.

Burden as to Deceased's Gross Negligence.—Under a statute making a railroad liable for death at crossings because of its failure to sound the bell, unless deceased was guilty of gross negligence, the burden is upon the defendant. *Slattery v. New York, etc. R. Co.*, 203 Mass. 453, 89 N. E. 622.

Not Proof Beyond Reasonable Doubt. The mother's due care need not be proved beyond a reasonable doubt as this is a civil action and not a criminal action. *Grella v. Lewis Wharf Co. (Mass.)*, 97 N. E. 745, stating history of Massachusetts legislation.

25. **Ill.**—*Chicago, etc. R. Co. v. Huston*, 196 Ill. 480, 63 N. E. 1028 (that son worked for father and received wages therefor does not change rule); *Nordhaus v. Vandalia R. Co.*, 147 Ill. App. 274, *affirmed*, 242 Ill. 166, 89 N. E. 974; *Savage v. Hayes Bros. Co.*, 142 Ill. App. 316; *Cleveland, etc. Co. v. Dukeman*, 130 Ill. App. 105; *s. c.*, 134 Ill. App. 396, *affirmed*, 237 Ill. 104, 86 N. E. 712 (the question as to whether the "next of kin" received pecuniary assistance is then immaterial); *Grace, etc. Co. v. Strong*, 127 Ill. App. 336, *affirmed*, 224 Ill. 630, 79 N. E. 967; *Huff v. Peoria, etc. Co.*, 127 Ill. App. 242. **Minn.**—*Youngquist v. Minneapolis, etc. R. Co.*, 102 Minn. 501, 114 N. W. 259. **S. C.**—*Mason v. Southern R. Co.*, 58 S. C. 70, 36 S. E. 440, 79 Am. St. Rep. 826, 53 L. R. A. 913. **Tex.**—*Gonzales v. Galveston, etc. Co.*

(*Tex. Civ. App.*), 107 S. W. 896. **Wash.**—*Atrops v. Costello*, 8 Wash. 149, 35 Pac. 620. *Contra*, *St. Louis M. & S. E. R. Co. v. Garner*, 76 Ark. 555, 89 S. W. 550. See *supra*, VIII, A.

Presumption as Extending to Adult Children.—Though in *Rautman v. Chicago, etc. R. Co.*, 156 Ill. App. 457, it is said the presumption of pecuniary loss extends to adult children, in other jurisdictions pecuniary loss on the part of adult children must be affirmatively proved. *St. Louis, M. & S. E. R. Co. v. Garner*, 76 Ark. 555, 89 S. W. 550; *Standard Light, etc. Co. v. Munsey* (*Tex. Civ. App.*), 76 S. W. 931; *International, etc. R. Co. v. De Bajligethy*, 9 *Tex. Civ. App.* 108, 28 S. W. 829.

Presumption of Existence of Family Relation.—"Under age the law presumes the relation to exist, and that stands for proof until the contrary appears. Over age, no doubt but the relation must be shown to exist in point of fact." *Lewis v. Hunlock's Creek, etc. Co.*, 203 Pa. 511, 53 Atl. 349; *Pennsylvania R. Co. v. Adams*, 55 Pa. 499.

Son Living in Another State and Not Aiding Parents.—The presumption of pecuniary loss by the father is not overcome by evidence that deceased was seventeen years old, self supporting and lived in another state than that of the father and for several years the father had not demanded any pecuniary aid, as he had a legal right to his services. *Youngquist v. Minneapolis, etc. R. Co.*, 102 Minn. 501, 114 N. W. 259. But this presumption does not exist where the son left the parent's home without their consent and had never contributed anything to their support or assistance in any manner. *Dean v. Oregon, etc. Co.*, 38 Wash. 565, 80 Pac. 842.

26. **U. S.**—*Standard Oil Co. v. Parkinson*, 152 Fed. 681, 82 C. C. A. 29 (Nebraska statute. Presumption is rebuttable and evidence in support of it may be produced prior to whether it is known defendant will present evidence to disprove it); *Peden v. Amer-*

of pecuniary loss to wife and children from the death of the husband and father does not extend to the "next of kin" not dependent upon him for support, and they must show pecuniary loss to justify a recovery for more than nominal damages.²⁷

In some jurisdictions the doctrine of nominal damages is not applicable and actual pecuniary loss must be proved to justify any recovery in all cases.²⁸

Burden of Proving Life Expectancy and Earnings.—In order to recover substantial damages, plaintiff has the burden of proving deceased's life expectancy,²⁹ as well as what the future earnings of deceased will

ican B. Co., 120 Fed. 523. **Ill.**—Swift Co. v. Gaylord, 229 Ill. 330, 82 N. E. 299; Romeo v. Western, etc. Co., 157 Ill. App. 67, 72; Bonato v. Peabody Coal Co., 156 Ill. App. 196. **Ind.** Cleveland, etc. R. Co. v. Starks (Ind. App.), 89 N. E. 602; Pittsburgh, etc. R. Co. v. Reed, 44 Ind. App. 635, 88 N. E. 1080. **N. J.**—Carter v. West Jersey, etc. Co., 76 N. J. L. 602, 71 Atl. 253. **Ohio.**—Toledo, etc. Co. v. Ward, 25 Ohio C. C. 399, husband presumed to support wife unless evidence to the contrary. **Pa.**—Delaware, etc. R. Co. v. Jones, 128 Pa. 308, 18 Atl. 330, pecuniary loss need not be proved by wife for negligent killing of husband to recover substantial damages:

Loss of Support Presumed.—Where the domestic relations between the deceased husband and wife were proved to have been the happiest which could have existed, loss of support will be presumed. *Evarts v. Santa Barbara R. Co.*, 3 Cal. App. 712, 86 Pac. 830.

27. Pittsburgh, etc. R. Co. v. Reed, 44 Ind. App. 635, 88 N. E. 1080; Cleveland, etc. R. Co. v. Drumm, 32 Ind. App. 547, 70 N. E. 286.

Loss Presumed Only Where Legal Right to Services or Support Exists. Where the deceased had a legal right to demand the services of the deceased, or to demand support and maintenance at the hands of deceased, then substantial pecuniary damages will be presumed, while if recovery is sought by a collateral relative, or one having no such legal claim, and who was, in fact, not dependent upon deceased, the presumption of substantial damages may not be indulged. **Ill.**—Romeo v. Western, etc. Co., 157 Ill. App. 67; Chicago, etc. R. Co. v. Scholten, 75 Ill. 468. **Ind.**—Korrady v. Lake Shore, etc. R. Co., 131 Ind. 261, 29 N. E. 1069.

N. D.—Haug v. Great Northern R. Co., 8 N. D. 23, 77 N. W. 97, 73 Am. St. Rep. 727, 42 L. R. A. 664. **Tex.**—Winnt v. International, etc. R. Co., 74 Tex. 32, 11 S. W. 907.

Collateral Relatives.—There is no presumption that the collateral relations might reasonably expect to derive pecuniary benefit from the continuation of the life of the deceased. *Romeo v. Western, etc. Co.*, 157 Ill. App. 67, 72.

28. Hurst v. Detroit, etc. R. Co., 74 Mich. 539, 48 N. W. 44; Van Brunt v. Cincinnati, etc. R. Co., 78 Mich. 530, 44 N. W. 321; Cooper v. Lake Shore, etc. R. Co., 66 Mich. 261, 33 N. W. 306, 11 Am. St. Rep. 482; McGown v. International, etc. R. Co., 85 Tex. 289, 20 S. W. 80; Rader v. Galveston, etc. R. Co. (Tex. Civ. App.), 137 S. W. 718; Galveston, etc. R. Co. v. Gormley (Tex. Civ. App.), 27 S. W. 1051.

In England the action cannot be supported to recover nominal damages (*Boulter v. Webster*, 11 L. T. 598, 13 W. R. 298), but actual damages must accrue to plaintiff from the death. Damages are not presumed from the relationship of the parties entitling a party to nominal damages (*Duckworth v. Johnson*, 4 H. & N. 653, 29 L. J. Ex. 25, 5 Jur. (N. S.) 630, 7 W. R. 655. See also *Franklin v. Southeastern R. Co.*, 3 H. & N. 211, 4 Jur. (N. S.) 565; *Weems v. Mathieson*, 4 Macq. & H. L. 215; *Sykes v. Northeastern R. Co.*, 44 L. J. C. P. 191, 32 L. T. 199; *Hull v. Great Northern R. Co.*, 26 L. R. Ir. 289; *Holleran v. Bagnell*, L. R. 6 Ir. 333; *Bourke v. Cork, etc. R. Co.*, L. R. 4 Ir. 682).

29. Savannah, etc. R. Co. v. Stewart, 71 Ga. 427; *Buckman v. Philadelphia, etc. R. Co.*, 227 Pa. 277, 75 Atl. 1069.

be and their present value to those who were dependent upon deceased.³⁰

G. AS TO MATTER IN MITIGATION OR EXCUSE.—The legal presumption is that the killing of one man by another is wrongful, and the burden is on the defendant to plead and prove any matter in justification or mitigation thereof.³¹

H. AS TO VALIDITY OF MARRIAGE.—In an action by the mother to recover for the death of her child, the burden of proof to show a valid marriage, where such marriage is denied in the answer, is upon plaintiff.³²

XI. VERDICT AND JUDGMENT.—A. VERDICT.—1. In General.—In accordance with the general rule a general verdict on a complaint for wrongful death, specifying various acts of negligence in several distinct counts, is sufficient.³³

Apportionment Against Defendants.—A verdict against several persons jointly causing the wrongful death should not apportion the damages against the defendants.³⁴

2. Apportioning Recovery.—Some statutes giving an action for wrongful death provide for the apportionment of the recovery among the designated beneficiaries by the jury in their verdict,³⁵ and since

30. *St. Louis, etc. R. Co. v. Freeman*, 89 Ark. 326, 116 S. W. 678; *Railway Co. v. Robbins*, 57 Ark. 377, 21 S. W. 886; *Sieber v. Great Northern R. Co.*, 76 Minn. 269, 79 N. W. 95.

31. *Rutherford v. Foster*, 125 Fed. 187, 193, 60 C. C. A. 129 (there is a legal presumption that an assault and battery with a deadly weapon was wrongful); *Suell v. Derricott*, 161 Ala. 259, 49 So. 895, 23 L. R. A. (N. S.) 996 (burden of proving killing was in self-defense is upon defendant).

Burden of Proving Father's Consent to Breach of Employment Contract. Where the theory of an action for the wrongful death of a child was a breach of contract of hiring made with the father, the burden of proving the consent of the father to the breach of the contract of hiring is upon the defendant. *Haynie v. North Carolina, etc. Co. (N. C.)*, 73 S. E. 198.

32. *Lynch v. Knoop*, 118 La. 611, 43 So. 252.

33. Where the complaint contained four counts specifying various acts of negligence relied upon but constituting only one cause of action, a verdict for plaintiff "on each and all of the four causes of action" in the complaint and assessing the damages is sufficient. *Mize v. Rocky Mt., etc. Co.*, 38 Mont. 521, 100 Pac. 971; *Schmalfeld v. Peoria,*

etc. R. Co., 156 Ill. App. 1. See generally the title "Verdict."

34. In an action against two defendants, a verdict finding both guilty of gross negligence and assessing the injuries at \$5,000, and then apportioning the damages between the defendants, is improper, but the part apportioning the verdict will be regarded as surplusage and judgment will be rendered against both defendants for the full amount. *San Marcos, etc. Co. v. Compton*, 48 Tex. Civ. App. 586, 107 S. W. 1151.

35. U. S.—*Illinois Cent. R. Co. v. O'Niell*, 177 Fed. 328, 100 C. C. A. 658 (Louisiana statute). Mass.—*Smith v. Thomson-Houston Elec. Co.*, 188 Mass. 371, 74 N. E. 664. N. Y.—*Johnson v. Phoenix Bridge Co.*, 197 N. Y. 316, 90 N. E. 953, reversing 133 App. Div. 807, 118 N. Y. Supp. 88 (Canada statute). Tex.—*International, etc. R. Co. v. White*, 103 Tex. 567, 131 S. W. 811, modifying 120 S. W. 958; *Texas, etc. R. Co. v. Scarborough*, 104 S. W. 408, affirmed, 101 Tex. 436, 108 S. W. 805 (defendant cannot complain thereof).

While the failure to apportion the damages in the verdict among the designated beneficiaries is error (*Houston, etc. R. Co. v. Moore*, 49 Tex. 31), it is not ground for reversal where no

the verdict and judgment must follow the pleadings, a verdict and judgment giving the several plaintiffs respectively an amount in excess of that claimed in the pleadings cannot be sustained.³⁶ But still the verdict and judgment should be for a gross sum as in other cases.³⁷

Excluding Beneficiaries.—The jury may properly exclude any beneficiaries not entitled to a recovery.³⁸

3. Special Verdict.—The court should not submit special interrogatories as to immaterial and evidentiary facts in connection with the manner in which the injury was caused.³⁹

objection to the verdict on this ground is made (*March v. Walker*, 48 Tex. 372; *International, etc. Co. v. Lehman* [Tex. Civ. App.], 72 S. W. 619), or no request for an instruction requiring the jury to apportion the recovery among the beneficiaries is made (*Missouri, etc. R. Co. v. Evans*, 16 Tex. Civ. App. 68, 41 S. W. 80; *Texas, etc. R. Co. v. Hudman*, 8 Tex. Civ. App. 309, 28 S. W. 388, writ of error refused by supreme court).

In an action by parents for death of their child, the recovery being exclusively for the benefit of husband and wife, and the recovery being community property, the jury need not find a separate amount for each. *Galveston, etc. R. Co. v. Hughes*, 22 Tex. Civ. App. 134, 54 S. W. 264. See also *Gulf, etc. Co. v. Burleson* (Tex. Civ. App.), 26 S. W. 1107.

Manner of Apportionment as Ground for Complaint by Defendant.—The defendant cannot complain of the manner in which the verdict is apportioned between the plaintiffs where the facts justify the submission of the issue as to whether each of the plaintiffs has suffered a loss. *International, etc. R. Co. v. Munn*, 46 Tex. Civ. App. 276, 102 S. W. 442. See also *Texas, etc. R. Co. v. Hudman*, 8 Tex. Civ. App. 309, 28 S. W. 388.

36. *International, etc. R. Co. v. McDonald*, 75 Tex. 41, 12 S. W. 860.

37. While the jury in arriving at the total amount of the damages should consider the pecuniary injury to each beneficiary where the statute requires the jury to assess the damages accruing to the designated beneficiaries "respectively," the verdict should be for a gross sum not exceeding the maximum prescribed by the statute. *Wolf v. Lake Erie, etc. R. Co.*, 55 Ohio St. 517, 45 N. E. 708, 36 L. R. A. 812.

Verdict Awarding Damages to Each Plaintiff Separately.—A verdict not in the usual form, but finding deceased was killed by defendant's negligence, and awarding damages in specified amounts to each plaintiff separately, is in legal effect equivalent to the usual formula and supports the judgment. *International, etc. Co. v. Johnson*, 23 Tex. Civ. App. 160, 55 S. W. 772. Thus, a verdict finding "for the plaintiffs and fixing the damages as follows" giving the names of, and the amount awarded to, each plaintiff is not reversible error. *International, etc. R. Co. v. White*, 103 Tex. 567, 131 S. W. 811, modifying 120 S. W. 958.

38. *Missouri Pac. R. Co. v. Henry*, 75 Tex. 220, 12 S. W. 828, failure to prove pecuniary loss.

Excluding Persons in Verdict.—If any of the beneficiaries are found guilty of contributory negligence, the jury should name them in their verdict and thus exclude them. *Wolf v. Lake Erie, etc. R. Co.*, 55 Ohio St. 517, 45 N. E. 708, 36 L. R. A. 812.

Failure To Name One Plaintiff.—A verdict apportioning the damages among several beneficiaries and not mentioning the mother disposes of her action, where it was alleged and proved she was not damaged and no recovery was asked on her account. *Houston, etc. R. Co. v. Lemair*, 55 Tex. Civ. App. 237, 119 S. W. 1162.

39. *Chicago, etc. R. Co. v. Jordan*, 215 Ill. 390, 74 N. E. 452, findings as to whether deceased ran into the car or did the car run into and strike deceased requested where negligence charged was failure to ring bell, excessive speed.

Special findings as to wilful or wanton injury should not be required where there is no evidence tending to prove

Findings as to Probable Length of Life. — It is proper to refuse to require special findings as to how long deceased would have lived had he not been killed.⁴⁰

Inconsistent Findings. — As in other cases the special findings should not be inconsistent with the verdict rendered.⁴¹

Itemizing Elements of Damages. — The jury should not be required to itemize and assess a separate amount for each element entering into and making up the gross sum allowed.⁴²

such injury. *Chicago, etc. R. Co. v. Jordan*, 215 Ill. 390, 74 N. E. 452.

Utah.—It is within the discretion of the court to grant or refuse to direct special findings. *Webb v. Denver, etc. R. Co.*, 7 Utah 117, 24 Pac. 616, code provision.

See generally the title "Verdict."

Special Verdict Erroneously Stating Position of Building.—Though a petition claiming damages for death resulting from explosion of gas in a certain building on the left side of the street, and the special verdict stated the building was on the right side of the street, it is immaterial. *Alexandria M., etc. Co. v. Irish*, 16 Ind. App. 534, 44 N. E. 680.

Contributory Negligence.—A special finding as to whether deceased was exercising reasonable care for her own safety at the time of the accident is proper, as that is an ultimate and not an evidentiary matter. If the jury answers "Don't know," a categorical answer of "yes" or "no" may be demanded. *Cleveland, etc. Co. v. Doerr*, 41 Ill. App. 530.

40. *Engvall v. Des Moines, etc. Co.*, 145 Iowa 560, 121 N. W. 12.

41. A special finding that deceased knew the risk and voluntarily assumed it is not necessarily at variance with a verdict for plaintiff. *Pieart v. Chicago, etc. R. Co.*, 82 Iowa 148, 47 N. W. 1017 (knowledge of want of running boards on engine); *Hammer v. Chicago, etc. R. Co.*, 61 Iowa 56, 15 N. W. 597. A finding in an answer to special interrogatories that deceased was negligent is not at variance with a finding for the defendant. *Noble v. Indianapolis, etc. R. Co. (Ind.)*, 91 N. E. 757. Nor is a special finding that deceased did not take proper precautions to guard herself from injury while crossing the tracks, inconsistent with a general finding for plaintiff (*Treffert v. Ohio, etc. R. Co.*, 36 Ill.

App. 93, statute provided that special findings of fact should control general verdict); but a finding that deceased after seeing and hearing the train at a distance, walked across the track without looking for the train, but that he was not guilty of contributory negligence, is inconsistent and will be set aside (*Kearney v. Chicago, etc. R. Co.*, 47 Wis. 144, 2 N. W. 82).

In an action against a city and a contractor for death from bricks falling which were negligently piled in the streets, a special verdict finding the contractor not negligent, and the city negligent is inconsistent, and it is reversible error to set aside the special findings in favor of the contractor and render judgment against the city upon the others. *Gregg v. Wilmington*, 155 N. C. 18, 70 S. E. 1070.

42. *Valparaiso L. Co. v. Tyler (Ind.)*, 96 N. E. 768; *Southern Indiana R. Co. v. Moore (Ind. App.)*, 71 N. E. 516.

Where interrogatories requiring such itemization are required, the answer thereto would control the general verdict. *Valparaiso Co. v. Tyler, supra*.

Itemizing Probable Future Services. The trial court need not require the jury to itemize the value of the probable future services of a deceased child to his next of kin. *Union Pac. R. Co. v. Dunden*, 37 Kan. 1, 14 Pac. 501.

Separate Verdicts as to Actual and Exemplary Damages.—Where the testimony warrants a charge upon both actual and exemplary damages, the jury should be required to respond in separate verdicts, if any, the amount of actual and that of exemplary damages they may find. If this is not done, the courts cannot, upon a motion for new trial, advisedly review the action of the jury and determine whether the verdict is supported by the law and evidence. *Galveston, etc.*

B. JUDGMENT.—Where the statute requires the jury to apportion the damages among the designated beneficiaries, the judgment must follow the verdict.⁴³ If one of the plaintiffs is not entitled to sue for the death, a joint judgment cannot be rendered in favor of the plaintiffs.⁴⁴

XII. NEW TRIAL.—A general statute prohibiting the grant of a new trial in action for personal injuries because of the inadequacy of the damages is applicable to actions for death by wrongful act.⁴⁵

XIII. COSTS.—Where the administrator sues for the wrongful death of his intestate, he is not personally liable for the costs, where the costs cannot be made out of the property of the estate, but his liability is only that of an administrator.⁴⁶

In some states, however, the administrator when suing for the wrongful death of his intestate is considered as trustee of the designated beneficiaries and not of the estate, so that he is personally liable for the costs where he fails in the suit or recovers less damages than carries costs.⁴⁷

R. Co. v. LeGierse, 51 Tex. 189, 203.

Finding as to Evidence of Damage.

The issues "what was the expectancy of life of the plaintiff's intestate?" and "what would have been his accumulations arising from his net income for that period?" are properly refused instead of the issue "what damage is the plaintiff entitled to recover?" as under the former the court or the clerk would have had to make the calculation and return the verdict. *Watson v. Seaboard, etc. Co.*, 133 N. C. 188, 45 S. E. 555.

43. Part of Recovery to Attorneys.

In an action by the mother, widow and minor children of deceased, it is fundamental error to render a judgment giving the attorneys one-third of the recovery, in the absence of pleading, evidence, or a verdict to support it, especially where the interest of minors are concerned. *El Paso, etc. R. Co. v. Murtle*, 49 Tex. Civ. App. 273, 108 S. W. 998, writ of error refused by supreme court (defendant may complain thereof).

The court could not render a judgment distributing the proceeds in other proportions than that given by the verdict, or apportion part of the recovery to the attorneys for their fees, especially where the interests of minors are concerned. *Shippers' Compress, etc. Co. v. Davidson*, 35 Tex. Civ. App. 558, 80 S. W. 1032.

44. *Willis Coal, etc. Co. v. Grizzell*, 198 Ill. 313, 65 N. E. 74, reversing 100

Ill. App. 480; *Texas, etc. Co. v. Lee* (Tex. Civ. App.), 82 S. W. 306 (if judgment is rendered in favor of wife and parents where the parents are not entitled to recover, the judgment may be reversed as to the parents and affirmed as to the wife).

A joint judgment for the husband and wife for the burial expenses of their deceased child, which recovery belongs to husband alone, is not such error as defendant can avail himself of. *Missouri, etc. R. Co. v. Evans*, 16 Tex. Civ. App. 68, 41 S. W. 80.

45. *Gann v. Worman*, 69 Ind. 458. See generally the title "**New Trial.**"

46. Ark.—*Warren, etc. R. Co. v. Waldrop*, 93 Ark. 127, 123 S. W. 792. **Ind.**—*English v. Smock*, 34 Ind. 115. **N. J.**—*Kinney v. Central R. Co.*, 34 N. J. L. 273, statute provided any person prosecuting an action in his administrative capacity should not be liable for costs.

Distribution of Damages Not Criterion.—In *Kinney v. Central R. Co.*, 34 N. J. L. 273, it is said: "The action is given by the statute, in terms, to the personal representatives of the deceased. That the damages, when recovered, are to be distributed among the widow and children, to the exclusion of creditors, cannot take the case out of the general rule."

47. *Hicks v. Barrett*, 40 Ala. 291.

The judgment for costs should be *de bonis propriis* instead of *de bonis intestatis*, and consequently the sureties

Security for Costs.—Whether the administrator should give security for costs is discretionary with the court.⁴⁸

XIV. INDICTMENT. — NATURE OF REMEDY.—The proceeding against a corporation by indictment for the recovery of a fine or forfeiture for death by wrongful act is to be considered and treated as a civil action for the recovery of damages, in its main feature; and the same rules are applied in such case as in other civil causes.⁴⁹

Existence of Beneficiaries.—Under statutes providing for the recovery of a fine or forfeiture by indictment for the benefit of designated beneficiaries, the indictment must allege the existence of the beneficiaries for whom the fine may be recovered.⁵⁰

Alleging Administration.—But under a statute giving the recovery to the executor or administrator for the benefit of designated beneficiaries,

on the administrator's bond are not liable therefor. *Hicks v. Barrett, supra.*

Amendment.—The error in rendering judgment *de bonis intestatis* instead of *de bonis propriis* is amendable and may be cured. *Hicks v. Barrett*, 40 Ala. 291.

48. Where the court expressly refused to take into consideration in any degree the plaintiff's cause of action, but based its order requiring the administrator to give security for costs solely upon the fact that plaintiff was personally irresponsible and the estate insolvent, though such order is a discretionary one, the appellate court will reverse the order as the lower court in such case did not in fact exercise its discretion. *Rutherford v. Madrid*, 77 Hun 545, 28 N. Y. Supp. 923.

In *Gmaehle v. Rosenberg*, 80 App. Div. 541, 80 N. Y. Supp. 705, it was held that security for costs should be required where the complaint did not state a cause of action.

49. *State v. Manchester, etc. R. Co.*, 52 N. H. 528.

Though the proceeding is in substance civil, the form of the indictment as well as the verdict must be governed by the rules of criminal law applicable to indictments. *State v. Manchester, supra.*

Nolle Prosequi by Prosecution.—*State v. Maine, etc. R. Co.*, 77 Me. 241, 1 Atl. 673.

Where Remedy by Indictment Used. The remedy by indictment was formerly used in Massachusetts, Maine, New

Hampshire, Connecticut and Rhode Island. *State v. Manchester, etc. R. Co.*, 52 N. H. 528, 549. It is now superseded by the civil action for damages in all states but Massachusetts. See state statutes.

Implied Repeal.—In *state v. Maine Cent. R. Co.*, 90 Me. 267, 38 Atl. 158, it was held that the statute giving a civil action for death by wrongful act impliedly repealed the remedy by indictment.

50. **Me.**—*State v. Grand Trunk R. Co.*, 60 Me. 145, an averment that he "then and there having a lawful wife and child alive" is not sufficient where an averment that he left widow or heirs, or both, is necessary as this applies to the time of the indictment. **Mass.**—*Com. v. Eastern R. Co.*, 5 Gray 473, an averment that defendant is liable to the fine "to the use of J. S.," who has been duly appointed administrator is not sufficient. **N. H.**—*State v. Gilmore*, 24 N. H. 461.

Naming Beneficiaries.—As persons necessary to sustain the action, the heirs, if unknown, need not be named; but as persons for whose benefit the forfeiture is incurred and to whom it is to be paid, there must be a formal averment in the indictment setting out these facts and giving their names. *State v. Grand Trunk R. Co.*, 60 Me. 145, 153 (that "their names are unknown" is insufficient). But where the fine is payable to the administrator for the benefit of designated beneficiaries, the names of the beneficiaries need not be alleged. *Com. v. Boston, etc. R. Co.*, 11 Cush. (Mass.) 512.

the indictment must allege that administration was taken out in the state on deceased's estate.⁵¹

Setting Forth Wrongful Acts. — No greater particularity in setting out the unlawful acts or negligence causing death is necessary than in a civil action,⁵² but if particular acts of negligence are averred, the proof will be restricted to the acts alleged.⁵³

Gross Negligence. — If the fine can only be recovered where defendant is guilty of gross negligence, it is necessary to aver gross negligence in the indictment.⁵⁴

Instantaneous Death. — The indictment need not allege that death was instantaneous.⁵⁵

Reasonable Care. — There is no necessity for an allegation that deceased was in the exercise of due and reasonable care, where the particular acts of negligence causing death are set out.⁵⁶

51. Alleging Administration. — It must be alleged, however, under statute giving the fine to the executor for the benefit of designated beneficiaries that administration has been taken out in the state. *Com. v. Sanford*, 12 Gray (Mass.) 174.

Administration Shown by Implication. — A petition alleging that A resided and was killed in Boston, and that B is of Boston and "has been duly appointed and now is administrator of said A" sufficiently shows B was appointed administrator in the state of Massachusetts. *Com. v. East Boston Ferry Co.*, 13 Allen (Mass.) 589.

52. *Com. v. Boston, etc. R. Co.*, 11 Cush. (Mass.) 512.

Charging Several Acts in Indictment. An indictment charging several distinct acts of carelessness or negligence on the part of the corporation and also on the part of the corporation's servants is not open to the objection of duplicity. *State v. Manchester, etc. R. Co.*, 52 N. H. 528, 559.

Names of Servants. — The names of the agents or servants causing death need not be alleged; nor need the particular employment of the servants or the kind of negligence be averred. *Com. v. Boston, etc. R. Co.*, 11 Cush. (Mass.) 512.

New Hampshire. — The particular acts of negligence or carelessness, or by what special unfitness of servants the accident occurred, need not be set forth. *State v. Manchester, etc. R. Co.*, 52 N. H. 528.

53. Evidence as to the neglect on the part of the corporation to give the required signals cannot be given where no such allegation is made in the indictment, the only allegation being that the corporation ran the engine rashly and without watch, care or foresight, and with great, unreasonable, and improper speed. *Com. v. Fitchburg, etc. R. Co.*, 10 Allen (Mass.) 189.

54. *Com. v. Fitchburg, R. Co.*, 120 Mass. 372, indictment against railroad under statute making it liable for the gross negligence only of its servants. See also *Com. v. Brocton R. Co.*, 143 Mass. 501, 10 N. E. 506; *Com. v. Boston, etc. R. Co.*, 133 Mass. 383; *State v. Manchester, etc. R. Co.*, 52 N. H. 528.

Facts showing merely negligence on the part of the employes in operating a train in failing to give proper signals is insufficient where gross negligence on the servant's part is essential. *Com. v. Boston, etc. R. Co.*, 133 Mass. 383.

55. *Com. v. Metropolitan R. Co.*, 107 Mass. 236 (That a remedy by civil action is given for wrongful death where the death is not instantaneous does not render it necessary that there be such allegation in proceeding by indictment).

56. *State v. Manchester R. Co.*, 52 N. H. 528.

Though by the proviso of the statute there can be no recovery where deceased was wrongfully on the railroad tracks, the indictment need not allege

Costs. — Though the prosecution is by indictment the beneficiaries are liable for the costs which cannot be a charge upon the county.⁵⁷

he was "not on the railroad tracks contrary to law." Com. v. Fitchburg R. Co., 10 Allen (Mass.) 189.	57. State v. Grand Trunk R. Co., 58 N. H. 198. See generally the title " Costs. "
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DE BENE ESSE. — See **Depositions.**

Vol. VI

DEBT

By ARTHUR E. DENNIS,
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I. CHARACTERISTICS AND DISTINCTIONS.—A. IN GENERAL.—Debt is an action for the recovery of a sum certain¹ *eo nomine*² and *in numero*.³

It may be brought for a sum capable of being ascertained, though not ascertained at the time when the action is brought.⁴

It was formerly said that the plaintiff could not recover less than the amount claimed in the declaration,⁵ but this, it seems, applies only where a special contract is declared on, and which must, therefore, be proved as laid to avoid a variance.⁶

1. **U. S.**—Stockwell *v.* United States, 13 Wall. 531, 20 L. ed. 491. **Ala.**—M'Kenzie & Bennock *v.* Connor, 1 Stew. 162. **Ark.**—Trapnall *v.* Merrick, 21 Ark. 503; Gregory *v.* Bewly, 5 Ark. 318. **Ill.**—Fox River Mfg. Co. *v.* Reeves, 68 Ill. 403; Hoy *v.* Hoy, 44 Ill. 469; Mix *v.* Nettleton, 29 Ill. 245. **Me.**—Braun *v.* Maine Benefit Assn., 92 Me. 341, 42 Atl. 500; Mitchell *v.* McNabb, 58 Me. 506. **N. J.**—Morgan *v.* Town of Guttenberg, 40 N. J. L. 394. **Pa.**—Weiss *v.* Mauch Chunk Iron Co., 58 Pa. 295. **Tenn.**—Nunnellee *v.* Morton, Cooke 21. **Va.**—Russell *v.* Louisville & N. R. Co., 93 Va. 322, 25 S. E. 99; Davis *v.* Mead, 13 Gratt. 118. **W. Va.**—State *v.* Harmon, 15 W. Va. 115.

"The true test," says Story, J., in Bullard *v.* Bell, 1 Mason 243, 4 Fed. Cas. No. 2,121, "is, therefore, whether the sum to be recovered has, upon the contract itself, a legal certainty."

"The three distinguishing points in the action of debt are that the contract must be,—1st, for money; 2dly, for a sum certain; 3rdly, specifically recoverable." Cassady *v.* Laughlin, 3 Blackf. (Ind.) 134.

Debt may be brought where the sum to be recovered is made certain either by act of the parties or by operation of law. Hickman *v.* Searcy's Exr., 9 Yerg. (Tenn.) 47.

Debt will not lie on a collateral or conditional undertaking. Reid *v.* Blaney, 2 Me. 128; Butcher *v.* Andrews, 1 Salk. (Eng.) 23, 91 Eng. Reprint 22.

2. Baum *v.* Tonkin, 110 Pa. 569, 1 Atl. 535.

3. 7 Petersdorff Com. Law 354; Bac. Abr., Vol. III, p. 83, and the following cases: **U. S.**—Du Bois *v.* Seymour, 152 Fed. 600, 81 C. C. A. 590. **Ala.**—M'Kenzie & Bennock *v.* Connor, 1 Stew. 162. **Ark.**—McLaughlin *v.* Hutchins, 3 Ark. 207. **Ind.**—Cassady *v.* Laugh-

lin, 3 Blackf. 134. **Ky.**—Campbell *v.* Weister, 1 Litt. 30. **Me.**—Mitchell *v.* McNabb, 58 Me. 506. **W. Va.**—State *v.* Harmon, 15 W. Va. 115.

"By 'eo nomine,' and 'in numero' is only meant that a specific sum is sought to be recovered which is improperly detained, and that the action does not sound in damages, as does the action of assumpsit, thus drawing the proper line of demarcation between them." Thompson *v.* French, 10 Yerg. (Tenn.) 452; Nunnellee *v.* Morton, Cooke (Tenn.) 21.

4. **U. S.**—Stockwell *v.* United States, 13 Wall. 531, 20 L. ed. 491; Union Iron Co. *v.* Pierce, 4 Biss. 327, 24 Fed. Cas. No. 14,367; Dillingham *v.* Skein, Hempst. 181, 7 Fed. Cas. No. 3,912a; Collins *v.* Johnson, Hempst. 279, 6 Fed. Cas. No. 3,015a. **Ark.**—Gregory *v.* Bewly, 5 Ark. 318; Bentley *v.* Dickson, 1 Ark. 165. **Ill.**—Warren *v.* McCarthy, 25 Ill. 83. **Ky.**—Jenkins *v.* Richardson, 6 J. J. Marsh. 441. **Mass.**—Reed *v.* Davis, 8 Pick. 514. **N. H.**—Orne *v.* Roberts, 51 N. H. 110; Janvrin *v.* Seamon, 29 N. H. 280; Lovell *v.* Bellows, 7 N. H. 375. **N. Y.**—Mayor, etc., of New York *v.* Butler, 1 Barb. 325. **Pa.**—Baum *v.* Tonkin, 110 Pa. 569, 1 Atl. 535. **Va.**—Russell *v.* Louisville & N. R. Co., 93 Va. 322, 25 S. E. 99; Davis' Admr. *v.* Mead, 13 Gratt. 118. **Eng.**—Walker *v.* Witter, 1 Doug. 1, 99 Eng. Reprint 1.

5. 3 Black. Com. 155; Bullard *v.* Bell, 1 Mason 243, 4 Fed. Cas. No. 2,121; Hooper *v.* Shepherd, 2 Str. 1089, 93 Eng. Reprint 1050. And see Emery *v.* Fell, 2 T. R. 28, 100 Eng. Reprint 16.

6. **Ala.**—Butler *v.* Limerick, Minor 115. **N. Y.**—Mayor, etc., of New York *v.* Butler, 1 Barb. 325. **N. C.**—Dowd *v.* Seawell, 14 N. C. 185. **Va.**—Shelton *v.* Welsh, 7 Leigh 175. **Eng.**—Pemberton *v.* Shelton, Cro. Jac. 498, 79 Eng. Reprint 425.

In other cases the plaintiff may recover whatever his evidence shows him to be entitled to.⁷

Debt for Penalty a Civil Action. — Even when brought to recover a penalty given by a statute, debt is considered a civil action and governed by the rules of pleading applicable to such an action.⁸

Debt an Extensive Remedy. — The scope of the action of debt is broader than either assumpsit or covenant.⁹

Washington, J., in commenting on the statement of Judge Blackstone that "the plaintiff must prove the whole debt he claims, or he can recover nothing at all" (3 Black. Com. 155), says: "If the writer merely means to say, that where a special contract is laid in the declaration it must be proved as laid, the doctrine will not be controverted. . . . But if Judge Blackstone meant to say, that in every case where debt is brought on a simple contract, the plaintiff must prove the whole debt as claimed by the declaration, or that he can recover nothing, he is opposed by every decision, ancient and modern. . . . Whence the opinion arose, that in an action of debt on a single contract, the whole sum must be proved, I cannot ascertain. It certainly was not, and could not be the doctrine prior to Slade's Case (Trin. 44 Eliz., 4 Co. 92b); and it is clear, that it was not countenanced by that case. However, let the opinion have originated how it might, Lord Loughborough, in the above case, denominates it an erroneous opinion, and says that it has been sometime since corrected." United States v. Colt, Pet. C. C. 145, 25 Fed. Cas. No. 14,839.

And similarly "wherever a statute gives a certain sum *in numero*, that exact sum must be demanded, else it cannot be taken to be the penalty given by that statute." Dowd v. Seawell, 14 N. C. 185.

"If, however, the statute itself give an uncertain penalty, or a penalty to be measured by reference to some uncertain thing, then the sum demanded is not conclusive on the plaintiff; but he may recover according to the certainty made by his proof." Dowd v. Seawell, 14 N. C. 185; Pemberton v. Shelton, Cro. Jac. 498, 79 Eng. Reprint 425.

7. Ala.—M'Kenzie & Bennock v. Connor, 1 Stew. 162; Butler v. Limerick, Minor 115. Ky.—White v. Walker,

1 T. B. Mon. 34. N. Y.—Mayor, etc. v. Butler, 1 Barb. 325. N. C.—Love v. Schenck, 34 N. C. 304. Pa.—Huber v. Burke, 11 Serg. & R. 238. Eng. Walker v. Witter, 1 Doug. 1, 99 Eng. Reprint 1; Speake v. Richards, Hob. 206, 80 Eng. Reprint 353; Pemberton v. Shelton, Cro. Jac. 498, 79 Eng. Reprint 425.

"And, even in actions of debt, where the contract is proved or admitted, if the defendant can show that he has discharged any part of it, the plaintiff shall recover the residue." 3 Black. Com. 156, and cases cited.

A remittitur of the excess will cure a variance between the sum demanded and that proved. Ingledew v. Cripps, 2 Ld. Raym. 814, 92 Eng. Reprint 43; Andrews v. De La Hay, Hob. 178, 80 Eng. Reprint 325.

The remittitur may be entered before or after verdict, or even after demurrer. Hughes v. Union Ins. Co., 8 Wheat. (U. S.) 294, 5 L. ed. 620.

8. United States v. Southern Pac. Co., 162 Fed. 412; United States v. Elliott, 25 Fed. Cas. No. 15,043; Jacobs v. United States, 1 Brock. 520, 13 Fed. Cas. No. 7,157.

"Thus, in this case, though it be an action on the statute, it is an action of debt; which is a common law action, and will be tried in a common law manner." United States v. Mündel, 6 Call (Va.) 245.

9. 1 Chit. Pl. 97; 7 Petersdorff Com. Law 354.

"At common law debt is a very extensive remedy. It lies on simple contract and on specialties for the payment of money. It lies on judgments for money, and on legal liabilities; and it lies for penalties and other liabilities created by statute, requiring the payment of money when the statute declares no other remedy, and where the amount of the liability is certain or may be readily rendered certain. 1 Chit. Pl. 110-112. And we may lay it

B. DISTINGUISHED FROM ASSUMPSIT.—Assumpsit is based on the promise¹⁰ and may therefore be brought for damages or sums uncertain, for which debt will not lie.¹¹ But if the amount is fixed by contract, whether express or implied, debt and assumpsit are concurrent remedies.¹² Therefore debt will lie wherever *indebitatus assumpsit* could be maintained.¹³

Debt, and not assumpsit, however, is the proper form of action upon specialties of all kinds.¹⁴

down as a general rule, that whenever the obligation is to pay a sum of money which, as to amount, is certain, or may be readily rendered certain, whether the liability arises on simple contract, legal liability, specialty, record or statute, the action of debt is a proper form of remedy." *Union Iron Co. v. Pierce*, 4 Biss. 327, 24 Fed. Cas. No. 14,367.

"At common law, an action of debt would lie on a debt appearing by a record, or by any other specialty, such as a contract under seal; and would also lie for a definite sum of money due by a simple contract." *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. ed. 95.

"Elementary writers, who treat of the different forms of actions, state that debt is by far the most extensive of those *ex contractu*." *Mahaffey v. Petty*, 1 Ga. 261.

"Debts for which an action of debt may be brought at common law, may be classed under four general heads: 1st. Judgments obtained in a court of record on a suit. 2nd. Specialties acknowledged to be entered of record as a recognizance, statutes merchant or staple, or such like. 3d. Specialties indented or not indented. 4th. Contracts without specialties, either express or implied." *Respublica v. Le Caze*, 1 Yeates (Pa.) 55; s. c. Add. 59.

10. *Houghton v. Stowell*, 28 Me. 215.

"The action of debt is founded upon contract, the action of assumpsit upon the promise, and in this consists the principal distinction between the two actions." *Metcalf v. Robinson*, 2 McLean 363, 17 Fed. Cas. No. 9,497.

But debt is not necessarily founded upon contract. *Stockwell v. United States*, 13 Wall. (U. S.) 531, 20 L. ed. 491.

"It is immaterial in what manner

the obligation was incurred, or by what it is evidenced, if the sum owing is capable of being definitely ascertained." *Stockwell v. United States*, *supra*.

11. Debt "differs from an action of assumpsit, in that the latter is for the recovery of damages for the non-performance of a parol or simple contract." *DuBois v. Seymour*, 152 Fed. 600, 81 C. C. A. 590.

In *Thompson v. French*, 10 Yerg. (Tenn.) 452, the "proper line of demarcation between them" is said to be that debt lies when a specific sum is sought to be recovered, which does not sound in damages, as does the action of assumpsit.

12. Ga.—*Mahaffey v. Petty*, 1 Ga. 261. Me.—*McVicker v. Beedy*, 31 Me. 314; *Houghton v. Stowell*, 28 Me. 215. Pa.—*DeHaven v. Bartholomew*, 57 Pa. 126. Tenn.—*Thompson v. French*, 10 Yerg. 452; *Hickman v. Searey's Admr.*, 9 Yerg. 47.

Debt cannot be maintained on an account stated, even though an acknowledgment referring thereto is written at the foot of the account. Opposite the total defendant wrote and signed "Amount due Turner and Brown, July 25, 1835." *Wilson v. Turner*, 4 Mo. 274.

13. *United States v. Colt*, 1 Pet. C. C. 145, 25 Fed. Cas. No. 14,839; *Collins v. Johnson*, Hempst. 279, 6 Fed. Cas. No. 3,015a; *Bullard v. Bell*, 1 Mason 243, 4 Fed. Cas. No. 2,121. Ill.—*Larmon v. Carpenter*, 70 Ill. 549; *Bedell v. Janney*, 9 Ill. 193. Me.—*Seretto v. Rockland*, etc. R. Co., 101 Me. 140, 63 Atl. 651; *Portland v. Atlantic & St. L. R. Co.*, 66 Me. 485. Mass.—*Van Deusen v. Blum*, 18 Pick. 229. N. C.—*Gardner v. Clark*, 5 N. C. 283. Tenn.—*Hickman v. Searey's Admr.*, 9 Yerg. 47. Eng.—*Walker v. Witter*, 1 Doug. 1, 99 Eng. Reprint 1; 1 Chit. Pl. 109.

14. U. S. — *French v. Tunstall*,

Assumpsit formerly had the advantage over debt in that it was not subject to wager of law by the defendant, as was debt,¹⁵ and was more commonly used on that account.¹⁶

C. **DISTINGUISHED FROM COVENANT.**—Covenant is a much narrower action than debt in that it is confined to agreements under seal.¹⁷

It is the exclusive remedy, however, where the obligation is for the payment of an uncertain or unliquidated sum which can only be ascertained by a jury as damages.¹⁸ In other cases, debt is a concurrent remedy.¹⁹

II. GENERAL GROUNDS FOR THE ACTION.—Debt is the appropriate action for whatever may be denominated a debt, as distinguished from a claim for damages merely, for a breach of contract,²⁰

Hempst. 204, 9 Fed. Cas. No. 5,104a. **Ill.**—*Leland v. Barry*, 69 Ill. 348. **Me.** *Jackson v. York & C. R. Co.*, 48 Me. 147. **R. I.**—*McCardell v. Williams*, 19 R. I. 701, 36 Atl. 719. **Eng.**—*Hooper v. Shepherd*, 2 Str. 1089, 93 Eng. Reprint 1050.

In *Leland v. Barry*, 69 Ill. 348, it was held that the plaintiff could not disregard the bond by which the money was secured and sue in assumpsit on the simple promise.

In West Virginia by the 10th section of chapter 99 of the Code *assumpsit* was made concurrent with debt upon notes for the payment of money, "whether sealed or not." *State v. Harmon*, 15 W. Va. 115.

Coupon of Bond.—Nor will assumpsit lie on a coupon, even when detached from the bond, *Jackson v. York & C. R. Co.*, 48 Me. 147.

15. *United States v. Colt*, Pet. C. C. 145, 25 Fed. Cas. No. 14,839; *Bullard v. Bell*, 1 Mason 243, 4 Fed. Cas. No. 2,121.

"The wager of law, if it ever had a legal existence in the United States, is now completely abolished." *Childress v. Emory*, 8 Wheat. 642, 5 L. ed. 705. It was abolished in England by 3 and 4 Wm. IV, ch. 42, §13.

16. *Hickman v. Searcy's Exr.*, 9 Yerg. (Tenn.) 47.

"Thus it appears, that in all cases of contracts, unless a special damage was stated, the primitive action was debt, and that the action of *indebitatus assumpsit* succeeded principally, I presume, to avoid the wager of law, which, in *Slade's Case*, was one of the main arguments waged by the defendant's counsel against allowing the intro-

duction of the action of assumpsit, as it thereby deprived the defendant of his privilege of waging his law." *United States v. Colt*, Pet. C. C. 145, 25 Fed. Cas. No. 14,839.

17. *State v. Harmon*, 15 W. Va. 115. Covenant will not lie where a contract under seal was later varied by parol. The action in such case must be debt or assumpsit. *M'Voy v. Wheeler*, 6 Port. (Ala.) 201.

18. **Ark.**—*Gregory v. Bewly*, 5 Ark. 318; *McLaughlin v. Hutchins*, 3 Ark. 207. **Ill.**—*Fox River Mfg. Co. v. Reeves*, 68 Ill. 403; *Haynes v. Lucas*, 50 Ill. 436. **N. J.**—*Morgan v. Town of Guttenberg*, 40 N. J. L. 394.

Covenant is the appropriate action, therefore, if it is desired to recover damages for the breach of the agreement, since by counting in debt the plaintiff's right to recover is restricted to certain sums of money alleged to be due by the terms of the contract. *Seretto v. Rockland*, etc. R. Co., 101 Me. 140, 63 Atl. 651.

19. **Ind.**—*Massey v. Chance*, 7 Blackf. 160. **Pa.**—*Huber v. Burke*, 11 Serg. & R. 233. **R. I.**—*McCardell v. Williams*, 19 R. I. 701, 36 Atl. 719.

If for a sum certain, debt and covenant are, in general, concurrent remedies. *McLaughlin v. Hutchins*, 3 Ark. 207.

20. **U. S.**—*Stockwell v. United States*, 13 Wall. 531, 20 L. ed. 491. **Ark.**—*Gregory v. Bewly*, 5 Ark. 318. **Me.**—*Mitchell v. McNabb*, 58 Me. 506. **N. H.**—*Payne v. Smith*, 12 N. H. 34; *Lowell v. Bellows*, 7 N. H. 375. **N. J.**—*Rutan v. Hopper*, 29 N. J. L. 112; *Flanagan v. Camden Ins. Co.*, 25 N. J. L. 506; *Van Horn v. Hamilton*, 5 N. J.

though damages are recoverable in debt,²¹ which are usually interest on the amount detained.²² But if the gist of the action is damages, debt will not lie.²³

Liability Must Be To Pay Money.—The liability must be for the pay-

L. 477. **N. Y.**—Mayor, etc. of New York *v.* Butler, 1 Barb. 325. **Pa.** Weiss *v.* Mauch-Chunk Iron Co., 58 Pa. 295. **Tenn.**—Nunnellee *v.* Morton, Cooke 21.

“A debt, technically so called, may be evidenced by record, by contract under seal, or by simple contract only; its distinguishing feature is, that it is for a sum certain or that may readily be reduced to a certainty, and the action of debt lies for the recovery thereof *eo nomine*, without regard to the manner in which the obligation is incurred, or is evidenced.” Baum *v.* Tonkin, 110 Pa. 569, 1 Atl. 535.

“A debt is a sum of money due by express agreement, either in writing or by parol, where the quantity is fixed, and does not depend on future calculation; the non-payment or non-performance is an injury for which an action of debt may be brought.” Respublica *v.* Le Caze, 1 Yeates (Pa.) 55; s. c. Add. 59.

Whenever the obligation is to pay a certain sum of money, debt is a proper form of action. Union Iron Co. *v.* Pierce, 4 Biss. 327, 24 Fed. Cas. No. 14367.

“Where there is a contract of service for a definite period, and the servant is dismissed without cause before the expiration of the time, he can maintain debt for the stipulated wages or salary after the term has ended.” Kirk *v.* Hartman, 63 Pa. 97.

Costs.—An order of court awarding costs is conclusive evidence of the liability and right to recover. And the remedy in case they are not paid is by an action of debt. Doyle *v.* Wilkinson, 120 Ill. 430, 11 N. E. 890; Cole *v.* Lunger, 42 N. J. L. 381; Baird *v.* Johnson, 14 N. J. L. 120.

Escape.—An action of debt will lie upon the statutory liability arising from an escape. Porter *v.* Sayward, 7 Mass. 377; Minton *v.* Woodworth, 11 Johns. (N. Y.) 474. And it is held that the bond is only inducement to the action. Hyatt *v.* Robinson, 15 Ohio 372.

Partnership Account.—Debt will not

lie on a demand which brings into controversy an unsettled partnership account, since the latter cannot be determined in that form of action. Young *v.* Brick, 3 N. J. L. 241.

A military certificate will not support an action of debt. Gibbon *v.* Jameson's Exrs., 5 Call. (Va.) 294.

Unliquidated Damages.—Debt will not lie where the demand is rather for unliquidated damages than for money. Lowell *v.* Bellows, 7 N. H. 375; Somerville *v.* Grim, 17 W. Va. 803.

“By the words ‘unliquidated damages,’ is manifestly meant (if there be any meaning in what is most unquestionably a very loose use of words), such damages as are sustained by the non-performance of an executory contract, which cannot be considered as a money demand, and the amount of which may depend upon such a variety of considerations and circumstances, as to render it exceedingly difficult to be ascertained.” Thompson *v.* French, 10 Yerg. (Tenn.) 452.

21. **Ill.**—Miller *v.* Blow, 68 Ill. 304; McGinty *v.* Laguerrenne, 10 Ill. 101. **Mass.**—Reed *v.* Davis, 8 Pick. 514. **Miss.**—Williams *v.* Williams, 11 Smed. & M. 393.

“It is not disputed, that in debt for the penalty, the vendor may go for damages only, and retain the land.

There was error then in directing the jury that nothing less than the purchase money could be given, when an action in this form could be maintained, only for damages for breach of the contract.” Huber *v.* Burke, 11 Serg. & R. (Pa.) 238.

The damages should be assessed by the jury. Loellke *v.* Grant, 120 Ill. App. 74; Keeton *v.* Scantland, Hard. (Ky.) 149.

The damages must be certain. Rutan *v.* Hopper, 29 N. J. L. 112; Flanagan *v.* Camden Ins. Co., 25 N. J. L. 506.

22. Mager *v.* Hutchinson, 7 Ill. 266; Nunnellee *v.* Morton, Cooke (Tenn.) 21.

23. Du Bois *v.* Seymour, 152 Fed. 600, 81 C. C. A. 590; Mitchell *v.* McNabb, 58 Me. 506.

ment of money or it will not support an action of debt.²⁴ It will not lie for money payable out of a particular fund,²⁵ nor on a contract to pay a certain amount of goods or merchandise.²⁶ But if the sum due

24. **Ark.**—Hudspeth v. Gray, Durrive & Co., 5 Ark. 157. **Ill.**—Mix v. Nettleton, 29 Ill. 245; Nash v. Nash, 16 Ill. 79. **Ind.**—Cassady v. Laughlin, 3 Blackf. 134. **Ky.**—January v. Henry, 3 T. B. Mon. 8; Mattox v. Craig, 2 Bibb. 584. **Va.**—Minnick v. Williams, 77 Va. 758. **Eng.**—Walker v. Witter, 1 Doug. 1, 99 Eng. Reprint 1.

There is no debt in the absence of an obligation to pay money. **Ill.**—Larmon v. Carpenter, 70 Ill. 549. **Pa.** Weiss v. Mauch Chunk Iron Co., 58 Pa. 295. **Vt.**—Durrill v. Lawrence, 10 Vt. 517.

"That an action of debt will not lie, except upon a contract or legal liability to pay a sum certain in money, or for a sum of money, which may be readily ascertained, and rendered certain, is a principle, we think, too well established to be now questioned." Hudspeth v. Gray, Durrive & Co., 5 Ark. 157.

A bond is a contract for the payment of money even though it is to become void upon certain conditions. Mestling v. Hughes, 89 Ill. 389; Courson v. Browning, 86 Ill. 57.

In Gregory v. Bewly, 5 Ark. 318, the contract sued on was for the payment of a certain sum, "which may be discharged in Arkansas money," and the court held that "the obligation sued on in this case is for the direct payment of money and for a sum certain. The alternative condition attached to it by which it may be discharged in Arkansas money, was only a stipulation introduced for the benefit of the makers, by performing which they might have discharged themselves from their obligation to pay the money. It was a mere means of payment, by availing themselves of which, at the maturity of the obligation, they would be discharged. Day v. Lafferty, 4 Ark. Rep. 450. Failing in this, the obligation loses its alternative character, and becomes a simple and absolute bond for the direct payment of money. Debt, with an averment that payment had not been made in Arkansas money will therefore lie upon such an obligation. . . . The obligation here sued on, is distinguished

from the case of one payable primarily in 'common currency of Arkansas,' which this court has declared to be bank notes of the State of Arkansas. Dillard v. Evans, 4 Ark. Rep. 175; Hudspeth et al. v. Gray, Durrive & Co., 5 Ark. Rep. 157."

Debt was maintained on a bill obligatory for the payment of six hundred Polish guilders which the declaration averred to be *ad valorem* two hundred and twenty pounds of legal English money. Rands v. Peck, Cro. Jac. 618, 79 Eng. Reprint 527.

Gold Coin.—In an action on a California judgment to be paid "in United States gold coin," it was held that the plaintiff could maintain debt in Illinois because by taking a judgment for the payment of dollars generally she waived her right to insist upon payment in United States gold coin. Belford v. Woodward, 158 Ill. 122, 41 N. E. 1097.

Bank Notes.—But contracts for payment in bank notes it has been held will not support an action of debt. **Ala.** Young v. Scott, 5 Ala. 475. **Ind.**—Osborne v. Fulton, 1 Blackf. 233; Wilson v. Hickson, 1 Blackf. 230. **Ky.** Campbell v. Weister, 1 Litt. 30. **Tenn.** Deberry v. Darnell, 5 Yerg. 451.

25. Illinois State Hospital v. Higgins, 15 Ill. 185.

26. **Ala.**—Young v. Scott, 5 Ala. 475, for the payment of "one thousand dollars in current bank notes." **Ill.**—Mix v. Nettleton, 29 Ill. 245, in county orders. **Ind.**—Osborne v. Fulton, 1 Blackf. 233 ("to be paid in notes on the Bank of Kentucky, or the branch bank of Madison at Lawrenceburgh"); Wilson v. Hickson, 1 Blackf. 230 ("in United States bank notes or its branches"). **Ky.**—Campbell v. Weister, 1 Litt. 30 ("in any good current bank paper"); Mattox v. Craig, 2 Bibb 584 ("to be discharged in good merchantable bricks"); Bruner v. Kelseo, 1 Bibb 487 ("in leather, or other good property at its value"). **N. J.**—Flanagan v. Camden Mut. Ins. Co., 25 N. J. L. 506 (the insurance company had the right to rebuild, therefore debt would not lie); Stroud v. Shimer, 8 N. J. L. 134 ("I prom-

is certain, debt will lie therefor upon failure of the debtor to make payment otherwise than in money.²⁷

III. DEBT ON CONTRACT.—A. IN GENERAL.—1. **Form of Contract Not Material.**—Debt, therefore, lies on all contracts on which a sum certain, or ascertainable, is due, irrespective of the form of the contract.²⁸

2. **Instalment Contracts.**—If the amount is payable in instalments the action will not lie until the last instalment falls due.²⁹ But if each payment is separate and distinct, the action may be brought upon default in any one.³⁰

ise to pay to Isaac Shimer," followed by a list of quantities of grain at certain prices). **Tenn.**—*Deberry v. Darnell*, 5 Yerg. 451, "to be paid in North Carolina bank notes."

In *Mix v. Nettleton*, *supra*, the contract was for one thousand and fifty dollars, "payable in orders on the county of Ogle and State of Illinois, of such size and denomination as said Mix may be able to furnish," and it was held debt would not lie because it was "not for the money named, but for the thing to be paid."

A stipulation to pay in state bank notes is held not to be a contract for payment in the currency of the Union, but in a substitute for money, which is regarded as any other merchandise. *Campbell v. Weister*, 1 Litt. (Ky.) 30.

27. **Ky.**—*Keeton v. Scantland*, Hard. 149. **Me.**—*Barrett v. Twombly*, 23 Me. 333. **Mo.**—*Edwards v. McKee*, 1 Mo. 123. **Va.**—*Minnick v. Williams*, 77 Va. 758.

In *Weiss v. Mauch-Chunk Iron Co.*, 58 Pa. 295, it is said that "there is a broad distinction between an agreement to pay a certain sum of money in shares of stock or other property, and an agreement to issue such shares or deliver such other property in specie. In the former case the refusal to pay in property gives the creditor the right to demand the sum of money, and to maintain an action of debt. In the latter his only claim is for damages in an action of assumpsit or covenant, according as the agreement is under seal or not."

A clause permitting payment in services is not considered to be in the alternative, but is to be viewed as a means by which the payment of money may be defeated, and is therefore mere-

ly a defeasance. *Edwards v. M'Kee*, 1 Mo. 123.

28. **U. S.**—*Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. ed. 95; *DuBois v. Seymour*, 152 Fed. 600, 81 C. C. A. 590. **N. C.**—*Gardner v. Clark*, 5 N. C. 283. **Pa.**—*Baum v. Tonkin*, 110 Pa. 569, 1 Atl. 535.

"If the nature of the demand be such as to sustain the action, it is immaterial whether the contract be by deed or by parol, express or implied. Provided the *certainty* of the sum appears, and the plaintiff is to recover the sum *in numero*, and not to be repaid in damages, the action of debt may be sustained irrespective of the form of the contract." *Flanagan v. Camden Mut. Ins. Co.*, 25 N. J. L. 506.

"Debt will lie on all the contracts, express or implied, arising out of the ordinary transactions of life." *Mahaffey v. Petty*, 1 Ga. 261.

29. **Ark.**—*English v. Watkins*, 4 Ark. 199. **Ind.**—*Cross v. Watson*, 6 Blackf. 129; *Farnham v. Hay*, 3 Blackf. 167. **Eng.**—*Rudder v. Price*, 1 H. Bl. 547; *Dean v. Gover*, 2 Saund. 302, note 1.

"I know of no difficulty in the way of such an action (debt on a covenant for the purchase price of land) except that, perhaps, where the purchase money is payable by instalments, it might possibly admit of a doubt, whether the vendor, after having recovered one instalment, could bring a second action on the covenant; or whether he would have to wait till all the instalments should be due; a matter about which I intimate no opinion." *Huber v. Burke*, 11 Serg. & R. (Pa.) 238.

30. *Hoy v. Hoy*, 44 Ill. 469 (in this case the action was on an agreement

3. Recognizances.—Debt will also lie on a recognizance to the state or to an individual, as well as *scire facias*.³¹

B. CONTRACTS UNDER SEAL.—1. In General.—It is also a proper form of action on contracts under seal which possess the other necessary requisites.³²

Mortgages.—Debt will lie on a mortgage containing an agreement to pay a stipulated sum,³³ but not in the absence of a covenant to pay.³⁴

Lease.—Debt is the proper form of action on a lease to recover rent in arrear, after the expiration of the lease.³⁵

2. Bonds.—Bonds for the payment of a sum certain will support an action of debt. This applies both to individual bonds³⁶ and to

under seal to pay a certain sum annually for ten years); *Lancaster v. Lancaster*, 29 Ill. App. 510.

31. Ill.—*Eimer v. Richards*, 25 Ill. 260. **Ind.**—*State v. Inman*, 7 Blackf. 225. **Me.**—*State v. Boies*, 41 Me. 344; *State v. Folsom*, 26 Me. 209. **Mass.**—*Green v. Dana*, 13 Mass. 493; *Com. v. Green*, 12 Mass. 1. **N. H.**—*State v. Wheeler*, 67 N. H. 511, 41 Atl. 173; *State v. Welch*, 59 N. H. 134; *State v. Stevens*, Smith 251. **N. Y.**—*Champlain v. People*, 2 N. Y. 82; *People v. Van Eps*, 4 Wend. 387; *People v. Kane*, 4 Denio 530. **Pa.**—*Bodine v. Com.*, 24 Pa. 69; *Davy v. Jackson*, 2 Yeates 280.

The action was not questioned in *State v. Davis*, 43 N. H. 600, and in *Philbrick v. Buxton*, 43 N. H. 462.

Debt is the proper form of action upon a recognizance though not filed and made of record in the supreme court. *State v. Wheeler*, 67 N. H. 511, 41 Atl. 173; *State v. Welch*, 59 N. H. 134. *Contra*, *Bridge v. Ford*, 4 Mass. 641.

32. U. S.—*Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. ed. 95; *French v. Tunstall*, Hempst. 204, 9 Fed. Cas. No. 5,104a. **Ark.**—*Hanger & Ashley v. Dodge*, 24 Ark. 208; *Gregory v. Bewly*, 5 Ark. 318. **Ill.**—*Miller v. Blow*, 68 Ill. 304; *Hoy v. Hoy*, 44 Ill. 469; *Nash v. Nash*, 16 Ill. 79; *Henry v. Heldmaier*, 129 Ill. App. 86; *Rynders v. Coxie Bros. & Co.*, 80 Ill. App. 629; *Abe Lincoln, etc. Soc. v. Miller*, 23 Ill. App. 341; *Price v. Farrar*, 5 Ill. App. 536. **Ind.**—*Massey v. Chance*, 7 Blackf. 160; *Tillotson v. Stipp*, 1 Blackf. 77. **Ky.**—*Appelgate v. Jacoby*, 9 Dana 206. **Me.**—*Seretto v. Rockland, etc. R. Co.*, 101 Me. 140, 63 Atl. 651; *Carleton v.*

Bird, 94 Me. 182, 47 Atl. 154. **Md.**—*Wales v. Walling*, 3 Har. & J. 565. **Pa.**—*Brubaker's Admr. v. Taylor*, 76 Pa. 83. **R. I.**—*McCardell v. Williams*, 19 R. I. 701, 36 Atl. 719. **Tenn.**—*Bayley v. Hazard*, 3 Yerg. 487. **Va.**—*Davis v. Mead*, 13 Gratt. 118.

“To maintain the action of debt upon a specialty, the instrument must show on its face an undertaking to pay a sum certain to a specified person and at a certain time.” *Larmon v. Carpenter*, 70 Ill. 549.

In *Kentucky* a note for payment of money or tobacco was on the same footing as a specialty, and treated as such by the courts. *Stephens v. Crostwait*, 3 Bibb (Ky.) 222; *Rands v. Peck*, Cro. Jac. 618, 79 Eng. Reprint 527.

33. Conger v. Lancaster, 6 Yerg. (Tenn.) 477.

34. Ill.—*Larmon v. Carpenter*, 70 Ill. 549. **Ind.**—*Smith v. Stewart*, 6 Blackf. 162. **Md.**—*Barrell v. Glover*, 2 Gill 171. **N. Y.**—*Culver v. Sisson*, 3 N. Y. 264; *Elder v. Rouse*, 15 Wend. 218. **Pa.**—*Fidelity Ins. & Tr. Co. v. Miller*, 89 Pa. 26; *Scott v. Fields*, 7 Watts 360.

35. Norton v. Vultee, 1 Hall (N. Y.) 384.

36. Ala.—*Williams v. Harper*, 1 Ala. 502; *Clay v. Drake*, Minor 164. **Ark.**—*McLaughlin v. Hutchins*, 3 Ark. 207. **Ill.**—*Terre Haute, etc. R. Co. v. Peoria, etc. R. Co.*, 182 Ill. 501, 55 N. E. 377, *affirming* 81 Ill. App. 435; *Becker v. People*, 164 Ill. 267, 45 N. E. 500 (supersedeas); *Kilgore v. Drainage Com.*, 111 Ill. 342 (appeal bond); *Mix v. People*, 92 Ill. 549 (appeal bond); *People v. Hunter*, 89 Ill. 392 (administrator's bond); *Mestling v. Hughes*, 89

bonds given by public officers for the proper discharge of their official duties.³⁷

C. SIMPLE CONTRACTS.—1. **In General.**—Debt will also lie for a definite sum of money due by a simple contract.³⁸

2. **Bills and Notes.**—Bills of exchange and promissory notes generally will support the action.³⁹

Ill. 389 (appeal bond); *Mix v. People*, 86 Ill. 329 (appeal bond); *Herrick v. Swartwout*, 72 Ill. 340 (appeal bond); *George v. Bischoff*, 68 Ill. 236 (appeal bond); *Caldwell v. Richmond*, 64 Ill. 30; *Cleveland v. Skinner*, 56 Ill. 500; *Governor v. Lagow*, 43 Ill. 134; *Manning v. Pierce*, 3 Ill. 4 (replevin bond); *Loellike v. Grant*, 120 Ill. App. 74 (attachment bond); *Heisen v. Westfall*, 86 Ill. App. 576; *Rynders v. Coxie Bros. & Co.*, 80 Ill. App. 629 (appeal bond); *Shunick v. Thompson*, 25 Ill. App. 619 (appeal bond); *Sears v. Nagler*, 13 Ill. App. 547 (attachment bond). **Ind.** *Crist v. Crist*, 8 Blackf. 574. **Ky.**—*Griffith v. Com.*, 1 Dana 270, administrator's bond. **Me.**—*Jackson v. York & C. R. Co.*, 48 Me. 147. **Mass.**—*Bean v. Parker*, 17 Mass. 591, 602. **Miss.**—*Matthews v. Redwine*, 23 Miss. 233. **N. H.** *Judge v. Merrill*, 6 N. H. 256; *Pierce v. Reed*, 2 N. H. 359. **N. J.**—*English v. Mayor, etc.*, 42 N. J. L. 275. **Va.** *Hughes v. Kelly*, 30 S. E. 387; *Bailey v. Beckwith*, 7 Leigh 604.

The obligee of a bond may sue thereon without first exhausting his remedy against the property, since that is merely cumulative. *Kilgore v. Drainage Com.*, 111 Ill. 342.

The summary statutory remedy will not lie if the bond lacks any of the statutory requirements. *Tolleson v. State*, 139 Ala. 159, 35 So. 997.

37. *Rudesill v. County Court, etc.*, 85 Ill. 446; *Foltz v. Stevens*, 54 Ill. 180; *Lusk v. Cassell*, 25 Ill. 191; *People v. McHatten*, 7 Ill. 731; *Foster v. People*, 121 Ill. App. 165; *Pickett v. People*, 114 Ill. App. 188; *Carmichael v. The Governor*, 3 How. (Miss.) 236.

38. **U. S.**—*Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. ed. 95. **Ala.** *M'Voy v. Wheeler*, 6 Port. 201. **Ark.** *Bentley v. Dickson*, 1 Ark. 165. **Idaho.** *McCallum v. McClarren*, 15 Idaho 374, 98 Pac. 200. **Ill.**—*Dunlap v. Buckingham*, 16 Ill. 109. **Ky.**—*White v. Walker*, 1 T. B. Mon. 34. **Me.**—*Seretto v. Rockland, etc. R. Co.*, 101 Me. 140, 63 Atl. 651; *Portland v. Atlantic & St. L. R. Co.*, 66 Me. 485; *National*

Exch. Bank v. Abell, 63 Me. 346; *McVicker v. Beedy*, 31 Me. 314; *Norris v. School Dist.*, 12 Me. 293. **Mass.** *Smith v. Lowell*, 8 Pick. 178. **N. H.** *Gray v. Johnson*, 14 N. H. 414. **N. Y.** *Mayor, etc. of New York v. Butler*, 1 Barb. 325. **Pa.**—*Gebhart v. Francis*, 32 Pa. 78. **Tenn.**—*McGavock v. Puryear*, 6 Coldw. 34.

Debt is the exclusive remedy in New Jersey on simple contracts for the payment of money, the Act of Assembly directing that actions thereon should be brought as actions of debt and *not otherwise*. *Riker v. Jacobus*, 2 N. J. L. 309; *Chattin v. Payday*, 2 N. J. L. 129.

Account.—"Debt will lie upon an open account for goods sold and delivered, as well as an action of assumpsit." *Dillingham v. Skein, Hempst.* 181, 7 Fed. Cas. No. 3,912a; *Collins v. Johnson, Hempst.* 279, 6 Fed. Cas. No. 3,015a (account stated for value of cotton delivered to defendant's gin). And see *Portland v. Atlantic & St. L. R. Co.*, 66 Me. 485.

39. **U. S.**—*Metcalf v. Robinson*, 2 McLean 363, 17 Fed. Cas. No. 9,497. **Ala.**—*Stone v. Gover*, 1 Ala. 287; *Boddie v. Ely*, 3 Stew. 182; *Butler v. Limerick, Minor* 115. **Ark.**—*Bentley v. Dickson*, 1 Ark. 165. **Ill.**—*Mayer v. Hutchinson*, 7 Ill. 266. **Ind.**—*Taylor v. Walpole*, 1 Blackf. 378. **Ky.**—*Scott v. Colmesnil*, 7 J. J. Marsh. 416; *Leather's Representative v. M'Glasson*, 3 T. B. Mon. 223; *Payne v. Mattox*, 1 Bibb 164. **Mass.**—*Martin's Admr. v. Root*, 17 Mass. 222. **Mo.**—*Middleton v. Atkins*, 7 Mo. 184; *Lee v. Hunt*, 6 Mo. 163; *Dyer & Mason v. Sublette & Campbell*, 6 Mo. 14; *Tabor v. Jameson*, 5 Mo. 494; *Boyd v. Sargent*, 1 Mo. 437. **N. C.**—*Gardner v. Clark*, 5 N. C. 283. **Pa.**—*Camp v. Bank of Owego*, 10 Watts 130. **Tenn.**—*McGavock v. Puryear*, 6 Coldw. 34.

It was early contended by some of the judges that promissory notes were only evidences of indebtedness and that therefore no action could be maintained on them (*Trier v. Bridgman*, 2

3. Book Account.—In Vermont there is a statutory action in the nature of debt known as "book account."⁴⁰ This form of action lies

East 359, 102 Eng. Reprint 406; *Clarke v. Martin*, 2 Ld. Raym. 757, 92 Eng. Reprint 6), but the controversy was ended by the statute 3 & 4 Anne, ch. 9, §1, which enacted that all notes signed by a person, promising to pay to another, his order or bearer, any sum of money, should be construed to be by virtue thereof, due and payable to any person, to whom the same was made payable. (See *Camp v. Bank of Owego*, 10 Watts (Pa.) 130; *Brown v. Harraden*, 4 T. R. 148, 100 Eng. Reprint 943).

It is well settled that an action of debt may be maintained by the payee of a bill of exchange or promissory note against the drawer or maker, when the instrument is expressed to be for value received, or purports to be founded on some consideration. **U. S.**—*Raborg v. Peyton*, 2 Wheat. 385, 4 L. ed. 268. **Ill.**—*Frink v. King*, 4 Ill. 144. **Eng.**—*Bishop v. Young*, 2 Bos. & P. 78.

It may be supported although no consideration be expressed on the face of the instrument, since the law implies that it is based upon a good consideration. *Dunlap v. Buckingham*, 16 Ill. 109; *Hatch v. Traves*, 11 Ad. & El. 702, 113 Eng. Reprint 581.

The objection that debt will not lie on a collateral undertaking does not apply to an action against the drawer, for although his liability is conditional in the first instance, it becomes fixed and absolute on default of the drawee, and on his receiving due notice of the default. *Dunlap v. Buckingham*, 16 Ill. 109.

Debt lies also in favor of an indorsee. **U. S.**—*Raborg v. Peyton*, 2 Wheat. 385, 4 L. ed. 268. **Ala.**—*Carroll v. Meeks*, 3 Port. 226. **Me.**—*National Exch. Bank v. Abell*, 63 Me. 346. **N. Y.** *Wilmarth v. Crawford*, 10 Wend. 340. In *Snyder v. Hummel*, 2 N. J. L. 82, it was held that the plaintiff could not recover on a note of hand, endorsed in blank, without first writing a proper assignment above the endorsement.

A bank which discounts a note may bring debt against the maker. *Nelson v. Bank of State of Missouri*, 7 Mo. 219.

But if the instrument be lost, debt is not the proper action. *Stephens v. Crostwait*, 3 Bibb (Ky.) 222; *Edwards v. M'Kee*, 1 Mo. 123.

40. "In this action there are very few new principles. It is chiefly a new combination of known common law and chancery principles. It is the ancient action of account enlarged to comprehend not all, but a large class of cases; and the chancery mode of proceeding by bill and cross-bill, with the addition of allowing each party to tender his own oath as well as demand that of his adversary; with also the improvement of having the parties confront each other, and be subject to an open cross-examination, the great test of truth—all other proofs also admissible as in other actions; and men of general intelligence and especially conversant with the nature of the claims in dispute, selected for triers, with the supervisory power of the courts in points of law; and all this in a plain and direct manner, unincumbered with forms." *McLaughlin v. Hill*, 6 Vt. 20.

"It is supposed that the substitute of this form of action was brought to New England by a dissenting English minister from Holland, not long after the arrival of the pilgrims." *McLaughlin v. Hill*, 6 Vt. 20; Vermont St., 1894, §§1445-1452.

Connecticut.—A similar action called book debt existed in Connecticut prior to the Practice Act. But all forms of actions have now been abolished in that state. Conn. Gen. St., 1902, §607; *Dunnett v. Thornton*, 73 Conn. 1, 46 Atl. 158; *Morehouse v. Throekmorton*, 72 Conn. 449, 44 Atl. 747; *Jacobs v. Holgenson*, 70 Conn. 68, 38 Atl. 914.

The statute still makes certain provisions in regard to an action for a debt due by book to balance book accounts, giving each party the right to oyer of the books of the other by order of the court on motion duly made. Gen. St. (Conn.), 1902, §§980, 981.

The statute, in general terms, authorized the admission of the evidence of the parties and of other persons interested, quoad the book debt. *Peck v. Abbe*, 11 Conn. 207; *Weed v. Bishop*,

whenever there is an unsettled account between the parties.⁴¹

Where the articles are in themselves proper subjects of book charge, a special agreement as to the mode of payment will not preclude the plaintiff from the right to charge them on book, and sue for them in this form of action.⁴²

The right to charge must exist at the time when the property is delivered, and in consequence of such delivery.⁴³

Where there are no items properly chargeable on book, the action of book account will not lie for the adjustment of other items proper for the action of account.⁴⁴

And since allowing a party to support a claim by his own testimony is repugnant to general common law principles, the courts will not extend this action beyond the objects of its institution.⁴⁵

4. Contracts of Insurance.—Debt will lie on a contract of insurance upon the happening of the contingency if the amount due is

7 Conn. 128; *Bryan v. Jackson*, 4 Conn. 288.

See the title "Account and Accounting," Vol. 1.

41. *Flint v. Eureka Marble Co.*, 53 Vt. 669; *Weeks v. Boynton*, 37 Vt. 297; *Woodward v. Cutter*, 33 Vt. 49; *McKay v. Brown*, 13 Vt. 593.

Book debt is the proper action to recover for articles furnished by a guardian for the necessary support, maintenance and education of his ward, or by others at his request. *Stanton v. Wilson*, 3 Day (Conn.) 37.

Book debt will lie for labor performed in the defendants' service and for their benefit. *Parker v. Bryant*, 40 Vt. 291.

Matters not strictly in themselves chargeable on book may be made so by agreement entered into by the parties or implied from their course of dealings with each other. *Scott v. Lance*, 21 Vt. 507.

If the agreement is to give time for payment, upon the debtor's giving a note with surety, if such note is not furnished, the creditor may sue at once on book or in general *assumpsit*. *Hale & Fish v. Jones*, 48 Vt. 227.

A party cannot recover in the action of book account for items which he could not recover under the common counts in general *assumpsit*. *Kidder v. Sowles*, 44 Vt. 303.

Where on a previous settlement items were omitted by the plaintiff by mistake, he cannot later maintain an action of book debt therefor, but is left

to his remedy in *assumpsit*. *Remington v. Noble*, 19 Conn. 383.

42. *Newton v. Higgins*, 2 Vt. 366.

43. *Bradley v. Goodyear*, 1 Day (Conn.) 105; *Slasson v. Davis*, 1 Aik. (Vt.) 73.

But where the defendant agreed to pay the expenses of the plaintiff, incurred in attempting to sell a patent, from the beginning, and both parties treated the agreement as relating back to expenses previously incurred, the plaintiff had a right to charge the expenses on book, and to recover for them in this form of action. *Perry v. Buckman*, 33 Vt. 7.

44. *Duryea v. Whitecomb*, 31 Vt. 395.

This statute did not merge the action of account with that of book account, and therefore the existence of a few items of book account in connection with a general account will not support an action under the statute. *Huxley v. Carman*, 46 Vt. 462.

The action of book account is not proper to determine the performance of the covenants of a lease. *Proctor v. Wiley*, 55 Vt. 344.

By statute (Vt. St., §1446) items of account may be adjusted in book account, but it is held that this does not operate *vice versa* to allow the adjustment of items of book account in account. *Admr. of Gilley's Estate v. Tenny*, 31 Vt. 401.

45. *Terrill v. Beecher*, 9 Conn. 344; *Bradley v. Goodyear*, 1 Day (Conn.) 105.

thereupon fixed;⁴⁶ but not if the amount is unliquidated or uncertain.⁴⁷

5. Oral Contracts.—The action of debt is not limited to written agreements but may be brought also on oral contracts.⁴³

6. Implied Contracts.—Debt will lie also on implied contracts if the amount due is definite or ascertainable.⁴⁹

7. Use and Occupation.—Debt will lie generally for the use and occupation of premises, since the plaintiff may declare on the common counts instead of on the demise.⁵⁰

46. U. S.—*Hughes v. Union Ins. Co.*, 8 Wheat. 294, 5 L. ed. 620, marine policy. **Ill.**—*Independent Order, etc. v. Stahl*, 64 Ill. App. 314 (life insurance); *Abe Lincoln, etc. Soc. v. Miller*, 23 Ill. App. 341 (life insurance). **Pa.** *Heffron v. Kittanning Ins. Co.*, 132 Pa. 580, 20 Atl. 698 (fire insurance); *Metropolitan L. Ins. Co. v. Drach*, 101 Pa. 278 (life insurance); *People's Ins. Co. v. Spencer*, 53 Pa. 353.

47. Braun v. Maine Benefit Assn., 92 Me. 341, 42 Atl. 500.

"The contract of insurance is to indemnify the insured and even in case of a valued policy the amount specified is only *prima facie* evidence of the real value. The damages are unliquidated. Furthermore, the company had the right to rebuild." *Flanagan v. Camden Mut. Ins. Co.*, 25 N. J. L. 506.

48. Ky.—*Hampton v. Barr*, 3 Dana 578. **N. J.**—*Seely v. Myres*, 2 N. J. L. 364. **Pa.**—*Baum v. Tonkin*, 110 Pa. 569, 1 Atl. 535.

A parol award is sufficient to support the action. *Riker v. Jacobus*, 2 N. J. L. 309.

If the original contract was under seal, but it has been varied by a subsequent parol agreement, debt or assumption is the proper action, not covenant, the covenant being only inducement to the action. *M'Voy v. Wheeler*, 6 Port. (Ala.) 201.

49. U. S.—*Dillingham v. Skein*, Hempst. 181, 7 Fed. Cas. No. 3,912a (for goods sold and delivered); *Collins v. Johnson*, Hempst. 279, 6 Fed. Cas. No. 3,015a. **Ala.**—*Strange v. Powell*, 15 Ala. 452; *Blackburn v. Baker*, 7 Port. 284. **Ark.**—*Gregory v. Bewly*, 5 Ark. 318. **Ky.**—*Jenkins v. Richardson*, 6 J. J. Marsh. 441. **Mass.**—*Van Deusen v. Blum*, 18 Pick. 229; *Smith v. Lowell*, 8 Pick. 178. **N. J.**—*Little v. Gibbs*, 4 N. J. L. 240; *Witherly v. Morgan*, 2 N. J. L. 78. **N. Y.**—*Van*

Hook v. Wittock, 3 Paige 408. **Pa.** *Metropolitan L. Ins. Co. v. Drach*, 101 Pa. 278. **Tenn.**—*Hickman v. Searcy's Exr.*, 9 Yerg. 47. **Eng.**—*Emery v. Fell*, 2 T. R. 28, 100 Eng. Reprint 16.

The statement of Sir William Blackstone (3 Bl. Com. 154) that debt is "a sum of money due by certain and express agreement," is commented on in *United States v. Colt*, Pet. C. C. 145, 25 Fed. Cas. No. 14,839, as follows: "The doctrine laid down by this writer appears to be much too general and unqualified, although, to a certain extent, it is unquestionably correct. Debt is certainly a sum of money due by contract, and it most frequently is due by a certain and express agreement, which also fixes the sum, independent of any extrinsic circumstances. But it is not essential that the contract should be express, or that it should fix the precise amount of the sum to be paid. Debt may arise on an implied contract, as for the balance of an account stated, to recover back money which a bailiff has paid, more than he had received, and in a variety of other cases, where the law, by implication, raises a contract to pay. 2 Com. Dig. 365."

Money Had and Received.—Debt lies to recover money lent, paid out, had and received, etc. *Somerville v. Grimt*, 17 W. Va. 803.

"If, at the request of the defendant, he (the plaintiff) has paid money for him on an execution, or otherwise, the action of debt is his proper remedy." *Little v. Gibbs*, 4 N. J. L. 240.

The recovery of a statutory penalty is said to be "upon an implied promise which the law annexes to the liability." *Russell v. Louisville & N. R. Co.*, 93 Va. 322, 25 S. E. 99. And see 1 Chit. Pl. 108.

50. Ark.—*Trapnall v. Merrick*, 21 Ark. 503. **Ill.**—*Miller v. Blow*, 63 Ill. 304. **Mo.**—*Garvey v. Dobyns*, 8 Mo. 213.

8. **Quantum Meruit.**—Debt may be brought for the reasonable value of services or goods.⁵¹

IV. DEBT ON STATUTES.—A. **IN GENERAL.**—Debt is the appropriate and usual action to recover a statutory penalty or forfeiture,⁵² where no specific mode of recovery of such penalty or for-

N. H.—Gray *v.* Johnson, 14 N. H. 414. **Pa.**—Davis *v.* Shoemaker, 1 Rawle 135. **Eng.**—King *v.* Fraser, 6 East 348, 102 Eng. Reprint 1,320; Wilkins *v.* Wingate, 6 T. R. 62, 101 Eng. Reprint 436.

51. **U. S.**—Collins *v.* Johnson, Hempst. 279, 6 Fed. Cas. No. 3,015a. **Ill.**—Frink *v.* King, 4 Ill. 144. **Ky.** Jenkins *v.* Richardson, 6 J. J. Marsh. 441. **Me.**—National Exch. Bank *v.* Abell, 63 Me. 346; McVicker *v.* Beedy, 31 Me. 314. **Mass.**—Van Deusen *v.* Blum, 18 Pick. 229; Smith *v.* Lowell, 8 Pick. 178. **N. Y.**—Mayor, etc. *v.* Butler, 1 Barb. 325. **Tenn.**—Thompson *v.* French, 10 Yerg. 452. **Eng.**—Emery *v.* Fell, 2 T. R. 28, 100 Eng. Reprint 16.

“The distinction is between a claim for the actual value of the work (for which debt will lie), and one where the plaintiff seeks to recover unliquidated special damages for the breach of a contract. The former is a debt, the latter is not, until settled by a judgment.” Mayor, etc. of New York *v.* Butler, 1 Barb. (N. Y.) 325.

“It would, therefore, be as available to the defendant to show any fact bearing upon the question of what the work done by the plaintiff was reasonably worth as if the action had been covenant broken or assumpsit. And the issue can be tried in this action whether the plaintiff did general work, or did extra work, and furnished extra materials, under the terms of the contract, to be ascertained, as therein agreed, and whether upon the facts proved, there was due to the plaintiff other sums of money at the date of the writ. In determining the sums, if any, due to the plaintiff he is limited in his proof to the specification of his claim, and against these items the defendant had the right to introduce counter proof.” Seretto *v.* Rockland, S. T. & O. H. R. Co., 101 Me. 140, 63 Atl. 651.

In Durrill *v.* Lawrence, 10 Vt. 517, it was held debt would not lie to recover the value of salt delivered by plaintiff to defendant, but which defendant had refused to receive on the

ground that it did not conform to the terms of the contract.

52. **U. S.**—Chaffee *v.* United States, 18 Wall. 516, 21 L. ed. 908. Stockwell *v.* United States, 13 Wall. 531, 20 L. ed. 491; Adams *v.* Woods, 2 Cranch 336, 2 L. ed. 297; United States *v.* Southern Pac. Co., 162 Fed. 412; Jacobs *v.* United States, 1 Brock. 520, 13 Fed. Cas. No. 7,157; Bullard *v.* Bell, 1 Mason 243, 4 Fed. Cas. No. 2,121. **Ala.**—Southern Car & F. Co. *v.* Calhoun County, 141 Ala. 250, 37 So. 425; Strange *v.* Powell, 15 Ala. 452; Spence *v.* Thompson, 11 Ala. 746; Blackburn *v.* Baker, 7 Port. 284. **Conn.**—Kellog *v.* The Union Co., 12 Conn. 7. **Ill.**—Indiana Millers', etc., Ins. Co. *v.* People, 170 Ill. 474, 49 N. E. 364; Vaughan *v.* Thompson, 15 Ill. 39; City of Carbondale *v.* Wade, 106 Ill. App. 654; Robley *v.* Culwell, 69 Ill. App. 272. **Me.**—Houghton *v.* Stowell, 28 Me. 215; Frost *v.* Rowse, 2 Greenl. 130. **Mass.**—Reed *v.* Davis, 8 Pick. 514; Stilson *v.* Tobey, 2 Mass. 521. **N. H.**—Orne *v.* Roberts, 51 N. H. 110; Janvrin *v.* Scammon, 29 N. H. 280; Morrison *v.* Bedell, 22 N. H. 234. **N. Y.**—Kerr *v.* Davis, 7 Paige 53; Van Hook *v.* Whitlock, 3 Paige 408. **N. C.**—Albright *v.* Tapscott, 53 N. C. 473; Dowd *v.* Seawell, 14 N. C. 185. **Pa.**—Garman *v.* Gamble, 10 Watts 382. **Va.**—Maple *v.* John, 24 S. E. 608; West *v.* Rawson, 21 S. E. 1019. **Eng.**—Pemberton *v.* Shelton, Cro. Jac. 498, 79 Eng. Reprint 425.

Debt will lie even though the amount to be recovered may depend on the finding of the jury. Reed *v.* Davis, 8 Pick. (Mass.) 514; Janvrin *v.* Scammon, 29 N. H. 280.

On Town Ordinance.—An action of debt is appropriate to recover a fine under an ordinance of a municipal corporation. Israel *v.* Jacksonville, 2 Ill. 290.

Action To Liquidate Damages.—It is not necessary to first liquidate the damages by bringing an action on the case. Orne *v.* Roberts, 51 N. H. 110.

Conviction of Offense.—Nor must

feiture is provided;⁵³ and *a fortiori* where it is the form designated therein.⁵⁴

Even when the statute gives another remedy it is considered as cumulative,⁵⁵ unless made exclusive.⁵⁶

B. ACTIONS QUI TAM. — A *qui tam* action of debt may be brought to recover a fine or penalty part of which is for the use of the state.⁵⁷

V. DEBT ON JUDGMENTS AND AWARDS. — A. JUDGMENTS. The action of debt lies on judgments, both of domestic and foreign

the offender be first convicted of the offense in a criminal action, since this is substantially found in giving judgment for the penalty. *Garman v. Gamble*, 10 Watts (Pa.) 382.

But if the statute is remedial and the party injured recovers the amount of damage he has sustained by a breach of the statute, case is the appropriate remedy. *Mount v. Hunter*, 58 Ill. 246; *Baylies v. Curry*, 30 Ill. App. 105, *affirmed*, 128 Ill. 287, 21 N. E. 595.

"Wherever a statute imposes a legal obligation upon one party to pay money to another, the person to whom payment is to be made, may maintain an action of debt for the money." *Van Hook v. Whitlock*, 3 Paige (N. Y.) 408.

53. *Russell v. Louisville & N. R. Co.*, 93 Va. 322, 25 S. E. 99; *West v. Rawson* (Va.), 21 S. E. 1019; *Mapel v. John*, 42 W. Va. 30, 24 S. E. 608.

54. *Orne v. Roberts*, 51 N. H. 110; *Morrison v. Bedell*, 22 N. H. 234.

55. Ill. — *Whitcraft v. Vanderver*, 12 Ill. 235. Me. — *Portland v. Atlantic & St. L. R. Co.*, 66 Me. 485. Va. *Sims v. Alderson*, 8 Leigh 479.

Debt may be brought notwithstanding the forfeiture could also be recovered by indictment or information. *United States v. Stocking*, 87 Fed. 857; *State v. Waterhouse*, 71 N. H. 488, 53 Atl. 304.

The charter of bank provided that "all bills and notes, whether under seal or otherwise, at any time discounted by said bank, shall be and are hereby placed upon the same footing as foreign bills of exchange, so that the like remedy shall be had for the recovery, thereof, against the drawer or indorser thereof, and with the like effect, except so far as relates to damages," but it was held that this section was not intended to fix or limit the remedy, but to fix the liabilities of the several parties to the

instrument, and, therefore, debt would lie. *Nelson v. Bank of State of Missouri*, 7 Mo. 219.

Where the statute provides for increased damages or increased costs, but does not create the cause of action, it is not necessary to declare on the statute, though the facts and circumstances necessary to bring the plaintiff within the statute may be set out in the declaration. *Morrison v. Bedell*, 22 N. H. 234.

But it is otherwise where the statute creates the remedy. *United States v. Mundel*, 6 Call (Va.) 245. "The truth is, it is sometimes necessary to distinguish between actions of debt at common law, and actions of debt upon a statute, for particular reasons, not applicable to the mode of trial. For instance, it is necessary to shew it to be 'an action on the statute,' because otherwise no cause of action will appear, a penalty in the case not existing at common law, and, therefore, creating no such contract."

56. Me. — *Hewins v. Currier*, 62 Me. 236; *Packard v. Brewster*, 59 Me. 404. Mass. — *Com. v. Connecticut River R. Co.*, 15 Gray 447; *Gale v. Boyle*, 6 Cush. 138; *Niles v. Drake*, 17 Pick. 516; *Crane v. Keating*, 13 Pick. 339. N. H. — *Pierce v. Read*, 2 N. H. 359.

By statute, 1852, ch. 312, §1, the action of debt is superseded by an action of tort for the recovery of penalties. *Com. v. Connecticut River R. Co.*, 15 Gray (Mass.) 447.

57. U. S. — *M'Donald v. Hearst*, 95 Fed. 656; *Adams v. Woods*, 2 Cranch 336, 2 L. ed. 297. Mass. — *Burnham v. Webster*, 5 Mass. 266. N. C. — *Dowd v. Seawell*, 14 N. C. 185. Pa. — *Garman v. Gamble*, 10 Watts 382.

United States Rev. St., §2124, provides that such a suit shall be in the name of the United States, thus putting an end to the right of the informer to sue in his own name. *United States v. Stocking*, 87 Fed. 857.

courts,⁵⁸ and of courts not of record as well as those of record.⁵⁹

A foreign judgment is not considered a record, however, but the action lies as on a simple contract.⁶⁰

58. U. S.—*Mills v. Duryea*, 7 Cranch 481, 3 L. ed. 411; *De Brimont v. Penniman*, 10 Blatchf. 436, 7 Fed. Cas. No. 3,715. **Ala.**—*Carter v. Crews*, 2 Port. 81; *McKenzie v. Connor*, 1 Stew. 162. **Ark.**—*Egan v. Tewksbury*, 32 Ark. 43. **Conn.**—*Denison v. Williams*, 4 Conn. 402. **Ill.**—*Belford v. Woodward*, 158 Ill. 122, 41 N. E. 1097; *Knickerbocker Life Ins. Co. v. Barker*, 55 Ill. 241; *Greathouse v. Smith*, 4 Ill. 541. **Ky.**—*Dudley v. Lindsey*, 9 B. Mon. 486. **Me.**—*Tourigny v. Houle*, 88 Me. 406, 34 Atl. 158; *Endicott v. Morgan*, 66 Me. 456; *National Exch. Bank v. Abell*, 63 Me. 346; *McVicker v. Beedy*, 31 Me. 314. **Mass.**—*Bissell v. Briggs*, 9 Mass. 462. **Miss.**—*Hinton v. First Nat. Bank*, 53 So. 344. **N. H.**—*Wilbur v. Abbott*, 59 N. H. 132. **N. J.**—*Beale v. Berryman*, 30 N. J. L. 216. **N. Y.**—*Andrews v. Montgomery*, 19 Johns. 162; *Gassner v. Sandford*, 2 Sandf. 440. **Ohio.**—*Stockwell v. Coleman*, 10 Ohio St. 34; *Pelton v. Platner*, 13 Ohio 209; *Silver Lake Bank v. Harding*, 5 Ohio 546. **Vt.**—*Wood v. Agostines*, 72 Vt. 51, 47 Atl. 108; *Adams v. Campbell*, 4 Vt. 447. **Va.**—*Kemp v. Mundell*, 9 Leigh 12; *Shelton v. Welsh*, 7 Leigh 175; *Anderson v. Price*, 4 Munf. 307. **Eng.**—*Henley v. Soper*, 8 B. & C. 16, 108 Eng. Reprint 949; *Otway v. Ramsay*, 4 B. & C. 416, 107 Eng. Reprint 1113a; *Harris v. Saunders*, 4 B. & C. 411, 107 Eng. Reprint 1113 (judgment of a court of Ireland); *Collins v. Lord Mathew*, 5 East 473, 102 Eng. Reprint 1152; *Messin v. Masareene*, 4 T. R. 493, 100 Eng. Reprint 1137; *Walker v. Witter*, 1 Doug. 1, 99 Eng. Reprint 1; *Russell v. Smyth*, 9 M. & W. 810; *Abouloff v. Oppenheimer*, 10 Q. B. D. 295 (judgment of court of Russia).

"Where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained." *Williams v. Jones*, 13 M. & W. (Eng.) 628.

"By the common law procedure, the appropriate form of an action at law to recover an amount due upon a judg-

ment is an action of debt." *Du Bois v. Seymour*, 152 Fed. 600, 81 C. C. A. 590.

The action of debt was approved on a judgment of a court of California "to be paid in United States gold coin," on the ground that the plaintiff waived her right to insist upon payment in gold by taking a judgment in Illinois payable in dollars generally. *Belford v. Woodward*, 158 Ill. 122, 41 N. E. 1097.

Decree of a Surrogate Court.—*Du Bois v. Dubois*, 6 Cow. (N. Y.) 494.

Order of a Court of Sessions.—*Rice v. Barre Turnpike Corp.*, 4 Pick. (Mass.) 130.

Right to Execution Does Not Bar. The creditor may bring an action of debt notwithstanding the fact that he may, at the time, be entitled to an execution on his judgment procured in a court of the same state. *Denison v. Williams*, 4 Conn. 402; *Greathouse v. Smith*, 4 Ill. 541.

Costs.—Debt has been held proper in England on a decree of a court of Scotland awarding costs. *Russell v. Smyth*, 9 M. & W. (Eng.) 810.

The judgment is not binding on the defendant, however, if the court rendering it acquired no jurisdiction over him. *McVicker v. Beedy*, 31 Me. 314.

Finality.—Debt will not lie unless the judgment is final. *Du Bois v. Seymour*, 152 Fed. 600, 81 C. C. A. 590; *De Brimont v. Penniman*, 10 Blatchf. 436, 7 Fed. Cas. No. 3,715.

59. Ind.—*Brown's Exr. v. Trulock*, 4 Blackf. 429; *Cole v. Driskell*, 1 Blackf. 16. **Ky.**—*McElfatriek v. Taft*, 10 Bush 160. **Ohio.**—*Pelton v. Platner*, 13 Ohio 209; *Silver Lake Bank v. Harding*, 5 Ohio 546. **Eng.**—*Williams v. Jones*, 13 M. & W. 628.

60. Cole v. Driskell, 1 Blackf. (Ind.) 16; *Harris v. Saunders*, 4 B. & C. 411, 107 Eng. Reprint 1113; *Otway v. Ramsey*, 4 B. & C. 416, note 10, 107 Eng. Reprint 1113n; *Galbraith v. Neville*, 5 East 475n, 102 Eng. Reprint 1152; *Walker v. Witter*, 1 Doug. 1, 99 Eng. Reprint 1.

But since the union between Great Britain and Ireland the judgments of the Irish courts are properly pleadable

It lies also on a final decree of a court of equity adjudging a fixed and certain sum to be due and owing from the defendant to the complainant, and nothing more.⁶¹

B. AWARDS. — Debt may be brought on an award finding a sum certain due from one of the parties to the other.⁶²

as records. *Galbraith v. Neville*, 5 East 475n, 102 Eng. Reprint 1152.

Full Faith and Credit. — Similarly in the United States the "full faith and credit" clause of the constitution (Art. IV, §1) gives the judgments of courts of record of sister states the same effect that they had where rendered. **U. S.** — *Mills v. Duryee*, 7 Cranch 481, 3 L. ed. 411. **Ky.** — *Dudley v. Lindsey*, 9 B. Mon. 486. **Ohio.** — *Stockwell v. Coleman*, 10 Ohio St. 34. **Va.** — *Kemp v. Mundell*, 9 Leigh 12.

The judgments of other states of the United States and the acts of congress in pursuance thereof are to be treated as domestic judgments; and the effect of such judgments in the state from which they came, is a question of law, not a question of fact as in the case of foreign judgments. *Kemp v. Mundell*, 9 Leigh (Va.) 12.

The effect of this clause does not extend, however, to courts not of record. *McElpatrick v. Taft*, 10 Bush (Ky.) 160; *Pelton v. Platner*, 13 Ohio 209.

"The court (in *Scott v. Cleveland*, 3 Mon. 62) must have overlooked the fact that such tribunals were not embraced by the act of congress." *McElpatrick v. Taft*, *supra*.

Nor will a judgment be given any greater force in another state than it would have where rendered. *Curtis v. Gibbs*, 2 N. J. L. 399. In this case a judgment on a foreign attachment in Pennsylvania was not given the force of a record because it did not appear that it imported absolute verity in Pennsylvania.

But debt will not lie on the judgment of a court which did not have jurisdiction. *Kibbe v. Kibbe*, *Kirby* (Conn.) 119.

61. **U. S.** — *Du Bois v. Seymour*, 152 Fed. 600, 81 C. C. A. 590. **Ill.** — *Dow v. Blake*, 148 Ill. 76, 35 N. E. 761; *Warren v. McCarthy*, 25 Ill. 83; *Lancaster v. Lancaster*, 29 Ill. App. 510. **Mass.** — *Howard v. Howard*, 15 Mass. 196. **N. Y.** — *Post & La Rue v. Neafie*,

3 Caine 22. **R. I.** — *Wagner v. Wagner*, 26 R. I. 27, 57 Atl. 1058.

"In early days there was doubt whether a decree in equity should be allowed to rank with a judgment at law, or whether it could be the basis of an action of debt in a court of law; but there is no doubt on that question now. Final decrees of courts of equity have the same conclusive effect as to questions of fact determined by them as judgments at law. If a final decree adjudges a fixed and certain sum to be due and owing from the defendant to the complainant, and nothing more, an action at law may be maintained on it for the recovery of the sum so adjudged to be due and owing; but the decree must be an unconditional one. The specific sum of money adjudged to be due must be payable in all events." *Du Bois v. Seymour*, 152 Fed. 600, 81 C. C. A. 590.

62. **Ala.** — *Strange v. Powell*, 15 Ala. 452. **Ill.** — *Bragg v. City of Chicago*, 73 Ill. 152. **Va.** — *Newby v. Forsyth*, 3 Gratt. 294; *Doolittle v. Malcom*, 8 Leigh 608.

"It is true that it (the award) directs that a particular debt should be paid to Thomas Williams by A. J. Williams, in the event it were not collected from another source. But this did not vitiate the award; if Thomas Williams failed to collect it, he might have claimed credit for the amount on the trial; or he might afterwards go against A. J. Williams for it, if the result of the effort to collect were not known at the time of trial." *Williams v. Williams*, 11 Smed. & M. (Miss.) 393.

A stipulation taken before a court of admiralty will support an action of debt. *Lacaze v. Com.*, Add. (Pa.) 59.

It is not necessary that the report of the referees should be made to the court. *Day v. Hooper*, 51 Me. 178.

Parol Award. — Debt will lie on a parol award under a statute making

VI. THE DECLARATION. — A. NECESSARY ALLEGATIONS. — 1.

In General. — The declaration should contain a sufficiently full statement of facts to show that all the conditions necessary to support an action of debt are present,⁶³ and to enable the court to render a final

debt the proper action on simple contracts to pay money. *Riker v. Jacobus*, 2 N. J. L. 309.

63. **Ark.** — *Hanger & Ashley v. Dodge*, 24 Ark. 208. **Ill.** — *Hoy v. Hoy*, 44 Ill. 469. **Ky.** — *Payne v. Mattox*, 1 Bibb 164.

Oyer of note held to cure possible uncertainty in allegation of its date. *Boyd v. Sargent*, 1 Mo. 437.

Sufficient facts by way of inducement must be recited to show that the cause of action has accrued. *Metcalf v. Robinson*, 2 McLean 363, 17 Fed. Cas. No. 9,497.

In the action of debt on simple contracts, express or implied, the subject-matter of the debt should be described precisely as in the common counts in assumpsit. *Metcalf v. Robinson*, 2 McLean 363, 17 Fed. Cas. No. 9,497.

Allegation that defendant took "land belonging to" the plaintiff, was held a sufficient averment of ownership in an action to recover the appraised value of condemned land. *Bragg v. City of Chicago*, 73 Ill. 152.

The words "at their special instance and request" are not material in an action of debt wherein it is stated that the goods were sold and delivered to the defendants by the plaintiff, as the indebtedness arises from the sale. *Durrill v. Lawrence*, 10 Vt. 517.

"Although the forms of pleading have been simplified by the code, the forms of action have been preserved and kept distinct." *Smith v. Woman's Med. College*, 110 Md. 441, 72 Atl. 1107; *Canton Nat. Bldg. Assn. v. Weber*, 34 Md. 669.

In debt on a recognizance the declaration must proceed as in debt and not in *scire facias*. *State v. Folsom*, 26 Me. 209.

Notice. — An averment that the defendants were justly indebted imports notice, where that is necessary to raise the indebtedness. *Kellogg v. Union Co.*, 12 Conn. 7.

Unnecessary allegations will be rejected as surplusage and will not vitiate the declaration, even on special demurrer. *Henry v. Heldmaier*, 129 Ill. App. 86.

Forms. — In *Rynders v. Coxie Bros. & Co.*, 80 Ill. App. 629, the declaration was held good against the objection that it was vague and uncertain, the court saying: "It (the declaration) states in positive terms that appellant made, executed and delivered the bond described in the declaration, and avers also, by way of describing the bond, that it contains certain recitals, specifying them, and then avers the condition of the writing obligatory, assigning the breach thereof. We are also of the opinion the declaration properly and accurately describes an action of debt where, in the commencement of the pleading, it is said the plaintiffs complain of the defendants 'of a plea that they render to the plaintiffs the sum of \$300 which they owe and unjustly detain from the plaintiffs.'"

The following declaration on a bond with condition attached was held good on both counts, in *Foltz v. Stevens*, 54 Ill. 180:

"State of Illinois, }
Jasper County, } ss.

In the Circuit Court.

To March Term, 1870.

James Foltz, the plaintiff in this suit, complains of James B. Stevens, the defendant, of a plea that he render to the plaintiff, for the use of John H. Halley, the sum of ninety dollars, which he owes and unjustly detains from him. For that, whereas, the defendant heretofore, to wit: On the thirtieth (30th) day of September, A. D. 1869, at said county by his certain writing obligatory, sealed with his seal, and now here to the court shown, the date whereof is the day and year aforesaid, acknowledged himself to be held and firmly bound unto the plaintiff in the sum of ninety dollars above demanded, to be paid to the plaintiff. Yet the defendant, although often requested so to do, hath not as yet paid the sum of ninety dollars above demanded, or any part thereof, to the plaintiff. but hath neglected and refused and still neglects and refuses so to do.

judgment thereon for the sum demanded, unless the claim be diminished by extrinsic circumstances.⁶⁴

Prout Patet Per Recordum. — When the action is founded on a record the allegations should conclude with a *prout patet per recordum*.⁶⁵

Per quod actio accrevit is the proper conclusion when the debt arises

And for that, whereas, also, the said defendant, on the day and year aforesaid, at the county aforesaid, made his writing obligatory, sealed with his seal and here in court to be produced, and then and there delivered the same to the plaintiff, whereby the said James B. Stevens, by the style and description of J. B. Stevens, acknowledged himself held and firmly bound unto James Foltz, constable of Jasper county, Illinois, in the sum of ninety dollars, for the payment of which he bound himself firmly, to be paid to the plaintiff. Which said writing obligatory was subject to a condition, thereunder written, whereby it was provided that if the said James B. Stevens, the defendant, should on the fifteenth day of October, A. D. 1869, between the hours of nine of the clock in the forenoon and four of the clock in the afternoon of said day, deliver to the said constable, or to such other officer as might, by law, be entitled to receive the same, the following described property, taken under execution in favor of John H. Halley, against one J. W. Hitchcock, to-wit: (describing the property), then the said writing obligatory was to be void, otherwise to remain in full force and effect, as by said writing obligatory here shown to the court will appear. Yet the said plaintiff says that said defendant did not on the fifteenth day of October, A. D. 1869, between the hours of nine o'clock in the forenoon and four o'clock in the afternoon of said day, nor did he at any other time, deliver to the said plaintiff, constable, as aforesaid, nor to any other officer entitled to receive the same, the said goods and chattels, nor any part thereof, according to the effect and tenor of said writing obligatory, and the said writing obligatory remains in full force and effect; whereby, and according to the term, and effect of said writing obligatory, an action hath accrued to the plaintiff to demand and have of the defendant the sum of ninety dollars. Yet the defendant, though often requested so to do, has not as

yet paid the said sum of ninety dollars, of any part thereof, to the damage of the plaintiff of ninety dollars. Therefore, he brings suit."

The following "simple and compendious form" is given by the court in *Mahaffey v. Petty*, 1 Ga. 261:

"For that, heretofore, to wit, on the —, the defendant was indebted to your petitioner two hundred dollars for services as an engineer on a steamboat, then rendered by your petitioner to the said defendant, as will appear by the annexed bill of particulars, and at his request, to be paid for by the defendant to your petitioner on request; whereby, and by reason of the non-payment thereof, an action hath accrued to your petitioner to have and demand the said sum of two hundred dollars."

64. *M'Kenzie v. Connor*, 1 Stew. (Ala.) 162.

Interest.—Interest stipulated for in the contract should be claimed, and its non-payment assigned in the breach, especially if it exceeds the statutory rate. *Hudspeth v. Gray*, *Durrive & Co.*, 5 Ark. 157.

But the interest should be claimed as damages and not as debt. *Butler v. Limerick*, *Minor* (Ala.) 115; *Boddie v. Ely*, 3 Stew. (Ala.) 182.

If the instrument sued on expresses no rate of interest, damages calculated at the statutory rate only can be recovered. *Clay v. Drake*, *Minor* (Ala.) 164.

The declaration need not aver that interest is allowed by the laws of the state in which the decree is rendered, to entitle the plaintiff to recover interest thereon. *Warren v. McCarthy*, 25 Ill. 83.

65. **N. H.** — *State v. Davis*, 43 N. H. 600; *Philbrook v. Buxton*, 43 N. H. 462; *State v. Kinne*, 39 N. H. 129. **N. Y.** — *People v. Kane*, 4 Denio 530. **Va.** — *Shelton v. Welsh*, 7 Leigh 175. **Eng.** — *May v. Spencer*, T. Raym. 50, 83 Eng. Reprint 28; *Corbet v. Cooke*, Cro. Eliz. 466, 78 Eng. Reprint 704; *Morse v. James*, Willes, 122, 127.

from matters *dehors* the narrative and not from matters set forth as inducement.⁶⁶

2. Agreement To Pay.—Since the action of debt is founded on the contract rather than on the promise, the declaration should aver that the defendant agreed to pay.⁶⁷

3. Performance of Conditions.—If the plaintiff's right to demand the debt is dependent upon some condition, the declaration must aver performance or tender of performance on his part.⁶⁸

4. Debet and Detinet.—The declaration should in general allege that the defendant owes and detains the sum demanded,⁶⁹ though one laid in the *detinet* only is not bad, because the plaintiff thereby only restricts his cause of action, which he has a right to do.⁷⁰

66. *Gebhart v. Francis*, 32 Pa. 78. The customary allegation was: that by reason of the said sum of money being unpaid, an action had accrued to the plaintiff to demand and have the same from the said defendant, etc.

67. *Metcalf v. Robinson*, 2 McLean 363, 17 Fed. Cas. No. 9,497; *Brill v. Neele*, 3 Barn. & Ald. 208, 106 Eng. Reprint 638.

"This is, undoubtedly, the more accurate form, though we do not regard it as essential." *Payne v. Smith*, 12 N. H. 34.

"Promised," instead of "agreed," is, therefore, bad. *Metcalf v. Robinson*, 2 McLean 363, 17 Fed. Cas. No. 4,947. And see, *McGinnity v. Laguerenne*, 10 Ill. 101, where this is said to be "the only distinguishing feature between the common counts in *assumpsit* and in *debt*."

If the declaration shows clearly that it is in debt, the use of "promise" instead of "agreed" will not render it bad (*Smith v. Webb*, 16 Ill. 105; *Cruikshank v. Brown*, 10 Ill. 75; *Flood v. Yandes*, 1 Blackf. (Ind.) 102), but if instead of a special count upon a contract which of itself creates a debt and raises a liability to pay, the count is a general *indebitatus* upon an implied promise of the defendant, a conclusion that the defendant "promised" to pay, etc., makes the count in *assumpsit* and not in debt (*Guinnip v. Carter*, 58 Ill. 296; *McGinnity v. Laguerenne*, 10 Ill. 101).

68. *Polk v. Mitchell*, 1 Har. (Del.) 433; *Caldwell v. Richmond*, 64 Ill. 30.

Contra, as to the non-performance of a condition in a collateral contract where the action is based on a bond, since the plaintiff has nothing to per-

form as to the latter. *Henry v. Heldmaier*, 129 Ill. App. 86.

Demand.—Demand from maker and notice to indorsers need not be averred to charge an indorser on a special contract under seal on the back of the note reading, "I assign the within to Wyatt V. Bayley, and bind myself to stand good until paid, for value received of him." *Bayley v. Hazard*, 3 Yerg. (Tenn.) 487.

Commencement of the action is said to be a sufficient demand for money due, and, therefore, no averment of a special demand is necessary. *Leather's Representative v. M'Glasson*, 3 T. B. Mon. (Ky.) 223. The omission of such averment was held not fatal after verdict in *Lusk v. Cassell*, 25 Ill. 191.

In the Common Counts.—It is not necessary to allege a request to pay in the common counts, since the allegation of refusal implies a request. *Somerville v. Grim*, 17 W. Va. 803.

69. *Waller's Exrs. v. Ellis*, 2 Munf. (Va.) 88.

70. In an action of debt on a replevin bond in the *detinet* only, Lord Ellenborough, C. J., said there was no doubt as to the sufficiency of the declaration in this respect for "a man may complain of only a part of his grievance and not of the whole, so these plaintiffs might abridge their demand, and declare in the *detinet* only, instead of the *debet* and *detinet*." But otherwise, if a party declare in the *debet* and *detinet* "where the party ought to have declared in the *detinet* only, for in that case he extends his own demand instead of abridging it." *Wilson v. Hobday*, 4 M. & S. 123, 105 Eng. Reprint 780.

But if both are omitted the declara-

But in an action by or against an executor or administrator the declaration should run in the *detinet* only, since one who is not a privy to the contract cannot be said to owe the plaintiff anything.⁷¹ And so also where the original agreement was to pay in something other than money.⁷²

5. Written Instruments.—If the action is founded on a written instrument it is sufficient to set it out according to its legal effect,⁷³ or only as much of it as is necessary to establish the plaintiff's right to recover.⁷⁴

tion is bad. *Adams v. Campbell*, 4 Vt. 447; *Woodcock v. Morgan*, 6 Mod. 306, 87 Eng. Reprint 1046.

71. The reason has also been said to be because it is not certain what sum shall be recovered, that depending on what assets of the testator he has in his hands. *Leather's Representative v. M'Glasson*, 3 T. B. Mon. (Ky.) 223 (holding it is no longer a substantial error to declare in the *debet* and *detinet*). *Rands v. Peck*, Cro. Jac. 618, 79 Eng. Reprint 527.

If the bond is to the executor in his own right, even though he be styled executor therein, a declaration in the *debet* and *detinet* is proper. *Bailey v. Beekwith*, 7 Leigh (Va.) 604; *Wilson v. Hobday*, 4 Maule & S. 120, 105 Eng. Reprint 780.

72. *Rands v. Peck*, Cro. Jac. 618, 79 Eng. Reprint 527, which was an action upon a bill obligatory for the payment of six hundred Polish guilders, the plaintiff declared in the *detinet* only, which was sustained by the court, for it was said "inasmuch as he is not to recover the guilders, but the value of them found by the jury, and the demand is not of any sum certain, and the value is not known to the court, the demand is good enough in the *detinet*."

73. *Carter v. Crews*, 2 Port. (Ala.) 81; *Newby v. Forsyth*, 3 Gratt. (Va.) 294.

Misnomer of Instrument Does Not Vitiare.—The objection that the instrument, alleged to be under the seal of the defendant, was called a promissory note, instead of a covenant or agreement, was held not well founded, "especially on general demurrer." *Smith v. Webb*, 16 Ill. 105.

74. *Newby v. Forsyth*, 3 Gratt. (Va.) 294; *Bristow v. Wright*, 2 Doug. 667, 99 Eng. Reprint 421. And see, *Rynders v. Coxie Bros.*, 80 Ill. App. 629.

"In an action of debt upon an award, it has been often decided that the plaintiff need not show any more of the award than makes for him." *Newby v. Forsyth*, 3 Gratt. (Va.) 294.

In debt on recognizance it is not necessary to state the occasion of taking the recognizance (*State v. Stevens*, Smith (N. H.) 251; *Champlain v. People*, 2 N. Y. 82; *People v. Kane*, 4 Denio 530), but it must be alleged that the default appears of record (*Mass.*—*Com. v. Downing*, 9 Mass. 520; *Bridge v. Ford*, 7 Mass. 209; 4 Mass. 641. **N. H.**—*State v. Davis*, 43 N. H. 600; *State v. Kinne*, 39 N. H. 129; *State v. Chesley*, 4 N. H. 366. **N. Y.**—*People v. Van Eps*, 4 Wend. 387), and that the recognizance has been filed and made a record of the court (*People v. Van Eps*, 4 Wend. (N. Y.) 387. "All the precedents of declarations in debt on recognizance of bail contain this averment").

Name of Plaintiff.—If the note set out was executed to the plaintiff below by another name, it is not necessary to aver that fact. *Lee v. Hunt*, 6 Mo. 163, where the court said: "The courts are now unanimous that the petition is good under the statute, and that the statement in the petition, that the plaintiffs are the legal owners of the note or bond, includes the averment, that the note set out was executed to the plaintiffs by the partnership name." *Overruling Dyer & Mason v. Sublette & Campbell*, 6 Mo. 14; *Tabor v. Jameson*, 5 Mo. 494. Nevertheless, if the averment is made it will not vitiate the petition. *Middleton v. Atkins*, 7 Mo. 184.

Name of Defendant.—Where the instrument sued on was signed "R. H. Yeates" and "Richard H. Yeates" was summoned, it was held unnecessary to aver in the petition that they

Profert. — Profert of the specialty upon which the action was founded was necessary at common law,⁷⁵ and is still necessary under some statutes in actions on written instruments,⁷⁶ but is largely dispensed with under modern practice.⁷⁷

6. Rent. — In debt for rent, although the demise be by deed, the plaintiff may count generally without declaring on the deed,⁷⁸ and may nevertheless produce the deed in evidence in support of the declaration.⁷⁹

Debt will lie for use and occupation generally, without setting forth the particulars of the demise,⁸⁰ and in such a form of action it is unnecessary to state the place where the premises lie, or any of the particulars of the demise.⁸¹

were the same person. *Yeates v. Heard*, 2 Ark. 459.

And mention of the name of the defendant in the *queritur* was held good, though it was omitted in the count. *Boyd v. Sargent*, 1 Mo. 437.

75. 1 Chit. Pl., §430; *Metcalf v. Standeford*, 1 Bibb (Ky.) 618.

76. **Ala.** — *Briggs & McClure v. Greenlee*, Minor 123. **Ark.** — *McDermott v. Cable*, 23 Ark. 200; *Beebe v. Real Estate Bank*, 4 Ark. 124 (promissory note). **Ky.** — *Metcalf v. Standeford*, 1 Bibb 618; *Scott v. Curd*, Hard. 64. **Miss.** — *Matthews v. Bailey*, 25 Miss. 33. **N. H.** — *Judge of Probate v. Merrill*, 6 N. H. 256. **Tenn.** — *Williams v. Bryan*, 5 Coldw. 104; *Anderson v. Allison*, *Anderson & Co.*, 2 Head 122.

A copy of the instrument in the body of the petition has been held sufficient to satisfy the requirement of *profert*. *Bostwick v. Fleming*, 2 Ark. 462.

The proper mode of declaring on an instrument in the custody of a public officer is to make *profert* of a copy duly authenticated. *Judge of Probate v. Merrill*, 6 N. H. 256.

This rule is held not to extend to matters of inducement, such as the letters of administration of an administrator. *Rawlings v. Paty*, 23 Ark. 204.

77. **Ala.** — *Strange v. Powell*, 15 Ala. 462. **Ill.** — *Fleet v. Hertz*, 201 Ill. 594, 66 N. E. 858, *reversing*, 98 Ill. App. 564. **N. J.** — *Harper v. Essex County Park Com.*, 73 N. J. L. 1, 62 Atl. 384. **N. Y.** — *Livingston County Suprs. v. White*, 30 Barb. 72.

"Formal *profert* is not necessary, even in an action upon a contract under seal, when a copy of the writing

is annexed to the declaration, and referred to in the body of the pleading as so annexed." *Harper v. Essex County Park Com.*, 73 N. J. L. 1, 62 Atl. 384. And see, *P. L. (N. J.)* 1903, p. 570.

In *Briggs & McClure v. Greenlee*, Minor (Ala.) 123, *Crenshaw, J.*, says: "I cannot discover any good reason why *profert* should be considered even necessary matter of form, if made; the writing declared on does not become part of the record unless oyer be craved; and the defendant, if he requires it, is entitled to oyer, whether *profert* be made or not."

78. *Trapnall v. Merrick*, 21 Ark. 503; *Gates v. Wheeler*, 2 Hill (N. Y.) 232; 1 Chit. Pl., §518, and note 1.

"The action of debt for rent in arrear, though founded on a deed, is an exception to the general rule, that whenever an action is founded on a deed, the deed must be declared on." *Garvey v. Dobyns*, 8 Mo. 213.

This is the usual mode where it is doubtful whether the lease is by indenture or parol, "adding a count for use and occupation by way of further caution." *Davis v. Shoemaker*, 1 Rawle (Pa.) 135.

79. *Gates v. Wheeler*, 2 Hill (N. Y.) 232.

This is said to be the only case where the plaintiff can count in that manner. *Attorney v. Parish*, 4 Bos. & P. (Eng.) 104.

80. *Davis v. Shoemaker*, 1 Rawle (Pa.) 135; *Wilkins v. Wingate*, 6 T. R. 62, 101 Eng. Reprint 436.

81. *Miller v. Blow*, 68 Ill. 304; *King v. Fraser*, 6 East 348, 102 Eng. Reprint 1320.

Form. — A declaration in the fol-

7. In Actions on Statute.—In an action upon a statute for a penalty, the plaintiff must allege all the facts upon which the statute creates the penalty.⁸²

If the statute contains an exception in the same clause which gives the right of action, the plaintiff must negative such exception in his declaration, but if there be a subsequent exemption, that is a matter of defense, and the other party must show it to protect himself.⁸³

If it clearly appears from the declaration that the action is founded on a statute, the phrase "contrary to the form of the statute" in conclusion, is unnecessary.⁸⁴

8. In Actions on Judgments.—The declaration in an action on a judgment need not aver the special facts showing the reason for bringing the suit,⁸⁵ nor the particulars as to the extent of the jurisdiction of the court in which it was rendered.⁸⁶

9. Book Account.—The declaration in book account should aver a balance due to plaintiff on book and make profert of the accounts, in addition to the other apt averments.⁸⁷

lowing form was held sufficient in *Miller v. Blow*, *supra*:

"And for that, whereas the said plaintiff, heretofore, to wit: on, etc., at, etc., demised by written lease to the said defendant a certain messuage and premises with the appurtenances, to have and to hold the same for a certain term of years, to wit: one part of said premises from the 2d day of March, 1869, up to the 31st day of December, 1874, and another part thereof from the 23d day of October, 1868, to the 31st day of December, 1874, yielding and paying for said messuage and premises the yearly rent of \$1000, from and after the 31st day of December, 1869, payable in advance on the 1st day of January then next ensuing, until the completion of the said term, said rent or any part thereof bearing interest at the rate of ten per cent. per annum from due until paid; by virtue of which said demise said defendant entered the premises and was possessed thereof from thence hitherto, when a large sum of money, to wit: the sum of \$2000 of the rent aforesaid, became and was due and payable from said defendant to said plaintiff, and still is in arrear and unpaid to the said plaintiff, whereby an action has accrued to the said plaintiff to demand and have the said sum of \$2000 above demanded; yet the said defendant has not yet paid the said sum of \$2000 above demanded, or any part thereof, although often

requested so to do, but has refused and still refuses, to the damage," etc.

82. *Blackburn v. Baker*, 7 Port. (Ala.) 284.

In debt to recover a penalty for cutting a tree, the name of the prosecutrix and title of the statute should be endorsed on the process, and the declaration should set out in what right the plaintiff sues, whether as owner or informer; where the tree was cut; that the defendant had neither right nor permission to cut it; and by what act of the legislature the suit was authorized. *Miller v. Stoy*, 5 N. J. L. 548.

That it (the cutting of the trees) was without permission of the owner is a material and essential averment, and its omission is fatal to the declaration. *Whitecraft v. Vanderver*, 12 Ill. 235.

83. *Whitecraft v. Vanderver*, 12 Ill. 235; *Teel v. Fonda*, 4 Johns. (N. Y.) 304; *Chitty Pl.* 223.

84. *Whitecraft v. Vanderver*, 12 Ill. 235.

85. *Denison v. Williams*, 4 Conn. 402.

86. It is sufficient to allege that the cause of action arose within the jurisdiction of the court. *Williams v. Jones*, 13 M. & W. (Eng.) 628.

87. The following form of declaration is given in the Public Statutes of Vermont, 1906, §6266, form 24:

In a plea that the defendant render to the plaintiff the sum of ——— dollars, which the plaintiff says is justly

B. CERTAINTY OF AMOUNT.—The declaration should show the amount due from the defendant to the plaintiff, since certainty of amount is an essential of the action.⁸⁸

A variance between the sum demanded in the *queritur* and those stated in the several counts, is not fatal error.⁸⁹

due from the defendant, to balance book accounts between them, as by the plaintiff's original book, ready to be produced in court, may appear. Now, the plaintiff says that the defendant, though often requested, has ever refused and still does refuse, to settle and adjust the account of the plaintiff or to pay the balance thereupon due.

Defects in the declaration are cured by a judgment to account, although they would have been fatal on special demurrer. *McKay v. Brown*, 13 Vt. 593.

Procedure.—The statute provides that when judgment to account is rendered, the court shall appoint one or more auditors to hear, examine and adjust the accounts between the parties, thus dispensing with a trial by jury. *Hall v. Armstrong*, 65 Vt. 421, 26 Atl. 592; *Kimball v. Rutland & B. R. Co.*, 26 Vt. 247.

An independent offset, not a matter of account, cannot be set up before the auditor, but must be pleaded in the county court. *Hassam v. Hassam*, 22 Vt. 516.

The auditors are authorized to adjust all accounts of a similar nature between the parties up to the time of the hearing. The report of the auditors must be accepted by the court as conclusive of the facts in issue submitted, "unless the contrary is shown," and judgment rendered thereon for the sum found in arrears from either party, with costs. *Matthews v. Tower*, 39 Vt. 433; *Thetford v. Hubbard*, 22 Vt. 440; *Wetherell, Whitney & Co. v. Evarts*, 17 Vt. 219 (*explaining Martin v. Fairbanks*, 7 Vt. 97); *Newell v. Keith's Exr.*, 11 Vt. 214.

88. **U. S.**—*Ashton v. Fitzhugh*, 1 Cranch C. C. 218, 2 Fed. Cas. No. 583. **Ala.**—*Carter v. Crews*, 2 Port. 81. **Me.** *Braun v. Maine Benefit Assn.*, 92 Me. 341, 42 Atl. 500. **Tenn.**—*Nunnallee v. Morton*, Cooke 21. **Va.**—*Anderson v. Price*, 4 Munf. 307.

"The pleadings must contain sufficient certainty to enable the court to

render final judgment thereon for the sum demanded, unless the claim be diminished by evidence of extrinsic circumstances." *M'Kenzie v. Connor*, 1 Stew. (Ala.) 162.

Variance From Record.—In an action on a judgment which did not carry interest, a claim of the amount with interest, *prout pater per recordum*, was held a fatal variance. *Shelton v. Welsh*, 7 Leigh (Va.) 175.

Damages.—In an action on a statute to recover a penalty, the damages inserted in the declaration need be only nominal. *Indiana Millers' M. Fire Ins. Co. v. People*, 170 Ill. 474, 49 N. E. 364.

This requirement of certainty is satisfied if sufficient data are given from which the amount can be readily ascertained. **U. S.**—*Stockwell v. United States*, 13 Wall. 531, 20 L. ed. 491. **Ill.**—*Abe Lincoln Soc. v. Miller*, 23 Ill. App. 341. **N. C.**—*Love v. Schenck*, 34 N. C. 304. And see cases under I, A, note 1.

In an action to recover on an insurance policy containing a covenant to pay the amount of one assessment upon the death of the insured, "provided that such payment shall not exceed \$3000," the declaration was held bad for failing to aver that the assessment amounted to \$3000. "Without such averment," said the court, "no sum appears to be due, and every declaration in an action of debt must show some certain amount due as damages." *Braun v. Maine Benefit Assn.*, 92 Me. 341, 42 Atl. 500.

In an action on a judgment for a penal sum to be discharged upon payment of a lesser sum, the plaintiff should declare for the penal sum. *Anderson v. Price*, 4 Munf. (Va.) 307.

But the contrary has been held in Alabama on the ground that a demand of the lesser sum was declaring according to the legal effect of the record. *Carter v. Crews*, 2 Port. (Ala.) 81.

89. **Ala.**—*Williams v. Harper*, 1 Ala. 502. **Ind.**—*Cozine v. Tousey*, 5

C. CONSIDERATION FOR THE AGREEMENT.—It is not necessary to allege the consideration where the action is based on an instrument which imports a consideration,⁹⁰ but it is otherwise where the cause of action arises on a simple contract.⁹¹

D. BREACH OF AGREEMENT.—The breach of the contract being essential to the cause of action, must in all cases be laid with certainty in the declaration,⁹² and must be commensurate with the contract.⁹³

Blackf. 46. **Ky.**—*Hampton v. Barr*, 3 Dana 578; *White v. Walker*, 1 T. B. Mon. 34. **Mo.**—*Boyd v. Sargent*, 1 Mo. 437. **Eng.**—*M'Quillan v. Cox*, 1 H. Bl. 249; *Lord v. Houston*, 11 East 62; 103 Eng. Reprint 927.

If there are two distinct counts the debt should be stated at the sum, and the first count should be for ——— dollars parcel of the debt, and the second for the residue. *People v. Van Eps*, 4 Wend. (N. Y.) 387.

"It is true that, when an entire sum is demanded in the writ or commencement of the declaration, and it is shown by different counts to consist of several distinct accounts, which together do not equal the aggregate demand, the different counts being certain and consistent in themselves, will be sustained; and if some of the counts are proven entire, and others are not, a recovery may be had on such as are established. Or if, after any particular count has been proved as laid, the claim be reduced by evidence of part payment or otherwise, the residue may be recovered." *M'Kenzie v. Connor*, 1 Stew. (Ala.) 162.

90. "In an action upon a record, or upon a contract under seal, a lawful consideration was conclusively presumed to exist, and could not be denied; but in an action, whether in debt or in assumpsit, upon a simple contract, express or implied, the consideration was open to inquiry. A foreign judgment was not considered, like a judgment of a domestic court of record, as a record or specialty. The form of action, therefore, upon a foreign judgment was not in debt, grounded upon a record or a specialty; but was either in debt, as for a definite sum of money due by simple contract, or in assumpsit upon such a contract." *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. ed. 95.

91. "The consideration for the contract must be stated, as also any in-

ducement necessary to explain the contract of consideration, and it should be stated the party agreed to pay. Stating that he promised to do so would be bad." *Metcalf v. Robinson*, 2 McLean 363, 17 Fed. Cas. No. 9,497.

Promissory Notes.—The statute 3 and 4 Anne, ch. 9, §1, enacted that all notes signed by a person promising to pay to another, his order or bearer, any sum of money should be construed to be by virtue thereof, due and payable to any person, to whom the same is made payable. The effect of this statute was to make an allegation of consideration unnecessary in an action of debt on such notes. This statute has been substantially re-enacted in the United States. *Stephens v. Crostwait*, 3 Bibb (Ky.) 222; *State v. Harmon*, 15 W. Va. 115.

92. **Ark.**—*Green v. Thornton*, 7 Ark. 383. **Ill.**—*Manning v. Pierce*, 3 Ill.

4. **Ky.**—*Applegate v. Jacoby*, 9 Dana 206. **Miss.**—*Carmichael v. The Governor*, 3 How. 236.

93. *Hudspeth v. Gray, Durrive & Co.*, 5 Ark. 157; *Stibbs v. Clough*, 1 Str. 227, 93 Eng. Reprint 487.

"The breach should be assigned in the words of the contract, either negatively or affirmatively, or in words which are co-extensive with the import and effect of it. . . . When the plaintiff inserts several distinct counts in his declaration, each of which is based upon a separate and distinct cause of action, he must negative the payment of the several sums therein demanded." *Green v. Thornton*, 7 Ark. 383.

In an action on a replevin bond, the declaration sufficiently assigns the breach where it sets out the non-performance of the conditions of the bond, and avers that the action of replevin had been tried, and that a return of the property had been adjudged, and a writ of *retorno habendo* awarded. *Manning v. Pierce*, 3 Ill. 4.

E. JOINDER. — Several counts in debt may be joined in the same action even though they are based on different grounds,⁹⁴ but actions of a different nature or asking other relief cannot be joined with counts in debt.⁹⁵

VII. THE PLEAS. — A. NIL DEBET. — 1. On Simple Contracts. *Nil debet* is the proper plea in actions on simple contracts,⁹⁶ even

In an action of debt on an agreement to pay one thousand dollars if either of the defendants set up in the tailoring business within twenty-five years, the breach to be assigned is not in the setting up and carrying on of the tailoring business, but in the failure to pay the sum agreed. *Applegate v. Jacoby*, 9 Dana (Ky.) 206.

94. Ala. — *Calvert v. Marlow*, 18 Ala. 67, counts in debt and detinue joined. Ill. — *Foltz v. Stevens*, 54 Ill. 180 (several counts on a bond held properly joined where all declared on a bond single and none declared upon an official bond); *Henry v. Heldmaier*, 129 Ill. App. 86. Me. — *National Exch. Bank v. Abell*, 63 Me. 346 (counts on judgment joined with the common counts); *Norris v. School Dist.*, 12 Me. 293 (specialty and simple contract). Mass. — *Smith v. Lowell*, 8 Pick. 178, counts on *quantum meruit* joined with those on specialty. N. H. — *Gray v. Johnson*, 14 N. H. 414, a count for rent may be joined with one in debt for use and occupation. W. Va. — *Somerville v. Grim*, 17 W. Va. 803, count on a specialty joined with common counts on simple contract.

Debt, as well as assumpsit, may be brought by the creditors of an insolvent company against the members thereof. *Van Hook v. Whitlock*, 3 Paige (N. Y.) 408.

"The general rule to be deduced from the authorities," says Lumpkin, J., in *Mahaffey v. Petty*, 1 Ga. 261, "as to what forms of action may be joined together is, that when the same plea may be pleaded, and the same judgment given on all the counts of the declaration, or when the counts are of the same nature and the same judgment is to be given on them all, though the pleas be different—as in case of debt upon bonds and simple contract—they may be joined." See *Brown v. Dixon*, 1 T. R. 276, 99 Eng. Reprint 1091; *Cutler v. Southern*, 1 Saund. 116; Bac. Abr. tit. Action in

General; Com. Dig. tit. Action in General; 1 Chit. Pl. 180; Tidd Pr. 11.

In New Jersey, counts in debt and assumpsit may be joined under Rule 16 of the supreme court. *Dayton v. Boettner* (N. J.), 81 Atl. 726.

95. 1 Chit. Pl. 231, and the following cases: U. S. — *Metcalf v. Robinson*, 2 McLean 363, 17 Fed. Cas. No. 9,497. Ala. — *Higdon v. Kennemer*, 120 Ala. 193, 24 So. 439, assumpsit. Ga. — *Mahaffey v. Petty*, 1 Ga. 261, assumpsit. Ill. — *Guinnip v. Carter*, 58 Ill. 296 (assumpsit); *Cruikshank v. Brown*, 10 Ill. 75; *Robley v. Culwell*, 69 Ill. App. 272 (trespass). Eng. — *Brill v. Neele*, 3 Barn. & Ald. 208, 106 Eng. Reprint 638 (assumpsit).

"Although the forms of pleading have been simplified by the code, the forms of action have been preserved and kept distinct. The pleadings, therefore, however simplified, must be still adapted to the particular form of action brought, and counts in debt can no more be joined with counts in assumpsit now than they could at common law." *Canton Nat. Bldg. Assn. v. Weber*, 34 Md. 669.

96. Ark. — *McConnell v. State Bank*, 6 Ark. 250. Ill. — *Poole v. Vanlandingham*, 1 Ill. 47. Pa. — *Baum v. Tonkin*, 110 Pa. 569, 1 Atl. 535. Va. — *Hughes v. Kelly*, 30 S. E. 387.

"The language of this plea puts in issue the existence of the debt, as non-assumpsit would in an action of *indebitatus assumpsit*." *McElpatrick v. Taft*, 10 Bush (Ky.) 160.

Under it "almost anything may be given in evidence which shows that the plaintiff never had a cause of action, and almost everything which shows at the time of the commencement of the suit he had no cause of action." *Klair v. Philadelphia, B. & W. R. Co. (Del.)*, 78 Atl. 1085.

When the declaration claimed three thousand dollars, and continued two counts for fifteen hundred dollars each, a plea of *nil debet* by defendants "that

though a specialty or indenture is the inducement thereto.⁹⁷

On Judgments.—*Nil debet* can be pleaded to actions on foreign judgments and on those rendered by domestic courts not of record.⁹⁸

2. Bad on Specialties.—But when the action of debt is founded

they did not owe the said sum of money above demanded or any part thereof," was held good on demurrer. *McConnel v. State Bank*, 6 Ark. 250, the court saying: "The plea of *nil debet* is not only substantially good, but is technically formal. There are not several sums demanded by the declaration, as is supposed by the demurrer, but only a single sum of three thousand dollars, and each count is for a parcel of that sum, and the two counts make up the aggregate of the sum demanded. The plea denies the indebtedness of the defendants below in the sum of money demanded or any part thereof, and is a complete answer to the whole declaration."

The words "is not indebted" are held to have the same meaning as "does not owe," in a plea of *nil debet*. *Miller v. Blow*, 68 Ill. 304.

Under the general issue, any matter that shows the debt is not owing, or a discharge of it, may be given in evidence. *McGavock v. Puryear*, 6 Coldw. (Tenn.) 34.

Fraud relating to the execution of the specialty may be shown (*Hughes v. Kelly* (Va.), 30 S. E. 387), but not merely fraud going to the consideration (*Wyche v. Macklin*, 2 Rand. (Va.) 426).

A plea of fraud is not a good defense to an action of debt on a bill single if the defendant retains the land. *Stone v. Gover*, 1 Ala. 287.

The plea of *non est factum* is a nullity in such cases, although the inducement to the contract, set forth in the plaintiff's narr., is a specialty. *Gebhart v. Francis*, 32 Pa. 78.

97. Ill.—*King v. Ramsay*, 13 Ill. 619; *Davis v. Burton*, 4 Ill. 41. **Mass.**—*Bean v. Farnam*, 6 Pick. 269. **Miss.**—*Matthews v. Redwine*, 23 Miss. 233. **N. H.**—*Dartmouth College v. Clough*, 8 N. H. 22. **N. Y.**—*Minton v. Woodworth*, 11 Johns. 474. **N. C.**—*Albright v. Tapscott*, 53 N. C. 473. **Ohio.**—*Hyatt v. Robinson*, 15 Ohio. 272. **Pa.**—*Gebhart v. Francis*, 32 Pa. 78; *Davis v. Shoemaker*, 1 Rawle 135.

"In debt for rent by indenture, or

for an escape, or on a devastavit by an executor, it has been held that the indenture or the judgment is but inducement; and that the arrears in rent, the escape and devastavit, are the foundation of the action." In these cases *nil debet* is a good plea. *Gates v. Wheeler*, 2 Hill (N. Y.) 232.

98. Ky.—*McElpatrick v. Taft*, 10 Bush 160. **Me.**—*Tourigny v. Houle*, 88 Me. 406, 34 Atl. 158. **Mass.**—*Warren v. Flagg*, 2 Pick. 448. **N. J.**—*Beale v. Berryman*, 30 N. J. L. 216. **N. Y.**—*Gassner v. Sandford*, 2 Sandf. 440. **Ohio.**—*Pelton v. Platner*, 13 Ohio 209; *Silver Lake Bank v. Harding*, 5 Ohio 346.

And see *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. ed. 95.

This plea puts in issue both the validity of the judgment and of the debt. *Tourigny v. Houle*, 88 Me. 406, 34 Atl. 158. *Contra*, *Stockwell v. Coleman*, 10 Ohio St. 34, holding that *null tiel record* is the proper plea to an action on a judgment of a justice of the peace.

Judgments of courts of record of a sister state are not foreign judgments, therefore, *nil debet* is not a proper plea in an action thereon. **U. S.**—*Mills v. Duryee*, 7 Cranch 481, 3 L. ed. 411. **Ill.**—*Knickerbocker Life Ins. Co. v. Barker*, 55 Ill. 241. **Miss.**—*Hinton v. v. First Nat. Bank*, 53 So. 344. **Ohio.**—*Stockwell v. Coleman*, 10 Ohio St. 34. **Vt.**—*Wood v. Agostines*, 72 Vt. 51, 47 Atl. 108. **Va.**—*Kemp v. Mundell*, 9 Leigh 12.

See the next section, *infra*.

But *nil debet* is proper if the judgment is merely declared on as evidence of the debt or promise. It puts in issue the jurisdiction of the court, but not the merits of the judgment. *Bissell v. Briggs*, 9 Mass. 462.

In *Wheaton v. Fellows*, 23 Wend. (N. Y.) 375, *nil debet* was held to be the proper plea to an action of debt on a judgment rendered in the justices' court of the city of Albany, on the ground that it was not a court of record.

on a record or specialty, although extrinsic facts are alleged, *nil debet* is not a good plea. If the defendant wishes to question the record or deed, he must do so directly by pleading *nul til record* or *non est factum*.⁹⁰ Nevertheless, if the plaintiff takes issue on such plea he thereby admits its sufficiency and puts in issue every material allegation in the declaration.¹

B. NUL TIEL RECORD.—1. In General.—*Nul til record* is the proper plea to an action on a record and puts in issue the existence thereof.²

99. Ill.—*Kilgore v. Drainage Com.*, 111 Ill. 342; *Mix v. People*, 92 Ill. 549; s. c., 86 Ill. 329; *Caldwell v. Richmond*, 64 Ill. 30; *Cleveland v. Skinner*, 56 Ill. 500; *Foster v. People*, 121 Ill. App. 165; *Loellke v. Grant*, 120 Ill. App. 74. Ky.—*Griffith v. Com.*, 1 Dana 270; *Scott v. Colmesnil*, 7 J. J. Marsh. 416; *Bradford v. Ross*, 3 Bibb 238. N. J.—*English v. Mayor, etc.*, of Jersey City, 42 N. J. L. 275. N. Y.—*Minton v. Woodworth*, 11 Johns. 475; *Gates v. Wheeler*, 2 Hill 232. Pa.—*Brubaker's Admr. v. Taylor*, 76 Pa. 83.

Nil debet "is had in debt on a bail bond, or on a recognizance of bail, or on a town collector's bond, or a specialty for not accepting and paying for stock according to contract. In these cases the bail or other bond, the recognizance and the specialty are held to be the foundation of the action; and although extrinsic facts are also alleged, the defendant cannot plead *nil debet*." *Gates v. Wheeler*, 2 Hill (N. Y.) 232.

Nil debet is not pleadable to an action of debt *sur amercement* as it is an attempt to bring the trial of a record before the jury. Me.—*Endicott v. Morgan*, 66 Me. 456. N. H.—*Wilbur v. Abbott*, 59 N. H. 132. N. J.—*Canfield v. Allen*, 1 N. J. L. 203.

The case of debt for rent is said to be an exception to this rule. *Gates v. Wheeler*, 2 Hill (N. Y.) 232.

1. Ill.—*Becker v. People*, 164 Ill. 267, 45 N. E. 500; *Foster v. People*, 121 Ill. App. 165; *Shunick v. Thompson*, 25 Ill. App. 619; *Price v. Farrar*, 5 Ill. App. 536. N. H.—*Dartmouth College v. Clough*, 8 N. H. 22. N. Y.—*Meyer v. M'Lean*, 1 Johns. 509; *Jansen v. Ostrander*, 1 Cow. 670. Pa.—*Brubaker's Admr. v. Taylor*, 76 Pa. 83. Va.—*Hughes v. Kelly*, 30 S. E. 387.

In *Rush v. Cobbett*, 2 Johns. Cas.

(N. Y.) 256, *nil debet* pleaded to a judgment of another state was held to require proof of the record.

But it is said that such a plea has been held to admit the execution of the deed. 2 Stark. Ev. 270, note (x) 6th Am. ed.

2. Me.—*Endicott v. Morgan*, 66 Me. 456. N. H.—*Philbrick v. Buxton*, 43 N. H. 462. N. Y.—*People v. Kane*, 4 Denio 530. Vt.—*Wood v. Agostines*, 72 Vt. 51, 47 Atl. 108; *Stevens v. Fisher*, 30 Vt. 200.

"A defect appearing upon the face of the record may be taken advantage of under a plea of *nul til record*, but those requiring extrinsic proof to make them apparent must be alleged before proved." *Wood v. Agostines*, 72 Vt. 51, 47 Atl. 108.

"It confesses nothing and avoids nothing; and there remains nothing for the plaintiff to do but to traverse the denial of the want of a record." *Wilbur v. Abbott*, 59 N. H. 132.

The plea should conclude with a verification by the record, not to the country. *Endicott v. Morgan*, 66 Me. 456; *Wilbur v. Abbott*, 59 N. H. 132.

In New York *nul til record* was made the general issue in an action of debt on a record, by 2 Rev. St. 409, §4, making the existence of the record an issue of fact triable by the jury. *Gassner v. Sandford*, 2 Sandf. (N. Y.) 440; *Trotter v. Mills*, 6 Wend. (N. Y.) 512.

Appeal Bond.—In an action upon an appeal bond, the suit is on the bond, not upon the record, hence *nul til record* is not a proper plea. *Mix v. People*, 86 Ill. 329; *Herriek v. Swartwout*, 72 Ill. 340; *Arnott v. Friel*, 50 Ill. 174. See the title "Appeal Bonds."

Complete Denial.—The plea must be a certain and complete denial of the existence of the record. "Comes the

2. On Judgments.—It is therefore appropriate in actions on domestic judgments or those of other states of the United States.³

The plea of *nul tiel record* puts in issue the judgment declared upon, and the plaintiff is bound to produce an exemplification of it in support of the affirmative of his plea.⁴

The question of the existence of a record is for the court; therefore a plea of *nul tiel record* should conclude with a verification, not to the country.⁵

C. NON EST FACTUM.—*Non est factum* is a proper plea to an action of debt on an instrument under seal.⁶ It puts in issue only the making of the instrument and admits everything but that fact.⁷

D. NON DAMNIFICATUS is a good plea when the condition of the bond is merely to indemnify, but if the condition stipulates for the performance of any particular act, such plea is no answer, but the performance of the act must be averred.⁸

defendant. *W. P. Egan*, by his attorney, and for plea to said plaintiff's bill of complaint says, that there is no such record on file, or exhibited to the court as mentioned in said plaintiff's complaint; of this he prays judgment for costs." Held insufficient, because it "neither traverses, nor attempts to traverse, any allegation in the declaration, nor does it deny that there was such record of judgment and recovery as declared upon, but only denies that such record is on file or exhibited." *Egan v. Tewkesbury*, 32 Ark. 43.

3. U. S.—*Mills v. Duryee*, 7 Cranch 481. 3 L. ed. 411. Ill.—*Warren v. McCarthy*, 25 Ill. 83. Ky.—*Dudley v. Lindsey*, 9 B. Mon. 486. Me.—*Endicott v. Morgan*, 66 Me. 456. N. Y. *Gassner v. Sandford*, 2 Sandf. 440. Vt. *Wood v. Agostines*, 72 Vt. 51, 47 Atl. 108. Eng.—*Collins v. Lord Mathew*, 5 East 475, 102 Eng. Reprint 1152, judgment of Ireland.

Foreign Judgment.—*Nul tiel record* is not a proper plea to a foreign judgment. *Endicott v. Morgan*, 66 Me. 456; *Walker v. Witter*, 1 Doug. 1, 99 Eng. Reprint 1.

4. Berry v. Mead, 3 N. J. L. 197; *Fitch v. Porter*, 30 N. C. 511.

5. Wilbur v. Abbott, 59 N. H. 132.

By statute, however, this has not been so always. See *Trotter v. Mills*, 6 Wend. (N. Y.) 512; *Gassner v. Sandford*, 2 Sandf. (N. Y.) 440.

6. Ill.—*Kilgore v. Drainage Com.*, 111 Ill. 342; *Rudesill v. County Court*, etc., 85 Ill. 446. N. J.—*English v.*

Mayor, etc. of Jersey City, 42 N. J. L. 275. W. Va.—*Kidd v. Beckley*, 64 W. Va. 80, 60 S. E. 1089.

"When interposed, the defendant may take advantage of any variance between the instrument and the declaration." *Mix v. People*, 92 Ill. 549.

If the plea is not sworn to it does not put in issue the signatures of the defendants. *Mix v. People*, 92 Ill. 549; *Herrick v. Swartwout*, 72 Ill. 340; *Governor v. Lagow*, 43 Ill. 134.

If a writing obligatory is declared on, its character as a specialty cannot be questioned by demurrer, but must be raised by a plea of *nil debet* or *non est factum*. *Kidd v. Beckley*, 64 W. Va. 80, 60 S. E. 1089.

A demurrer to a special plea cannot be carried back to the declaration over the plea of *non est factum*. *Shunick v. Thompson*, 25 Ill. App. 619; *Mix v. People*, 86 Ill. 329.

7. Rudesill v. County Court, etc., 85 Ill. 446.

Accord and satisfaction cannot be shown under a plea of *non est factum*. *Bailey v. Cowles*, 86 Ill. 333.

In action on appeal bond the judgment appealed from cannot be put in issue, since the obligors are estopped to deny its existence by the recitals in the bond. *Mix v. People*, 86 Ill. 329; *Herrick v. Swartwout*, 72 Ill. 340; *George v. Bischoff*, 68 Ill. 236; *Arnott v. Friel*, 50 Ill. 174.

8. Terre Haute, etc. R. Co. v. Peoria, etc. R. Co., 182 Ill. 501, 55 N. E. 377; *Sears v. Nagler*, 18 Ill. App. 547, citing *Coombs v. Newlon*, 4 Blackf. (Ind.)

E. NOT GUILTY.—Not guilty is a good plea in an action for a statutory penalty, though *nil debet* is better.⁹

F. NON-ASSUMPSIT.—Non-assumpsit is not a proper plea in this action.¹⁰

G. SPECIAL MATTER.—Any special matter may be set up in defense which would be good to avoid the plaintiff's cause of action,¹¹ and which could not be given under the general issue.¹² The plea must

120; *Andrews v. Waring*, 20 Johns. (N. Y.) 153.

"This is a good plea in all cases where the condition is to *indemnify and save harmless*, because it answers the condition in terms. But it is good in that case only." *McClure v. Erwin*, 3 Cow. (N. Y.) 332, which cites in support of this proposition *Woods v. Rowan*, 5 Johns. (N. Y.) 42; *Andrews v. Waring*, 20 Johns. (N. Y.) 153; *Horseman v. Obbing*, Cro. Jac. 634, 79 Eng. Reprint 546; *Codner v. Dalby*, Cro. Jac. 363, 79 Eng. Reprint 311; *Hulland v. Malken*, 2 Wils. 126.

"The primary and controlling question, however, is whether the bond declared upon provides for a penalty or forfeiture, or for liquidated damages. If the former, then the plea of *non damnificatus* is a proper plea." *Heisen v. Westfall*, 86 Ill. App. 576.

9. *Burnham v. Webster*, 5 Mass. 266; *Stilson v. Tobey*, 2 Mass. 521; *Atcheson v. Everitt*, 1 Cowp. 382, 98 Eng. Reprint 1142.

10. *Non-assumpsit* is not a proper plea in an action of debt. *Harlow v. Boswell*, 15 Ill. 56; *Lancaster v. Lancaster*, 29 Ill. App. 510. But it has been held good after verdict. *Stone v. Gosser*, 1 Ala. 287.

11. *Endicott v. Morgan*, 66 Me. 456; *Hammit v. Bullett's Exrs.*, 1 Call (Va.) 492.

In Delaware the St. 4 Ann. ch. 16, §12, permitting a plea of payment to an action of debt upon a judgment or single bill is held to be in force. *Connor v. Pennington*, 1 Del. Ch. 177.

Plene administravit is a good plea to an action against an administrator for a *devastavit*. *Griffith v. Com.*, 1 Dana (Ky.) 270.

A plea of payment admits the contract and the original liability as declared upon. *Gebhart v. Francis*, 32 Pa. 78.

Variances between writ and declaration should be taken advantage of by

a plea in abatement, not on a writ of error (*Chirac v. Reinicker*, 11 Wheat. (U. S.) 280, 6 L. ed. 474; *Duval v. Craig*, 2 Wheat. (U. S.) 45, 4 L. ed. 181; *Carpenter v. Hoyt*, 17 Ill. 529; *Cruikshank v. Brown*, 10 Ill. 75; *Prince v. Lamb*, 1 Ill. 378; *Rust v. Frothingham*, 1 Ill. 331), nor by motion in arrest of judgment (*Toledo, etc. R. Co. v. McLaughlin*, 63 Ill. 389).

In *Cruikshank v. Brown*, *supra*, it is said that "perhaps, according to modern practice, advantage might be taken of the variance by motion in the circuit court." And it is so held in *Windett v. Hamilton*, 52 Ill. 180.

12. *Klair v. Philadelphia, B. & W. R. Co.* (Del.), 78 Atl. 1085; *The Governor v. Lagow*, 43 Ill. 134 (holding that a special plea is obnoxious to special demurrer, if the facts alleged can be given in evidence under the general issue).

It was held not error to refuse leave to file an additional plea of release in an action on a *supersedeas* bond, wherein the plaintiff had joined issue on a plea of *nil debet*, instead of demurring thereto, since any matter might have been given in evidence under such plea, which showed that nothing was due at the time of the pleading, and a release or any other matter in discharge might have been proven. *Becker v. People*, 164 Ill. 267, 45 N. E. 500. See *supra*, VII, A.

Payment, discharge, or release, or other like matter must be specially pleaded to an action on a judgment since they cannot be shown under a plea of *nil debet*. *Hinton v. First Nat. Bank* (Miss.), 53 So. 544. "The plea of *nil debet* was simply an offer to relitigate the merits of the question of debt or no debt, and the demurrer was properly sustained."

Bond With Conditions.—There is no plea of general issue to an action of debt on a bond with conditions, but each and every material fact alleged

be specific and certain,¹³ and must contain matter sufficient to constitute a defense to the action.¹⁴

Book Account.—In the action of book account, there is no general issue which denies the whole declaration since a judgment to account is an admission of an unsettled account between the parties.¹⁵

As a general rule, any matter which admits the defendant to have been once accountable or chargeable, although it goes in discharge, must be plead before the auditors, and not in bar.¹⁶

VIII. PARTIES.—A. PLAINTIFF.—Debt will not lie by the assignee of a contract on an express covenant.¹⁷

in the declaration must be admitted or traversed by a special plea. *Mix v. People*, 86 Ill. 329; *Price v. Farrar*, 5 Ill. App. 536.

The jurisdiction of the court which rendered the judgment sued on may be attacked by a special plea setting out the facts. *Endicott v. Morgan*, 66 Me. 456.

13. *Mix v. People*, 86 Ill. 329; *People v. McHatton*, 7 Ill. 731.

A special plea of failure of the consideration to be paid for a note held bad for uncertainty because it did not aver that the time of payment had arrived. *Pike v. Fraser & Co.*, 17 Ark. 597.

No Consideration.—A special plea of no consideration is good in Illinois, but if the defendant plead failure of consideration he must show in what manner it has failed with as much precision as the allegations in the declarations are set out. *Poole v. Vanlandingham*, 1 Ill. 47.

On Bond.—If a particular breach is assigned in an action on a bond the plea must answer it, and a plea of general performance is bad. *Mix v. People*, 86 Ill. 329; *People v. McHatton*, 7 Ill. 731; *Bradley v. Osterhoudt*, 13 Johns. (N. Y.) 404.

14. Ill.—*Foltz v. Stevens*, 54 Ill. 180; *Loellke v. Grant*, 120 Ill. App. 74. Mass.—*Fitzgerald v. Hart*, 4 Mass. 429. Eng.—*Henries v. Jamison*, 5 T. R. 553, 101 Eng. Reprint 310.

Special pleas that the defendant "never was indebted as alleged," and "that it did not promise as alleged," held insufficient in an action of debt on a specialty. *Smith v. Woman's Med. College*, 110 Md. 441, 72 Atl. 1107.

In an action for the value of services evidenced by a promissory note, a special plea denying the authority of

the agent of the defendant to make the note, held bad, because the note was not the foundation of the action but only collateral thereto. *Frink v. King*, 4 Ill. 144.

15. *McKoy v. Browns*, 13 Vt. 593.

In Connecticut, nil debet was considered the plea of general issue. *Anderson v. Henshaw*, 2 Day (Conn.) 272. Under it the defendant may prove an accord and satisfaction by the acceptance by the plaintiff of a bill of exchange which, when paid, was to be in full satisfaction of his claim. *Anderson v. Henshaw, supra*.

Auditors.—No defense can be specially pleaded which depends for its effect upon the plaintiff's account, but all such defenses must go before the auditors. *Porter v. Smith*, 20 Vt. 344.

Plea in Set-Off.—When Filed.—It is wholly within the discretion of the county court when a plea in set-off shall be filed. *Ainsworth v. Drew*, 14 Vt. 563.

The defendant was held to have conceded that the debtor side of the plaintiff's account was correct by crediting it under his plea in off-set. *Cameron v. Estabrooks*, 73 Vt. 73, 50 Atl. 638.

See the title "Account and Accounting," Vol. 1.

16. *Delaware v. Staunton*, 8 Vt. 48.

Such plea cannot be sustained because they would put the question of payment, settlement, etc., in issue before the court and jury, where the parties cannot be sworn and testify, instead of putting them in issue before the auditors, where the parties are competent witnesses. *Delaware v. Staunton*, 8 Vt. 48. And see *Matthews v. Tower*, 39 Vt. 433.

17. *Carleton v. Bird*, 94 Me. 182, 47 Atl. 154; *Jackson v. York & C. R. Co.*,

Each of several covenantees may bring his several action where a distinct interest is given to each, although the language of the covenant is joint.¹⁸

The executor or administrator of the creditor may bring an action of debt¹⁹ in his own name,²⁰ and so also can a guardian for money due his ward.²¹

B. DEFENDANT.—Debt will lie to enforce contribution by a co-warrantor at the instance of one who has been compelled to reimburse the warrantee.²²

Before the wager of law was abolished it was held that debt would not lie against an executor in cases where the testator could have waged his law, though it would on simple contracts,²³ but the action now lies in all cases where it would have been proper against the testator.²⁴

Debt will also lie against any one who is in privity with the original obligor.²⁵

IX. VERDICT AND JUDGMENT.—The verdict and judgment must correspond to the issues and cannot exceed the amount claimed in the declaration.²⁶

48 Me. 147; *Dartmouth College v. Clough*, 8 N. H. 22.

“There is no privity of contract or of estate between the original lessor and an under tenant; and the under tenant is not liable to the original lessor in any form of action for rent.” *Dartmouth College v. Clough*, 8 N. H. 22.

Privity of Estate Sufficient.—But since either privity of contract or of estate will support the action, debt will lie against the assignee of a lessee who has assigned his whole term. *Dartmouth College v. Clough*, 8 N. H. 22.

18. *Gray v. Johnson*, 14 N. H. 414.

19. Ill.—*Frink v. King*, 4 Ill. 144.

Mass.—*Martin v. Root*, 17 Mass. 222.

Tenn.—*Hickman v. Searey's Exr.*, 9 Yerg. 47. Va.—*Bailey v. Beckwith*, 7 Leigh 604.

20. *Adams v. Campbell*, 4 Vt. 447.

21. *Independent Order, etc. v. Stahl*, 64 Ill. App. 314.

22. *Hickman v. Searey's Exr.*, 9 Yerg. (Tenn.) 47.

23. “The general rule is, that debt does lie against executors, upon a simple contract; and that an exception is that it does not lie in the particular case, where the testator may wage his law. When, therefore, it is established, in any given case, that there can be no wager of law by the

testator, debt is a proper remedy. . . . The reason is obvious; the plaintiff shall not, by the form of his action, deprive the executor of any lawful plea, that might have been pleaded by his testator; and as the executor can in no wise wage his law (Com. Dig. Pl., 2 W. 45), he shall not be compelled to answer to an action in which his testator might have used that defense.” *Childress v. Emory*, 8 Wheat. (U. S.) 642, 5 L. ed. 705.

24. Conn.—*Knapp v. Hanford*, 6 Conn. 170. Ky.—*Leather's Representative v. M'Glasson*, 3 T. B. Mon. 223. Va.—*Anderson v. Price*, 4 Munf. 307.

25. *DeHaven v. Bartholomew*, 57 Pa. 126; *Waller's Exrs. v. Ellis*, 2 Munf. (Va.) 88.

26. Ark.—*Hudspeth v. Gray, Dur-rive & Co.*, 5 Ark. 157. Conn.—*Perin v. Sikes*, 1 Day 19. Ky.—*Jenkins v. Richardson*, 6 J. J. Marsh. 441. Mo. *Boyd v. Sargent*, 1 Mo. 437. N. C. *Dozier v. Bray*, 9 N. C. 57. Vt.—*Keyes v. Throop*, 2 Aik. 276.

Error in finding a larger sum as a debt is merely informal where it appears by calculation to be for the debt and interest. *Friedly v. Scheetz*, 9 Serg. & R. (Pa.) 156.

Remittitur Cures Excessive Verdict.—“The subsequent motion by the appellee to resubmit the cause to the

In an action of debt on a penal bond, the verdict should find the amount of the debt and damages separately, and the judgment in such case should be for the debt, to be discharged on payment of the damages assessed.²⁷

jury with an instruction to render a verdict for such less sum, may, without violence to proper rules of practice be construed as equivalent to a *remittitur* from the first verdict over the judgment that was entered." Independent Order, etc. *v. Stahl*, 64 Ill. App. 314. And see *Hughes v. Union Ins. Co.*, 8 Wheat. (U. S.) 294, 5 L. ed. 620.

Several Judgment in Joint Action. Any joint action for a statutory penalty, though in form *ex contractu*, is nevertheless founded upon tort, and judgment may therefore be entered against those defendants whose liability is shown and in favor of the others whose complicity in the offense for which the penalty is prescribed, is not proved, just as in an action *ex delicto*. *Chaffee v. United States*, 18 Wall. (U. S.) 516, 21 L. ed. 908.

Omission Cured by Verdict.—Failure to aver demand in an action on the bond of a justice of the peace for money had and received in his official capacity, held cured by verdict, where the evidence showed demand. *Lusk v. Cassell*, 25 Ill. 191.

A judgment by nil dicit cures all defects as to matters of form, but not a substantial variance between the declaration and the instrument sued on. *Butler v. Limerick, Minor* (Ala.) 115.

A default judgment cannot be sustained on a declaration which does not state the sum claimed, the date of the bond, the assignment to the

plaintiff, nor the amount of damages. *Blane v. Sansum*, 2 Call (Va.) 495.

Exception.—The only exception to this rule is that an action on a statute to recover a penalty, the damages inserted in the declaration need only be nominal. *Indiana Miller's Fire Ins. Co. v. People*, 170 Ill. 474, 49 N. E. 364, where the declaration concluded to the damage of one cent, but the judgment was for \$1000.

27. *Caldwell v. Richmond*, 64 Ill. 30; *Freeman v. People*, 54 Ill. 153; *Odell v. Hole*, 25 Ill. 204; *March v. Wright*, 14 Ill. 248; *Toles v. Cole*, 11 Ill. 562; *Pickett v. People*, 114 Ill. App. 188; *Frazier v. Laughlin*, 6 Ill. 347.

Error Not Fatal.—But failure to do so is held to be only a technical and formal error, which will not warrant a reversal of the judgment. *Briggs & McClure v. Greenlee, Minor* (Ala.) 123; *Italian, etc. Co. v. Pease*, 194 Ill. 98, 62 N. E. 317; *Weber v. Powers*, 114 Ill. App. 411; *Pickett v. People*, 114 Ill. App. 188.

The word "damages" in a judgment does not, of itself, make a judgment in damages, and "at most, it was a mere irregularity, and is cured by section 56, of the Practice Act of 1872, Sess. Laws, 247." *Rockford, etc. R. Co. v. Steele*, 69 Ill. 253; *Independent Order, etc. v. Stahl*, 64 Ill. App. 314.

Statutory Penalty.—"Upon a plea of not guilty, if the jury find the defendant guilty, they ought also to find the forfeiture." *Stilson v. Tobey*, 2 Mass. 521.

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I. APPOINTMENT OF ADMINISTRATORS AND EXECUTORS.

A. IN GENERAL.—At the common law the king as *parens patriæ* was entitled to seize upon and administer the goods of an intestate and the crown later invested the church, acting through the ecclesiastical courts, with this branch of its prerogative.¹

Jurisdiction to appoint executors and administrators is now vested by statute in a court frequently known as the probate court but sometimes given a different name.²

B. JURISDICTIONAL FACTS.—1. **Domicil of Decedent.**—The application for primary administration of an estate should be made in the county where decedent had his domicil,³ and the fact that decedent left no effects in that county does not deprive the court of jurisdiction.⁴

2. **Situs of Assets.**—The existence of assets within the county is sufficient to confer jurisdiction over the grant of letters of administration on the estates of non-residents,⁵ and it is immaterial whether or not letters of administration have been taken out in the state where decedent had his domicil.⁶

The probate court has no jurisdiction to appoint an executor or administrator when decedent neither had his domicil nor left assets in the county where application is made.⁷

1. 2 Bl. Com. 494.

2. See local statutes.

3. **Ia.**—*In re Estate of King*, 105 Iowa 320, 75 N. W. 187. **Kan.**—*Ewing v. Mallison*, 65 Kan. 484, 70 Pac. 369. **Ky.**—*Trumbo v. Richardson*, 18 Ky. L. Rep. 878, 38 S. W. 700. **Mass.**—*Rackemann v. Taylor*, 204 Mass. 394, 90 N. E. 552. **Neb.**—*Atkinson v. Hasty*, 21 Neb. 663, 33 N. W. 206. **Wash.**—*Stern v. Sill*, 39 Wash. 557, 81 Pac. 1007.

4. **Toledo, St. Louis & K. C. R. Co. v. Reeves**, 8 Ind. App. 667, 35 N. E. 199; *Connors v. Cunard S. S. Co.*, 204 Mass. 310, 90 N. E. 601.

In **New York**, under L. 1871, ch. 335, giving the public administrator the right to administer an intestate's estate "whenever such person shall die leaving any assets or effects in the county," the requirement of the existence of assets applies only to decedents who, at the time of their deaths, did not reside within the state of New York. *Taylor v. Public Admr.*, 6 Dem. Sur. (N. Y.) 158.

5. **U. S.**—*New England Mut. Life Ins. Co. v. Woodworth*, 111 U. S. 138, 4 Sup. Ct. 364, 28 L. ed. 379. **Ala.**—*Equitable Life Assur. Soc. v. Vogel's Eirs.*, 76 Ala. 441, 52 Am. Rep. 344. **Ky.**—*Morrison v. Hampton's Admr.*, 20 Ky. L. Rep. 1573, 49 S. W. 781. **Neb.**—*Missouri Pac. R. Co. v. Bradley*,

51 Neb. 596, 71 N. W. 283. **N. C.**—*Shields v. Union Cent. Life Ins. Co.*, 119 N. C. 380, 25 S. E. 951.

"Where assets forming a part of the estate of a non-resident decedent are located in two counties of this state, administration can be granted in either, and the ordinary first commencing the exercise of jurisdiction will retain it." *Neal v. Boykin*, 132 Ga. 400, 64 S. E. 480.

In **New York**, sub. 2, §4, ch. 230 of the Laws of 1898, relating to the public administrator in the county of New York and referring to assets which "shall arrive within the county of New York after his death," should be construed as meaning that the assets must "arrive" or "come" into the state in good faith and not for the purpose of securing a resident plaintiff who can prosecute an action for negligence. *Hoes v. New York, N. H. & H. R. Co.*, 173 N. Y. 435, 66 N. E. 119.

6. **Ga.**—*Ott v. Hutchison*, 91 Ga. 31, 16 S. E. 106. **Mass.**—*Bowdoin v. Holland*, 64 Mass. 17. **Mo.**—*Wood v. Matthews*, 73 Mo. 477.

7. **Ill.**—*Illinois Cent. R. Co. v. Cragin*, 71 Ill. 177. **Ind.**—*McCord v. Thompson*, 92 Ind. 565. **Ia.**—*Christy v. Vest*, 36 Iowa 285. **La.**—*Miltenberger v. Knox*, 21 La. Ann. 399. **Vt.**—*Manning*

C. APPLICATION FOR LETTERS OF ADMINISTRATION. — 1. Who May Apply. — Although statutes usually designate those entitled to preference as appointees, anyone having a beneficial interest in the estate of decedent may make application for the appointment of an administrator.⁸ A creditor of the estate has such a beneficial interest,⁹ even though he is a non-resident.¹⁰

In the absence of an express statutory requirement as to interest, an appointment made upon application of one not beneficially interested is valid, if no appeal is made.¹¹

2. Form and Sufficiency. — The petition or application for the appointment of an executor or administrator should allege the facts necessary to confer jurisdiction.¹² It should therefore contain allegations as to the fact of death,¹³ intestacy,¹⁴ domicile of decedent,¹⁵ the existence of assets, especially if intestate is a non-resident,¹⁶ and an allegation that petitioner is beneficially interested in the estate as next of kin, creditor, or in some other capacity.¹⁷ It is not essential that a description be given either of the real or personal property belonging to the estate,¹⁸ or that the non-pendency of other applications be alleged.¹⁹

A creditor in his petition for the appointment of an administrator

v. Leighton, 65 Vt. 84, 26 Atl. 258. **Wis.**—*In re Barlass' Estate*, 143 Wis. 497, 128 N. W. 58.

8. *Diem v. Drogmiller*, 158 Mich. 380, 122 N. W. 637; *In re Sprague's Estate*, 125 Mich. 357, 84 N. W. 293.

Public Administrator.—A public administrator, by filing a petition for letters of administration upon the estate of a decedent, does not acquire any interest in the estate and where his term expires before the hearing of the petition, the court will not order letters issued to him. *In re Pingree*, 100 Cal. 78, 34 Pac. 521.

9. *Brennan's Admr. v. Harris*, 20 Ala. 185; *Ex parte Conrad*, 75 S. C. 1, 54 S. E. 799.

An attorney, who has rendered services for an administrator discharged without having paid for such services, is not a creditor of the estate and cannot apply under §§3807, 3808, St. 1898, for the appointment of an administrator *de bonis non*. *Wiesmann v. Daniels*, 114 Wis. 240, 90 N. W. 162.

10. *Branch v. Rankin*, 108 Ill. 444. **11.** *Mowry v. Latham*, 20 R. I. 736, 40 Atl. 236.

12. *Shipman v. Butterfield*, 47 Mich. 487, 11 N. W. 283; *Estate of Moore v. Moore*, 33 Neb. 509, 50 N. W. 443.

13. *Roderigas v. East River Sav.*

Inst., 76 N. Y. 316, 32 Am. Rep. 309; *Pleasants v. Dunkin*, 47 Tex. 343.

14. A verified petition for letters of administration stating that decedent died leaving no last will and testament, to deponent's knowledge, information and belief, was sufficient to give the surrogate jurisdiction to determine that fact. *In re Cameron's Estate*, 47 App. Div. 120, 62 N. Y. Supp. 187.

15. *Townsend v. Gordon*, 19 Cal. 188; *Abel v. Love*, 17 Cal. 234; *George v. Watson*, 19 Tex. 354.

If the existence of property within the county is alleged and relied upon to give jurisdiction, the fact that there is no allegation relative to domicile does not render the application insufficient. *Rankin v. Anderson*, 8 Baxt. (Tenn.) 240.

16. *Larson v. Union Pac. R. Co.*, 70 Neb. 261, 97 N. W. 313.

17. *Towner v. Griffin*, 115 Ga. 965, 42 S. E. 262; *Haug v. Primeau*, 98 Mich. 91, 57 N. W. 25; *Shipman v. Butterfield*, 47 Mich. 487, 11 N. W. 283.

18. *Spencer v. Wolfe*, 49 Neb. 8, 67 N. W. 858; *In re Miller*, 32 Neb. 480, 49 N. W. 427.

19. *Stern v. Sill*, 39 Wash. 557, 81 Pac. 1007.

need not set forth the nature and amount of his claim, or that he is a principal creditor,²⁰ or that no application has been made by the widow or next of kin.²¹

3. Verification.—Although the almost universal practice is to have the petition for letters of administration properly sworn to, verification is not necessary to confer jurisdiction.²²

4. Notice.—Persons entitled to preference in the granting of letters upon the estate of an intestate should be given notice of the application for the appointment of an administrator, since otherwise the right to administration cannot be taken from them.²³ Unless the statute provides otherwise, notice by publication is sufficient,²⁴ especially where those entitled to preference have actual notice;²⁵ and if, upon citation published, the court decides that another than the first petitioner should be appointed, he may make the appointment without publishing a second citation.²⁶

5. Objections to Appointment.—Resistance to the application for letters of administration can be made only by one having an interest as relative, creditor, or otherwise, in the estate of decedent.²⁷

20. *Johnson v. Johnson's Estate*, 66 Mich. 525, 33 N. W. 413.

21. *Wilkinson v. Conaty*, 65 Mich. 614, 32 N. W. 841.

22. *Ala.*—*Davis v. Miller*, 106 Ala. 154, 17 So. 323. *Neb.*—*In re Miller*, 32 Neb. 480, 49 N. W. 427. *N. Y.* *Johnston v. Smith*, 25 Hun 171.

Absence of Signature.—"Failure of petitioner to sign his petition for letters of administration does not prevent the county court from acquiring jurisdiction. *In re Estate of Graff*, 86 Neb. 535, 125 N. W. 1091.

In Washington, under Bal. Code, §6142, the failure of the applicant for letters of administration to file with his petition an affidavit stating the names and residence of the heirs is not a jurisdictional defect. *McLean v. Roller*, 33 Wash. 166, 73 Pac. 1123.

23. *Ga.*—*Rusk v. Hill*, 117 Ga. 722, 45 S. E. 42. *Mass.*—*Arnold v. Sabin*, 1 Cush. 525. *N. Y.*—*Matter of Campbell's Estate*, 192 N. Y. 312, 85 N. E. 392; *Matter of Page*, 107 N. Y. 266, 14 N. E. 193.

When a rule of court exists which requires notice of the filing of application to those entitled to preference as appointees, letters of administration granted to a creditor without notice to widow and next of kin are invalid, although the statute contains no requirement relative to notice. *Gans v. Dabergott*, 40 N. J. Eq. 184.

24. *La.*—*Heirs of Herriman v. Janney*, 31 La. Ann. 276. *Mich.*—*Wilkinson v. Conaty*, 65 Mich. 614, 32 N. W. 841. *Utah.*—*In re Bunting's Estate*, 30 Utah 251, 84 Pac. 109. *Wash.*—*Scott v. McNeal*, 5 Wash. 309, 31 Pac. 873.

Contents of Citation.—Under Florida St., §5, p. 78, McClellan's Dig., the citation need not state the name of any person as contemplated for appointment as administrator. *Robinson v. Epping, Bellas & Co.*, 24 Fla. 237, 4 So. 812.

25. *Arnold v. Sabin*, 1 Cush. (Mass.) 525.

26. *Ex Parte Small*, 69 S. C. 43, 48 S. E. 40.

27. *Ga.*—*Williams v. Williams*, 113 Ga. 1006, 39 S. E. 474; *Augusta & S. R. Co. v. Peacock*, 56 Ga. 146. *La.* *Succession of Williams*, 107 La. 610, 32 So. 65. *Wash.*—*Stern v. Sill*, 39 Wash. 557, 81 Pac. 1007.

When a stranger and the next of kin are appointed co-administrators, only next of kin will be heard to object to stranger's appointment. *Buckner's Admr. v. Louisville & N. R. Co.*, 120 Ky. 600, 87 S. W. 777.

Who Are Persons Interested.—A public administrator who asserts the right to administer the estate of a deceased person is a "person interested" in a contest for letters of administration and may appear and contest the appointment of some other petitioner

An objection to the appointment of an administrator should be seasonably made,²⁸ and may take the form of a written protest or a *several*.²⁹

D. TEMPORARY OR SPECIAL ADMINISTRATORS.—1. Grounds for Appointment.—The court may entertain an application for a temporary or special appointment when such an appointment is necessary to protect the interests of the estate because of the minority of those entitled to administration,³⁰ or because the will is being contested,³¹ or because a personal representative is immediately required to represent or protect the estate in some other pending litigation.³² The court may appoint a special administrator when a contest is pending over the appointment of a permanent administrator,³³ or whenever any contingency happens which is productive of great delay before letters of administration or letters testamentary can be issued.³⁴

2. Proceedings for Appointment.—Any party in interest may apply for the appointment of a special administrator or the court may appoint one of its own motion;³⁵ and an appeal may be taken from an order refusing to appoint and dismissing the application.³⁶

(Estate of Healy, 122 Cal. 162, 54 Pac. 736); and one who has acquired the interest of an heir may object, although he is neither an heir nor a creditor of estate (Dierks v. Smith, 119 Ga. 859, 47 S. E. 203).

28. Succession of Herron, 32 La. Ann. 835.

29. Ga.—Williams v. Williams, 113 Ga. 1006, 39 S. E. 474. **N. J.**—Slocum v. Grandin, 38 N. J. Eq. 485. **S. C.** Ex parte Crafts, 28 S. C. 281, 5 S. E. 718.

Stay of Proceedings.—When an affidavit is made against the appointment of one or more applicants, the application is to be stayed, not merely as to the one objected to, but generally. McGregor v. Buel, 24 N. Y. 166.

30. Wallis v. Wallis, 60 N. C. 78; Riegel v. Denhard, 17 W. N. C. (Pa.) 279, 4 Atl. 173.

31. Ala.—McDonnell v. Farrow, 132 Ala. 227, 31 So. 475. **Cal.**—Estate of Crozier, 65 Cal. 332, 4 Pac. 109. **Md.** Munnikhuysen v. Magraw, 57 Md. 172. **Mo.**—State v. Moehlenkamp, 133 Mo. 134, 34 S. W. 468; Rogers v. Dively, 51 Mo. 193. **N. J.**—In re Davenport's Appeal, 66 N. J. Eq. 300, 56 Atl. 295; Brown v. Ryder, 42 N. J. Eq. 356, 7 Atl. 568. **N. Y.**—In re Hopkin's Will, 41 Misc. 83, 83 N. Y. Supp. 890.

In New York, under Code Civ. Proc. §2582, an appeal from a surrogate's decree admitting a will to probate does

not stay the issuing of letters where in the surrogate's opinion as manifested by order the preservation of the estate requires the issuance of letters. In re Riede, 122 N. Y. Supp. 600.

32. Ala.—Malone v. Hill, 68 Ala. 225. **Ark.**—Mangum v. Cooper, 28 Ark. 253. **Ill.**—Stone v. Haskins, 97 Ill. App. 3. **N. J.**—In re Marsh's Estate, 55 Atl. 299. **Tenn.**—McKamy v. McNabb, 97 Tenn. 236, 36 S. W. 1091.

Tenure of Special Administrators. "The appointment of a special administrator is not intended to bring about a general administration of the estate; his powers are limited by the statute, and while they may, by order of the court, be made to embrace duties not strictly within the letter of the statute, under the pressure of necessity made to appear, the appointment should not continue longer than is reasonably necessary to secure the appointment of an administrator." In re Chadbourn's Estate, 14 Cal. App. 481, 112 Pac. 472.

33. Ala.—Clemens v. Walker, 40 Ala. 189. **Mich.**—People v. Wayne Probate Judge, 39 Mich. 302. **Tenn.**—Crozier v. Goodwin, 1 Lea 368.

34. Schenk v. Schenk, 80 Ill. App. 612; In re Hopkins' Will, 4 Misc. 83, 83 N. Y. Supp. 890.

35. Davenport v. Davenport, 68 N. J. Eq. 611, 60 Atl. 379.

36. Long v. Richardson, 26 Tex. Civ. App. 197, 62 S. W. 964.

An appointment may be made without notice to the next of kin of decedent.³⁷

E. BOND.—1. Necessity for Filing.—The statutes in the United States uniformly require the giving of a bond by administrators,³⁸ and the same requirement is made of executors,³⁹ unless the will contains a provision that the executor may act without bond and such a provision will be disregarded when the court is satisfied that a bond should be required.⁴⁰

2. Form and Sufficiency.—Although the statutes usually prescribe the form for the bond to be given by executors and administrators, the fact that the bond is not executed in strict compliance with the statutory requirements will not render it invalid.⁴¹

37. *Estate of Keegan v. Welch*, 83 Neb. 166, 119 N. W. 252.

38. Cal.—*Healy v. Superior Court*, 127 Cal. 659, 60 Pac. 428; *In re McPhee's Estate*, 10 Cal. App. 162, 101 Pac. 530. N. Y.—*In re Goundry's Estate*, 57 App. Div. 232, 68 N. Y. Supp. 155; *Ex parte Brown*, 2 Brad. Sur. 22. Tenn.—*Feltz v. Clark*, 4 Humph. 79.

Bond of Vice-Consul.—A vice-consul who applies for administration upon the estate of a decedent who was a citizen of a foreign country must file a bond before he is entitled to appointment. *Wyman, Petitioner*, 191 Mass. 276, 77 N. E. 379.

Collateral Attack for Failure To Give Bond.—The failure to give bond does not deprive the court of jurisdiction nor subject an appointment of an administratrix, made without bond first given, to collateral attack in an action brought by such administratrix. *In re Wiltsey's Will*, 135 Iowa 430, 109 N. W. 776.

39. Ky.—*Gibson's Exr. v. Fishback*, 22 Ky. L. Rep. 1267, 60 S. W. 396. N. H.—*Heydock v. Duncan*, 43 N. H. 95. N. Y.—*In re Wischmann*, 80 N. Y. Supp. 789. R. I.—*Sarle v. Probate Court of Scituate*, 7 R. I. 270.

Bond of Residuary Legatee.—Under Gen. Laws cap. 220, §7, providing that "if the executor be a residuary legatee, he may give a bond only to pay the funeral charges, debts and legacies of the testator," the court cannot require from a residuary legatee a bond for an inventory. *Leonard v. Clark*, 24 R. I. 470, 53 Atl. 636.

40. Ky.—*Busch v. Rapp*, 23 Ky. L. Rep. 605, 63 S. W. 479. N. Y.—*Free-man v. Kellogg*, 4 Redf. Sur. 218. Ore.—*Bellinger v. Thompson*, 26 Ore. 320, 37

Pac. 714, 40 Pac. 229. Va.—*Schnurman v. Biddle & Co.*, 109 Va. 702, 64 S. E. 977. Vt.—*Felton v. Sowles*, 57 Vt. 382.

Discretion of Court.—Under §3887. Ky. St., "a sound discretion is vested in the court to determine whether or not it is proper that the executor shall give bond although the will directs that he be permitted to act without bond. This discretion is not limited to cases of fraud or bad faith on the part of the executor, still less to cases of insolvency, but includes all circumstances showing it to be proper that a bond should be executed." *Gibson's Exr. v. Fishback*, 22 Ky. L. Rep. 1267, 60 S. W. 396. See also *McCann v. McCann's Exr.*, 29 Ky. L. Rep. 537, 93 S. W. 1045.

Administrator With Will Annexed. The provision in a will requesting that bond be dispensed with contemplates an acceptance of the trust by the executor and if he fails to accept and qualify, the provision is inoperative concerning an administrator with will annexed. *Langley v. Harris*, 23 Tex. 564.

41. Conn.—*Holbrook v. Bentley*, 32 Conn. 502. Ga.—*Awtrey v. Campbell*, 118 Ga. 464, 45 S. E. 301. Me.—*Pettingill v. Pettingill*, 60 Me. 411. Mo.—*Newton v. Cox*, 76 Mo. 352. Ohio.—*Gandolfo v. Walker*, 15 Ohio St. 251. Pa.—*Com. v. Miller*, 195 Pa. 230, 45 Atl. 921. R. I.—*Probate Court of Central Falls v. Adams*, 27 R. I. 97, 60 Atl. 769. Va.—*Yost v. Ramey*, 103 Va. 117, 48 S. E. 862.

Sureties and Principal Bound in Unequal Sums.—A bond approved by the court in which each surety is bound in half the sum in which the principal is

Every bond must name an obligee or it will be invalid either as a statutory or as a common law bond,⁴² and the bond must be signed by the one who is to be appointed as well as by his sureties.⁴³

Joint or Several Bonds.—If by statute the probate court has power to prescribe the form of bond to be given by executors, it may require a joint bond or a several bond, in its discretion, where there is more than one executor.⁴⁴

3. Proceedings To Compel Filing of Bond or Additional Security. Any person interested in the estate of decedent may file a petition praying that the personal representative be required to file a bond or additional security,⁴⁵ or the court may require an additional bond when from its personal knowledge such action seems proper.⁴⁶

In North Carolina, jurisdiction over proceedings to require additional bonds from administrators is vested in the clerk of the superior court, in his character as probate judge.⁴⁷

Effect of Appeal.—When an administrator appeals from an order of the surrogate requiring further security within a specified time and perfects his appeal before the expiration of the time limited for giving such further security, the surrogate has no authority pending the appeal to make the further order revoking the letters of administration, until the appellate court shall have authorized further proceedings before the surrogate upon the order appealed from. When an administrator makes such appeal, the respondent may, in a proper case, apply to the appellate court for an injunction to prevent the

bound is not for that cause void but is sufficient to give effect to the appointment, and to render the acts of the personal representative valid, although the court on appeal from the decree of the judge of probate, approving a bond in that form, would not have countenanced such a departure from the usual form for a bond. *Baldwin v. Standish*, 7 Cush. (Mass.) 207.

42. *Tidball v. Young*, 58 Neb. 261, 78 N. W. 507.

43. *Weir v. Mead*, 101 Cal. 125, 35 Pac. 567.

44. *Chamberlain v. Anthony*, 21 R. I. 331, 43 Atl. 646, construing Gen. Laws, c. 220, §1.

45. *Betts v. Cobb*, 121 Ala. 154, 25 So. 692; *Duggan v. Lamar*, 106 Ga. 855, 33 S. E. 43.

Necessary Allegations By Creditor. Since there is no presumption in favor of the payment of a judgment before the lapse of a year and a day from the date of its rendition, a judgment creditor of an insolvent estate, who files his petition in the probate court for the purpose of requiring the ad-

ministrator to give better security, need not allege that his debt is unpaid. *Meyer v. Dorrance*, 32 Miss. 263.

Wife entitled to usufruct of the entire estate may, on application of the heirs or the legatees, be required to file a bond. *Succession of Steele*, 23 La. Ann. 734.

Motion by Forced Heir.—In Louisiana, the right to move the court for an order requiring a bond from an executor is limited to creditors or claimants of specific property in the succession and a bond will not be exacted on motion of a forced heir. *Succession of Kranz*, 115 La. 545, 39 So. 594.

Proceeding by Rule.—A proceeding taken by an interested party, under La. Rev. St. §§10, 3698, to require an administrator to show cause why he should not furnish additional bond, may be by rule. *Block v. Bordelon*, 39 La. Ann. 872, 2 So. 833.

46. *Million v. Million*, 13 Ky. L. Rep. 143; *Ward v. Mississippi*, 40 Miss. 108.

47. *Hunt v. Sneed*, 64 N. C. 180.

administrator from wasting the assets of the estate pending the appeal.⁴⁸

Order of Appellate Court.—The order of an appellate court requiring other security from an executor or administrator, should be directory only to the court which granted letters, the latter court alone having authority to receive the additional bond and security.⁴⁹

No Funds.—In an action brought against an administrator to compel him to give a new bond he may plead that he has no funds in his hands belonging to the estate.⁵⁰

Notice.—Before an order requiring a new or additional bond is entered, the executor or administrator should be given notice and an opportunity to be heard.⁵¹

F. THE ORDER OF APPOINTMENT. — 1. In General.—An order of court is essential to vest the appointee with authority to act as the legal representative of a decedent's estate.⁵²

Liberal Construction.—An order appointing a personal representative is usually given a liberal construction in favor of its validity and regularity as an unconditional appointment.⁵³

The operative force of the order of appointment is limited solely to the granting of letters,⁵⁴ and no conditions should be annexed to the

48. *Vreedburgh v. Calf*, 9 Paige (N. Y.) 127.

49. *Atkinson v. Christian*, 3 Gratt. (Va.) 428.

50. *Hanlon v. Wheeler* (Tex. Civ. App.), 45 S. W. 821.

51. *Leonard v. Clark*, 24 R. I. 470, 53 Atl. 636.

52. *Wilson's Admr. v. Dibble*, 16 Fla. 782; *Callaghan v. Fluker*, 49 La. Ann. 237, 21 So. 253; *Succession of Gusman*, 35 La. Ann. 404; *Succession of Picard*, 33 La. Ann. 1135.

Appointment a Judicial Act.—The act appointing an administrator of an estate by the probate court is a judicial act while that of issuing letters of administration is ministerial. *Glendenning v. McNutt*, 1 Idaho 592; *Pickering v. Weiting*, 47 Iowa 242.

53. *Tucker v. Harris*, 13 Ga. 1, 53 Am. Dec. 488; *Louisville & N. R. Co. v. Edmunds' Admr.*, 23 Ky. L. Rep. 1049, 64 S. W. 727.

Appointments Held Sufficient.—Use of words "in vacation" at the top of the record of appointment will not invalidate order. *Brubaker v. Jones*, 23 Kan. 411. When by statute exclusive jurisdiction of the appointment of executors and administrators is vested in the circuit court and the clerk is authorized to appoint only in vacation,

the order need not state that it is made in vacation in order to sustain an appointment made by clerk. *Drake v. Sigafos*, 39 Minn. 367, 40 N. W. 257. An entry in the records of the County Court, "It is ordered that S. G. be appointed administrator of J. G. on his entering into a bond in the sum of \$4000 with J. B. and W. S. as sureties," is a valid grant of administration, although the record does not state that the administrator gave bond or properly qualified. *Spencer v. Cohoon*, 18 N. C. 27.

Insufficient Order.—An order which granted administration on "this estate" without specifying the name, but which was attached to a list of fourteen estates, that of decedent being one of them, is not a valid order granting letters of administration. *Harwood v. Wylie*, 70 Tex. 538, 7 S. W. 789.

Clerk's Failure To Enter Order. Under Cal. Civ. Code, §1412, the appointment of a special administrator is complete when the order is signed by the court, and the failure of the clerk to enter it upon the minutes is a mere neglect of duty which does not invalidate appointment. *McNeil v. Morgan* (Cal.), 108 Pac. 69.

54. *In re Morris*, 91 N. Y. Supp.

grant of administration except such as are authorized by statute.⁵⁵

Order Prematurely Made.—An order appointing an administrator before the second term of county court after the death of the intestate, though erroneous, will not be held void on collateral attack.⁵⁶

2. Appeal From Order.—a. *Right To Appeal.*—An appeal from an order granting or refusing letters of administration may be taken by a party aggrieved.⁵⁷

b. *Who May Appeal.*—Only persons who have an interest in the settlement of a decedent's estate may appeal from an order relative to the appointment of an executor or administrator,⁵⁸ but a creditor of the estate has such an interest.⁵⁹

c. *Decree on Appeal.*—Where the statute gives to the probate court discretion in the matter of granting letters, the exercise of such discretion will not be disturbed by the decree of the appellate court unless there is a plain abuse of it.⁶⁰ The appellate court, upon the

706, holding that a decree granting letters to one of two contesting relatives of deceased does not determine who is entitled to take as distributee. See also, *Bertig v. Higgins*, 89 Ark. 70, 115 S. W. 935; *Leach v. Misterns*, 13 Wyo. 239, 79 Pac. 28.

55. Improper Conditions.—The county court has no authority to annex as a condition to the grant of administration that the administrator shall pay the costs of a temporary appointment or that he shall pay a privileged claim. *Cain v. Haas*, 18 Tex. 616.

56. *Leach v. Owensboro City R. Co.*, 137 Ky. 292, 125 S. W. 708.

57. Cal.—*Estate of Damke*, 133 Cal. 433, 65 Pac. 888; *In re Woods*, 94 Cal. 566, 29 Pac. 1108. **Ga.**—*Headman v. Rose*, 63 Ga. 458; *Glisson v. Carter*, 28 Ga. 516. **Ia.**—*Reynolds v. Miller*, 6 Iowa 459. **Ky.**—*Mitchell v. Apperson*, 4 Ky. L. Rep. 368. **La.**—*Succession of Lamm*, 40 La. Ann. 312, 4 So. 53; *State v. Parish Judge of Plaquemines*, 22 La. Ann. 23. **Me.**—*In re Shaw*, 81 Me. 207, 16 Atl. 662. **Neb.** *In re Miller*, 32 Neb. 480, 49 N. W. 427. **N. J.**—*Quidort's Admr. v. Pergeaux*, 18 N. J. Eq. 472. **Tenn.**—*Wright's Distributees v. Wright*, Mart. & Yerg. 43.

Mandamus.—The proper mode of proceeding, in case the ordinary should grant administration to one not entitled, is by appeal and mandamus will not lie. *State v. Mitchell*, 3 Brev. (S. C.) 520.

Certiorari.—Since the aggrieved party may appeal from the decree of the

orphans' court, certiorari will not lie to a decree of the orphans' court, upon the right of administration. *Admrs. of Morris v. Morris*, 16 N. J. L. 526.

Insufficient Bill of Exceptions.

When an order refusing letters of administration is in general terms, it implies a finding against the petitioner upon all the material allegations of the petition, and if there is no specification of insufficiency of the evidence to justify the decision, the appellate court will not look into the evidence to ascertain its sufficiency to sustain the order. *In re Estate of Depeaux*, 118 Cal. 290, 50 Pac. 387.

58. Conn.—*Richardson v. Richardson*, 2 Root 219. **Mass.**—*Stebbins v. Lathrop*, 4 Pick. 33. **Miss.**—*Miller v. Keith*, 26 Miss. 166. **Tenn.**—*Stanley v. McKinzer*, 7 Lea 454. **Utah.**—*Jones v. Jones*, 12 Utah 72, 41 Pac. 563.

Debtor to Estate.—A debtor to the estate of a deceased person is not interested in and cannot appeal from a decree granting letters of administration upon such estate. *Swan v. Picquet*, 3 Pick. (Mass.) 443; *Estate of Hardy*, 35 Minn. 193, 28 N. W. 219.

A mere garnishee of a debtor to the estate has no such interest in the appointment of an administrator as enables him to appeal from the decree making an appointment. *Veazie Bank v. Young*, 53 Me. 555.

59. Mitchell v. Pyron, 17 Ga. 416.

60. Ark.—*Bankhead v. Hubbard*, 14 Ark. 298. **Cal.**—*Estate of Healy*, 122 Cal. 162, 54 Pac. 736. **Ind.**—*Wallis v.*

reversal of the order below, should remit the case to the probate court with directions relative to the making of the appointment.⁶¹

An appeal from a decree refusing to grant letters testamentary cannot be treated as an appeal from a decree refusing to admit the will to probate.⁶²

3. Collateral Attack.—When the court making the appointment has jurisdiction to grant letters of administration or letters testamentary, the appointment cannot be collaterally attacked;⁶³ but if want of jurisdiction appears, the order of appointment may be disregarded in any other court.⁶⁴

Cooper, 123 Ind. 40, 23 N. E. 977. **Tex.**—Hall v. Claiborne, 27 Tex. 217.

Discretionary When Appointment Temporary.—Under §2668, N. Y. Code Civ. Proc., the appointment of a temporary administrator is confided to the discretion of the surrogate and an appellate court will not interfere with the exercise of that discretion when a case is made out under the statute. Matter of Chase, 32 Hun (N. Y.) 318.

Failure To Exercise Discretion. When the court is vested with discretionary powers in making an appointment and appoints one whom he erroneously supposes he is bound by law to appoint, an appeal will lie and his decision may be reversed and the cause remanded so that he may proceed to exercise a sound discretion in making the appointment. Stephenson v. Stephenson, 49 N. C. 472.

61. Dexter v. Brown, 3 Mass. 32; Wallis v. Wallis, 60 N. C. 78.

62. *In re* Gurdy, 101 Me. 73, 63 Atl. 322.

63. **U. S.**—Cornell Steamboat Co. v. Fallon, 179 Fed. 293, 102 C. C. A. 345; Seefeld v. Duffer, 179 Fed. 214, 103 C. C. A. 32. **Ala.**—Louisville & N. R. Co. v. Perkins, 152 Ala. 133, 44 So. 602. **Ark.**—Jacobs v. Bentley, 86 Ark. 186, 110 S. W. 594, 126 Am. St. Rep. 1086; Lambert v. Tucker, 83 Ark. 416, 104 S. W. 131. **Cal.**—Abrook v. Ellis, 6 Cal. App. 451, 92 Pac. 396. **Ill.** Balsewicz v. Chicago, B. & Q. R. Co., 240 Ill. 238, 88 N. E. 734. **Kan.**—Parnell v. Thompson, 81 Kan. 119, 105 Pac. 502. **Ky.**—Cunningham v. Clay's Admr., 112 S. W. 852. **Mass.**—Connors v. Cunard Steamship Co., 204 Mass. 310, 90 N. E. 601. **Mich.**—Ackerman v. Pfent, 145 Mich. 710, 108 N. W. 1084. **Mo.**—Connor v. Paul, 133 Mo. App. 13, 119 S. W. 1006; Griesel v.

Jones, 123 Mo. App. 45, 99 S. W. 769. **N. J.**—Quidort's Admr. v. Pergeaux, 18 N. J. Eq. 472. **N. Y.**—Steele v. Leopold, 120 N. Y. Supp. 569. **Pa.** Zeigler v. Storey, 220 Pa. 471, 69 Atl. 894. **Wash.**—Meikle v. Cloquet, 44 Wash. 513, 87 Pac. 841. **W. Va.**—Cicerello v. Chesapeake, etc. R. Co., 65 W. Va. 439, 64 S. E. 621.

What Is Not Collateral Attack.—A suit by the heirs of the decedent against an administrator for judgment decreeing plaintiffs to be the owners of the property which the administrator seeks to sell, on the ground that the succession of the decedent has been closed and the heirs put in possession, is not a collateral attack on the appointment of the administrator. Thibodeaux v. Thibodeaux, 126 La. 578, 52 So. 773.

64. **U. S.**—Coe Brass Mfg. Co. v. Savlik, 93 Fed. 519, 35 C. C. A. 390. **Ala.**—Miller v. Jones, 26 Ala. 247. **Ga.** Lessee of Griffith v. Wright, 18 Ga. 173. **Ia.**—*In re* Estate of King, 105 Iowa 320, 75 N. W. 187. **Mass.**—Wales v. Willard, 2 Mass. 120. **Mich.**—Gillett v. Needham, 37 Mich. 143. **Ohio.** Union Sav. Bank & Trust Co. v. West. Union Tel. Co., 79 Ohio St. 89, 86 N. E. 478.

Injunction Against Exercise of Authority.—"A judge of probate who is appointed by a testator executor of a will is not qualified or authorized, even before the probate of such will, to appoint a special administrator on another estate to which the estate represented by him as executor is largely indebted; and such appointment of a special administrator is void, and the person assuming to act thereunder may be enjoined from so doing by this court sitting as the court of equity." Hussey v. Southard, 90 Me. 296, 33 Atl. 221.

Presumption of Jurisdiction.—In the absence of evidence to the contrary, it will be presumed in a collateral proceeding that the court making the appointment acted on proof of facts essential to its jurisdiction.⁶⁵

G. LETTERS TESTAMENTARY.—1. Persons Entitled.—Under the modern view, an executor derives his authority to represent the estate by virtue of his appointment by the court rather than because he is named in the will,⁶⁶ but it is the duty of the court to issue letters testamentary to the person named in the will, if he is legally competent and accepts the trust and, if required, gives bond to discharge his duties properly.⁶⁷

65. **Ga.**—*Jones v. Smith*, 120 Ga. 642, 48 S. E. 134. **Ind.**—*Peterson v. Erwin*, 28 Ind. App. 330, 62 N. E. 719; *Jenkins v. Peckinpaugh*, 40 Ind. 133. **Mass.**—*McCooley v. New York*, N. H. & H. R. Co., 182 Mass. 205, 65 N. E. 62. **N. Y.**—*Hoes v. New York*, N. H. & H. R. Co., 73 App. Div. 363, 77 N. Y. Supp. 117. **S. C.**—*Hendrix v. Holden*, 58 S. C. 495, 36 S. E. 1010. **S. D.**—*Blackman v. Mulhall*, 19 S. D. 534, 104 N. W. 250. **Tenn.**—*Ferrell v. Grigsby*, 51 S. W. 114. **Tex.**—*State v. Heirs of Zanco*, 18 Tex. Civ. App. 127, 44 S. W. 527. **Wyo.**—*Lethbridge v. Lauder*, 13 Wyo. 9, 76 Pac. 682.

66. **Ia.**—*In re Van Vleck's Estate*, 123 Iowa 89, 98 N. W. 557. **Mo.**—*Lamb v. Helm*, 56 Mo. 420; *Stagg v. Green*, 47 Mo. 500. **N. H.**—*Tappan v. Tappan*, 30 N. H. 50.

Qualification Necessary.—Under N. C. Rev., §28, declaring that "no foreign executor has any authority to intermeddle with the estate until he shall have entered into a bond," deeds made by foreign executors to lands in North Carolina, under a power in the will to sell, convey no title until the statutory requirements have been complied with. *Glascocock v. Gray*, 148 N. C. 346, 62 S. E. 433.

Control of Probate Court.—Because the executor is authorized by the will of his testator to sell certain real estate, it cannot therefore be said that as such executor he is authorized to administer the estate independently of the probate court. *Allen v. Reilly* (Tex. Civ. App.), 131 S. W. 1152.

67. **Ala.**—*Kidd v. Bates*, 120 Ala. 79, 23 So. 735. **Ill.**—*Clark v. Patterson*, 114 Ill. App. 312. **Md.**—*Garitee v. Bond*, 102 Md. 379, 62 Atl. 631. **Mass.**—*McGuinness v. Hughes*, 188

Mass. 201, 74 N. E. 317. **N. Y.**—*In re Raynor*, 48 Misc. 325, 96 N. Y. Supp. 895. **Wis.**—*Saxe v. Saxe*, 119 Wis. 557, 97 N. W. 187.

Effect of Improper Appointment.—In South Carolina, the grant of letters testamentary to one not nominated in the will is a nullity and will be disregarded by the courts. *Blakely v. Frazier*, 20 S. C. 144.

Possibility of Removal No Disqualification.—Letters testamentary to the executrix named in the will cannot be refused upon the ground that objections are filed by the heirs alleging there are reasons warranting the belief that the executrix will so conduct herself that grounds for the revocation of the letters will arise in the future, since section 1 of the administration act providing that the court "shall issue letters testamentary thereon to the executor named in the will, if he is legally competent and accepts the trust and gives bonds to discharge the same" is mandatory. *Clark v. Patterson*, 214 Ill. 533, 73 N. E. 806.

Non Residence As a Disqualification.—In the absence of a statutory provision, a non resident who has been nominated as executor is not disqualified and letters testamentary may be issued to him, although non residence is sometimes treated as ground for the exercise of the court's discretion in making the appointment. **Cal.**—*In re Brown's Estate*, 80 Cal. 381, 22 Pac. 233. **Mich.**—*Breen v. Kehoe*, 142 Mich. 58, 105 N. W. 28. **N. J.**—*Acker's Case*, 70 N. J. Eq. 669, 62 Atl. 556. **R. I.**—*Hammond v. Wood*, 15 R. I. 566, 10 Atl. 623. **Wis.**—*Cutler v. Howard*, 9 Wis. 309. **Wyo.**—*Rice v. Tilton*, 13 Wyo. 420, 80 Pac. 828; *Hecht v. Carey*, 13 Wyo. 154, 78 Pac. 705.

2. Delegation of Power To Choose.—A testator may delegate to a person designated in his will, the power to name an executor.⁶⁸

3. Renunciation.—One named as executor in a will may make a renunciation of the trust before he has performed any act which indicates an intention to accept;⁶⁹ and he may lose his right to have letters testamentary issued to him by his failure to make application and qualify.⁷⁰

An express declaration is not necessary to constitute a renunciation of the trust by one named as executor.⁷¹

Retraction.—A renunciation once made cannot be retracted after the appointment of another has been made by the court.⁷²

H. ISSUANCE OF LETTERS.—Although it is the universal practice to issue formal letters of administration or letters testamentary in pursuance of the order of the appointing court, the failure to issue letters does not affect the validity of the appointment, since they are only evidential.⁷³

68. *Brown v. Just*, 118 Mich. 678, 77 N. W. 263; *Hartnett v. Wandell*, 60 N. Y. 346, reversing 5 Thomp. & C. (N. Y.) 98.

Rule Unchanged by Statute.—The provisions of 2 Rev. St. 69, §1, to the effect that the surrogate shall issue letters testamentary to the persons "named" in the will as executors—does not preclude him from issuing letters to one not expressly named in the will but duly designated by virtue of a power to name given in will. *Matter of Alexander's Will*, 16 Abb. Prac. (N. Y.) 9.

69. *In re Baldwin's Estate*, 50 N. Y. Supp. 872; *Finch v. Houghton*, 19 Wis. 149.

70. *Pruett v. Pruett*, 131 Ala. 578, 32 So. 638; *Rice v. Tilton*, 13 Wyo. 420, 80 Pac. 828.

71. *Conn.*—*Solomon v. Wixon*, 27 Conn. 520; *Ayres v. Weed*, 16 Conn. 290. *N. C.*—*Wood v. Sparks*, 18 N. C. 389. *R. I.*—*Briggs v. Probate Court of Westerly*, 23 R. I. 125, 50 Atl. 335.

Objection to Will No Renunciation. A motion to set aside the probate of a will by one named as executrix therein is not equivalent to an application for leave to renounce the executorship of the will. *Gaither v. Gaither*, 23 Ga. 521. Filing of a caveat against the probate of the will by one of the executors is not an implied renunciation of the executorship. *In re Application of Maxwell*, 3 N. J. Eq. 611.

Executor's Renunciation as Trustee. One appointed both executor and trustee

by the same will may qualify as executor and refuse to qualify as trustee. *Devises of Ashe v. Ashe's Exrs.*, 1 Rich. Eq. (S. C.) 380.

72. *Jewett v. Turner*, 172 Mass. 496, 52 N. E. 1082; *In re Baldwin's Estate*, 50 N. Y. Supp. 872.

Renunciation Withdrawn Before Appointment Made.—One nominated as co-executor in a will, who renounces his right as such, may retract his renunciation at any time prior to the grant of letters to another, since the fact of such renunciation, even if done in pursuance of an agreement with the other executor, cannot operate to estop him from withdrawing it. *Estate of True*, 120 Cal. 352, 52 Pac. 815; *Taylor v. Tibbatts*, 13 B. Mon. (Ky.) 177.

73. *Ala.*—*Hosey v. Brashear*, 8 Port. 559, 33 Am. Dec. 299. *Cal.*—*Abel v. Love*, 17 Cal. 234; *Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237. *Miss.* *Weir v. Monahan*, 67 Miss. 434, 7 So. 291. *Mo.*—*State, to use of Moore v. Price*, 21 Mo. 434. *Ohio.*—*Tidd v. Bloch*, 26 Ohio C. C. 113.

Premature Issue.—That letters bear date earlier than the filing of the bond, as ordered, does not render the appointment void, since this is a mere irregularity and is cured by the subsequent filing of the bond, providing the order of appointment has not been vacated. *Brown v. Hannah*, 152 Mich. 33, 115 N. W. 980.

Where administration has been granted to more than one, letters may

II. TERMINATION OF AUTHORITY.—A. RESIGNATION.—1. Right of Executor or Administrator.—At common law an executor or administrator who had duly qualified and entered upon the discharge of his duties could not resign his office,⁷⁴ but in many jurisdictions the statutes permit either executors or administrators to resign.⁷⁵

2. Proceedings Necessary.—The right to resign being dependent upon the statute, a resignation can be made only after a compliance with the statutory conditions.⁷⁶

A resignation may be in a written instrument containing an express resignation of the trust,⁷⁷ or the acts of the personal representative may amount to a resignation.⁷⁸

Retraction of Resignation.—An executor or administrator cannot withdraw his resignation after action has been taken upon it.⁷⁹

be issued to those who qualify and a joint administration is not necessary. *In re Ireland's Estate*, 47 Misc. 545, 95 N. Y. Supp. 1079.

74. *Mass.*—*Sears v. Dillingham*, 12 Mass. 358. *N. C.*—*McIntyre v. Proctor*, 145 N. C. 288, 59 S. E. 39; *Washington's Exr. v. Blunt*, 43 N. C. 253. *Wis.*—*Sitzman v. Pacquette*, 13 Wis. 291.

75. *Ala.*—*Lunsford v. Lunsford*, 122 Ala. 242, 25 So. 171; *Rambo v. Wyatt's Admr.*, 32 Ala. 363. *Ky.*—*Warfield v. Brand's Admr.*, 13 Bush 77. *Neb.*—*Hazlett v. Blakely's Estate*, 70 Neb. 613, 97 N. W. 808. *Tex.*—*Roy v. Whitaker*, 92 Tex. 346, 48 S. W. 892, 49 S. W. 367.

Where there is good and sufficient cause to remove an administrator, the court may permit him to resign. *Tulburt v. Hollar*, 102 N. C. 406, 9 S. E. 430.

76. *In California*, an administrator may resign "*provided* he shall first settle his accounts and deliver up all the estate to such person as may be appointed by the court." *Haynes v. Meeks*, 20 Cal. 288. But one who has himself invoked an order accepting his resignation and appointing his successor will not be heard to complain that the order was made before he settled his accounts as directed by statute. *In re Estate of McDermott*, 127 Cal. 450, 59 Pac. 783.

Court Authorized To Accept.—Under *Tex. Rev. St.* 1895, Art. 2030, requiring that the resignation be presented to the county court in which administration is pending, no other court can act upon and accept the resignation of an executor or administrator.

Wells v. Houston, 23 Tex. Civ. App. 629, 56 S. W. 233.

Presumption of Compliance With Statute.—Although the records do not show that an administrator gave the eight weeks notice of his intention to apply for leave to resign, as required by statute, or that any express order was made permitting him to resign, but do show a full settlement of the estate "upon his resignation," it will be presumed that he gave the statutory notice. *Macey v. Stark*, 116 Mo. 481, 21 S. W. 1088.

77. *In re Allen's Estate*, 78 Cal. 581, 21 Pac. 426.

78. *Emmons v. Gordon (Mo.)*, 24 S. W. 146.

Acts Constituting Resignation.—An incumbent administrator who accepts a grant of administration *de bonis non* jointly with another person will be treated as having resigned his former office, although he presented no formal resignation. *Turner's Exrs. v. Wilkins*, 56 Ala. 173.

79. An executor, who on his application to the supreme court has been permitted to resign and has been discharged by the court, cannot, under §2639, Code Civ. Proc., retract that resignation. *Matter of Beakes*, 5 Dem. Sur. (N. Y.) 128. Where an administrator tendered his resignation with his final account and the heirs joined issue thereon, asking revocation of his letters for neglect of duty, he cannot evade the issue by withdrawing his resignation, and no further notice or citation to him is required upon fixing a day for hearing. *In re Dietrich's Estate*, 39 Wash. 520, 81 Pac. 1061.

B. REVOCATION OF LETTERS AND REMOVAL. — 1. Jurisdiction. The court which appoints a personal representative acquires jurisdiction to control the administration of the estate to its close continuously as one proceeding and therefore has power to remove an executor or administrator upon sufficient grounds.⁸⁰ Complete jurisdiction being vested in the appointing court, a court of equity will not remove an executor or administrator for an abuse of his trust.⁸¹ The power of revocation vested in the appointing court is not an arbitrary power and can only be exercised when the facts show just cause for removal.⁸²

80. **Ala.**—*Watson v. Glover*, 77 Ala. 323. **Cal.**—*Raine v. Lawlor*, 1 Cal. App. 483, 82 Pac. 688. **Ga.**—*Thomas v. Hardwick*, 1 Ga. 78. **Ill.**—*Wernse v. Hall*, 101 Ill. 423. **La.**—*Sheppard v. Barron*, 28 La. Ann. 799. **Minn.**—*Culver v. Hardenbergh*, 37 Minn. 225, 33 N. W. 792. **N. H.**—*Morgan v. Dodge*, 44 N. H. 255, 82 Am. Dec. 213. **N. Y.**—*Kerr v. Kerr*, 41 N. Y. 272. **N. C.**—*Edwards v. Cobb*, 95 N. C. 4; *In re Brinson*, 73 N. C. 278; *Taylor v. Biddle*, 71 N. C. 1. **Pa.**—*In re Perrett's Estate*, 14 Pa. Super. 611. **Tenn.**—*McGowan v. Wade*, 3 Yerg. 375. **Vt.**—*Holmes v. Estate of Holmes*, 26 Vt. 536.

Change of Venue Not Allowed. "The appointment and removal of an administrator, and the dealings which he has with his trust, are so exclusively under the supervision of the judge of the court wherein the estate is pending for settlement that it is evident it was never the legislative intention that this supervising might be destroyed by the filing of an affidavit for a change of venue, or for a change of judge." *Bowen v. Stewart*, Admr., 128 Ind. 507, 26 N. E. 168, 28 N. E. 73.

81. **Ill.**—*Mannhardt v. Illinois Staats Zeitung Co.*, 90 Ill. App. 315. **Mich.**—*Holbrook v. Campeau*, 22 Mich. 288. **N. J.**—*Bolles v. Bolles*, 44 N. J. Eq. 385, 14 Atl. 953; *Leddell's Exr. v. Starr*, 19 N. J. Eq. 159. **N. Y.**—*Hosack v. Rogers*, 11 Paige 603. *Compare*, *Neal v. Boykin*, 129 Ga. 676, 59 S. E. 912.

Jurisdiction of Equity When Executor Also Trustee.—Although the court of chancery does not possess power to remove an executor, yet when his duties as executor are intermingled with and in separable from his duties as trustee, the jurisdiction of a court of equity over trustees will extend, in a proper case, to restraining the person who is trustee from acting as trustee,

notwithstanding the fact that such restrain will incidentally prevent his performance of his functions as executor. *Bentley v. Dixon*, 60 N. J. Eq. 353, 46 Atl. 689.

82. **Ky.**—*Dunlaps v. Kennedy*, 10 Bush 539. **Md.**—*Jones v. Harbaugh*, 93 Md. 269, 48 Atl. 827; *Dalrymple v. Gamble*, 66 Md. 298, 7 Atl. 683, 8 Atl. 468. **Pa.**—*Brubaker's Appeal*, 98 Pa. 21.

Premature Appointment.—When appointment of friend and relative was made within forty days but father survived, it was duty of court to revoke letters on timely application of the one having prior right to appointment. *Carpigiani v. Hall* (Ala.), 55 So. 248. See also, *Williams v. Neville*, 108 N. C. 559, 13 S. E. 240; *In re O'Hare*, 60 Misc. 269, 113 N. Y. Supp. 281.

Grounds Held Sufficient To Warrant Removal.—Failure to give additional bond as ordered (*Betts v. Cobb*, 121 Ala. 154, 25 So. 692); refusal to take steps to recover property of testator which had been converted (*Haynes v. Carpenter*, 86 Mo. App. 30); adverse interest of executor who makes claim to practically entire estate (*In re Wallace*, 74 N. Y. Supp. 33); failure to account (*Armstrong v. Stowe*, 77 N. C. 360); error in making appointment, although statute specifies certain grounds and does not mention this one (*Heimberger v. Chamberlin*, 135 Ill. App. 615).

Insufficient Ground for Revocation. When a will has been probated and an executor appointed, the mere fact that a caveat is afterward filed to the will does not authorize the orphans' court to revoke the letters and grant administration *pendente lite*. *Grill v. O'Dell*, 111 Md. 64, 73 Atl. 876.

Order Depending Upon Litigated Question.—On an application to revoke letters of administration with the

2. Application for Removal.—a. *Who May Make.*—Any person interested in the settlement of a decedent's estate may make application for the removal of an administrator or executor.⁸³ In some jurisdictions the court may act upon its own motion and remove a personal representative without the filing of any application.⁸⁴

b. *Notice.*—An executor or administrator is entitled to notice of the institution of proceedings to secure his removal, and to an opportunity to be heard.⁸⁵

will annexed, the surrogate will not make an order of removal, if to do so he must pass upon a doubtful question as to the construction of the will when the question is pending in the supreme court, but will dismiss the application without prejudice. *In re Dunn's Estate*, 63 Misc. 180, 118 N. Y. Supp. 561.

83. Persons Held To Have Sufficient Interest.—Widow of decedent (*Pace v. Oppenheim*, 12 Ind. 533); any creditor injured by mis-appropriation or mal-administration (*Succession of Decuir*, 23 La. Ann. 167); portion of the heirs named in will (*Reed v. Crocker*, 12 La. Ann. 445); co-executor when one of two executors fails to discharge his duties (*Hesson v. Hesson*, 14 Md. 8); creditor of insolvent estate who has never proved his debt (*Brackett v. Williams*, 110 Mass. 549); a legatee named executor in a will which has been declared null and void by the surrogate but who has appealed from such decree (*Newhouse v. Gale*, 1 Redf. Sur. (N. Y.) 217); any person who has performed services for an estate, a claim for which has been allowed by the court, even though in a strict sense he is not a creditor of the estate but is a creditor of the administrator (*Mills' Estate*, 40 Ore. 424, 67 Pac. 107); the assignee of the interest of a residuary devisee (*Yeaw v. Searle*, 2 R. I. 164). See, also *In re Perrett's Estate*, 14 Pa. Super. 611; *Williams v. Dougherty*, 39 Ind. App. 9, 78 N. E. 1067, and *In re Sterling*, 68 Misc. 3, 124 N. Y. Supp. 894.

Persons Held Not To Have Sufficient Interest.—Judgment creditors of the executrix, widow, heirs, or those entitled to residuary estate, since they are not creditors of estate (*Carroll, Hoy & Co. v. Huie*, 21 La. Ann. 561); public administrator where the succession is not vacant (*Hawley v. Richards*, 26 La. Ann. 162); one against whom an administrator has begun an

action for the recovery of money and who claims he would not be safe in paying to the *de facto* administrator (*Chicago, B. & Q. R. Co. v. Gould*, 64 Iowa 343, 20 N. W. 464; *Missouri Pac. R. Co. v. Estate of Jay*, 53 Neb. 747, 74 N. W. 259).

Infant a Joint Petitioner.—Where one of the signers of a joint petition for the revocation of letters testamentary is an infant legatee, the petition will not be dismissed, if the other petitioner is a competent party to maintain the proceedings. *In re Denyse*, 62 Misc. 595, 116 N. Y. Supp. 1127.

84. Ala.—*Crawford v. Tyson*, 46 Ala. 299. **Cal.**—*Estate of Kelley*, 122 Cal. 379, 55 Pac. 136. **Tex.**—*Kuek v. Dixon* (Tex. Civ. App.), 127 S. W. 910.

85. D. C.—*In re Estate of Patten*, 7 Mackey 392. **Ill.**—*Munroe v. The People*, 102 Ill. 406; *Horn v. White*, 127 Ill. App. 222. **Ky.**—*Murray v. Oliver*, 3 B. Mon. 1. **La.**—*Succession of White v. Beattie*, 9 Rob. 353. **N. C.** *Trotter v. Mitchell*, 115 N. C. 190, 20 S. E. 386.

Citation To File Account Insufficient. Under §30, ch. 3 Ill. Rev. St., the county court has no jurisdiction to revoke the letters of an executor or administrator until he is first cited to appear and show cause why they should not be revoked and the court has no power in any case to remove an executor or administrator or upon a mere citation to appear and settle his accounts. *Hanifan v. Needles*, 108 Ill. 403.

In California, under §§1436 to 1440 inclusive, Code Civ. Proc., providing that the judge may suspend the powers of an executor when he has permanently removed from the state and then making it the duty of the judge to cite the executor "to appear and show cause why his letters should not be revoked," the court need not sus-

c. *Contents and Sufficiency.*—The petition for removal of an executor or administrator should show the nature of the interest claimed by the petitioner by alleging the facts constituting it,⁸⁶ and should allege a sufficient cause for the removal of the person against whom complaint is made.⁸⁷

pend before citing executor to appear. *In re Estate of Kelley*, 122 Cal. 379, 55 Pac. 136; *Estate of Healy*, 137 Cal. 474, 70 Pac. 455.

In New York, under Code Civ. Proc., §§2685, 2687, before the surrogate can remove application by petition must be made, a citation must issue and opportunity for a hearing must be given the offending party. A decree for removal upon an *ex parte* application is void. *In re Engelbrecht*, 15 App. Div. 541, 44 N. Y. Supp. 551.

Notice by Publication.—Under §2022, Ala. Rev. Code, a non-resident administrator or executor may be notified by publication, of the proceedings against him, and an order of removal upon such notice is not void. *Crawford v. Tyson*, 46 Ala. 299.

Actual Appearance a Waiver.—An executor who appears by his attorney and opposes a petition for his removal cannot later make the claim that he was not a party to the proceedings because not given proper notice. *Boyd v. Wyly*, 124 U. S. 98, 8 Sup. Ct. 364, 31 L. ed. 369.

86. *Vail v. Givan*, 55 Ind. 59; *Cusick v. Hammer*, 25 Ore. 472, 36 Pac. 525.

Signature on Behalf of Interested Party.—Since petition must purport to have been made by a person interested, one who signs the name of another to the petition must show his authority for so doing. *White v. Spaulding*, 50 Mich. 22, 14 N. W. 684.

87. **Ala.**—*Hubbard v. Smith*, 45 Ala. 516. **Colo.**—*Miller v. Hider*, 9 Colo. App. 50, 47 Pac. 406. **Ga.**—*Gould v. Glass*, 120 Ga. 50, 47 S. E. 505; *Gibson v. Maxwell*, 85 Ga. 235, 11 S. E. 615. **Mich.**—*White v. Spaulding*, 50 Mich. 22, 14 N. W. 684.

Allegations Liberally Construed.—In *Treat's Appeal from Probate*, 40 Conn. 288, upon proceedings to remove administrator, the court said: "In probate forms of this description the utmost strictness in declaring is not usually considered so essential, and when by fair and reasonable intend-

ment the necessary averment can be substantially found, the complaint will be held sufficient." See also *In re Griffith*, 84 Cal. 107, 23 Pac. 528, 24 Pac. 381.

Allegations Sufficient After Verdict. A complaint alleging that the administrator failed to administer the estate according to law and to inventory personal property of the estate, and failed to wind up the estate within the time prescribed by statute, while subject to demurrer or to a motion to make more definite and certain, is sufficient, after verdict, to support a judgment. *Lewellyn v. Lewellyn*, 87 Mo. App. 9. See also *Miller's Estate*, 174 Pa. 362, 34 Atl. 619.

Allegations on Information and Belief.—Allegations, in a petition for the removal of an executor or administrator, of facts enumerated in Code Civ. Proc., §2685, if made upon information and belief, must disclose the sources of information and the grounds of the belief. *Atkinson v. Striker*, 2 Dem. Sur. (N. Y.) 261.

Denial on information and belief is not sufficient if the matters denied must have been within the knowledge of the defendant. *Mills' Estate*, 40 Ore. 424, 67 Pac. 107.

Verification.—The petition for the removal of an administrator or executor should be verified (*Vail v. Givan*, 55 Ind. 59); but by the practice in Iowa, under code section 2680, a motion made after the filing of the petition to remove may be treated as an amendment and need not be verified (*Riordan v. White*, 42 Iowa 432).

Answer by Administrator.—In Indiana, under §2246, an answer and other pleadings required to form an issue are required, and there is a trial by the court without a jury. *McFadden v. Ross*, 93 Ind. 134. See also, *Phelps v. Martin*, 74 Ind. 339. The fact that the violation of duty by the personal representative actually benefited estate is no answer to a petition requesting removal. *Hake v. Stott*, 5 Colo. 140; *Crump v. Williams*,

3. Order on Proceedings for Removal.—a. *Necessity for Order.* Where the law does not declare the vacancy in the office of executor or administrator as a consequence flowing from a particular event, an order of court directing a revocation of letters or removal is essential.⁸⁸

b. *Appeal.*—In nearly all jurisdictions an appeal will lie from an order revoking or refusing to revoke the letters of an administrator or executor.⁸⁹ The appeal must be taken by a party who is aggrieved by the court's order.⁹⁰

56 Ga. 590. When an application was filed, and no answer having been filed, the clerk refused to grant application, and on appeal the court reversed the order and remanded the case, the clerk had the power to permit an answer to be filed. *Patterson v. Wadsworth*, 94 N. C. 538.

88. *Haynes v. Meeks*, 20 Cal. 288.

Order Insufficient To Remove.—Where court ordered administrator, on or before a certain day, to execute a new bond "and in case of his failure so to do, to settle his accounts as administrator, and to cease in the further discharge of his duties as administrator," his failure to file a bond by the day set did not terminate his authority until an order removing him was made. *Karn's Admr. v. Seaton*, 23 Ky. L. Rep. 101, 62 S. W. 737.

Order Held Sufficient.—Where administratrix has failed to give additional security as directed by the court and an entry is made "that the right of the administratrix to the administration of this estate cease," the order is sufficient to oust administratrix from her office. *Barrett v. Superior Court of Placer County (Cal.)*, 47 Pac. 592.

In Alabama, an order of the probate court removing an executor is void if made at a special term to which the case was not adjourned. *Boynton v. Nelson*, 46 Ala. 501.

Enforcement of Order.—The orphans' court has power to enforce, against the person of a dismissed executor, by process of attachment, a decree that he pay and deliver over to his successor all the goods and effects of the estate in his hands. *Tome's Appeal*, 50 Pa. 285.

89. *Alaska.*—*In re McIntire Estate*, 1 Alaska 73. *Ala.*—*Holtzelaw v. Ware*, 34 Ala. 307. *D. C.*—*Guthrie v. Welch*, 24 App. Cas. 562. *Ind.*—*Williams v.*

Dougherty, 37 Ind. App. 449, 77 N. E. 305; *Moore v. Bankers Surety Company*, 34 Ind. App. 633, 73 N. E. 607. *La.*—*Succession of Bedford*, 38 La. Ann. 244. *Mich.*—*Fleming v. Ottawa Probate Judge*, 137 Mich. 139, 100 N. W. 272. *Mont.*—*In re Koller's Estate*, 40 Mont. 137, 105 Pac. 549. *Nev.* *In re Bailey's Estate*, 31 Nev. 377, 103 Pac. 232. *N. C.*—*Pearce v. Lovinier*, 71 N. C. 248, holding that appellate court does not acquire jurisdiction to remove or appoint but must issue a procedendo to the probate judge requiring him to act. *Vt.*—*In re Bellow's Estate*, 60 Vt. 224, 14 Atl. 697. *Wyo.*—*Hecht v. Carey*, 13 Wyo. 154, 78 Pac. 705.

Appeal a Matter of Right.—Under the Act of March 15, 1832, §31, P. L. 135, an appeal from an order of the register of wills revoking letters of administration is a matter of right, and it is not necessary to secure the allowance of the orphans' court to bring such appeal. *Laukhuff's Estate*, 218 Pa. 585, 67 Atl. 874.

Where Appeal Not Allowed.—In a few cases the right to appeal from an order revoking or refusing to revoke letters of administration has been denied. *Estate of Moore*, 68 Cal. 394, 9 Pac. 315; *Estate of Keane*, 56 Cal. 407; *Monger v. Jeffries*, 62 Ohio St. 149, 56 N. E. 654; *Still's Estate*, 15 Ohio St. 484.

90. *Roberts v. More*, 5 Colo. App. 511, 39 Pac. 346; *O'Rourke v. Elsbree*, 11 R. I. 430; *Yeaw v. Searle*, 2 R. I. 164, holding that assignee of the interest of residuary devisee may appeal but that where, pending appeal from decree refusing to remove, appellant assigns his interest in estate for the benefit of creditors, his assignee becomes proper party.

When Administrator May Not Appeal.—Where the letters issued to an

Discretion of Trial Court.—Since the court is permitted to exercise a sound judicial discretion in determining whether an order for removal should be made, the appellate court will usually not make a different decree unless it appears that such discretion was abused.⁹¹

Effect of Appeal.—According to the practice in some jurisdictions an appeal from the decree of the probate court ordering the removal of an executor or administrator does not suspend the operation of the decree,⁹² while in other jurisdictions the decree is suspended by an appeal.⁹³

c. Collateral Attack.—A decree of a court of competent jurisdiction ordering the removal or revoking the letters of an administrator or executor cannot be attacked in a collateral proceeding.⁹⁴

administrator have been revoked by the court because a will has been found and probated, the revocation does not affect the substantial rights of the administrator, when the question of his compensation is left open, and he cannot appeal. *Cairns v. Donahy*, 59 Wash. 130, 109 Pac. 334.

Writ of Error.—Where petition for the removal of administrator is met by a plea and answer, upon which plea administrator is discharged as upon a full accounting, and the order is confirmed on appeal to the circuit court, the proceedings may be reviewed in the supreme court on writ of error. *Peckham v. Hoag*, 92 Mich. 423, 52 N. W. 734.

91. *Ariz.*—*In re Baldridge*, 2 Ariz. 299, 15 Pac. 141. *Cal.*—*Estate of Healy*, 137 Cal. 474, 70 Pac. 455; *Estate of Bell*, 135 Cal. 194, 67 Pac. 123; *Deck's Estate v. Gherke*, 6 Cal. 666. *D. C.*—*Guthrie v. Welch*, 24 App. Cas. 562. *Ind.*—*Whitehall v. State*, 19 Ind. 30. *Ia.*—*In re Estate of Moore*, 103 Iowa 474, 72 N. W. 674. *N. Y.*—*Matter of Keinz's Estate*, 88 Hun 298, 34 N. Y. Supp. 339. *Pa.*—*In re Perrett's Estate*, 14 Pa. Super. 611. *Va.*—*Reynolds v. Zink*, 27 Gratt. 29. *Wis.*—*Cutler v. Howard*, 9 Wis. 309.

For proceedings where appeal allowed and it is later found that verdict in appellate court was obtained by fraud. See *Crocker v. Crocker*, 198 Mass. 401, 84 N. E. 476, where it was held that supreme judicial court had no jurisdiction as a court of equity but that aggrieved party might file in probate court a petition for a bill of review to review the proceedings of that court made in accordance with the remaining decree.

92. *Conn.*—*Merrells v. Phelps*, 34 Conn. 109. *Ga.*—*Walker v. Maddox-Rucker Banking Co.*, 97 Ga. 386, 23 S. E. 897. *La.*—*State v. Judge of Fourth District Court*, 22 La. Ann. 116, holding that mandamus will not lie to compel a suspensive appeal from a judgment dismissing executor. *Minn.*—*Dutcher v. Culver*, 23 Minn. 415. *N. Y.*—*Estate of Angevine*, 1 Tuck. Sur. 245. *Ore.*—*Knight v. Hamaker*, 33 Ore. 154, 54 Pac. 659.

Temporary Appointment Pending Appeal.—Pending the appeal by an administrator from an order removing him, he is suspended from office and it is within the power of the court to appoint a special administrator to act during the period of suspension, but not to appoint a general administrator until such order of removal becomes final. *In re Moore*, 86 Cal. 72, 24 Pac. 846.

93. *Muirhead v. Muirhead*, 8 Smed. & M. (Miss.) 211; *Shaufler v. Stoeper*, 4 Serg. & R. (Pa.) 202, where court allowed an administrator, who had appealed from an order revoking his letters and directing that letters issue to another, to proceed in the recovery of debts due estate.

94. *Fla.*—*Mathews v. Durkee*, 34 Fla. 559, 16 So. 411; *Hart v. Bostwick*, 14 Fla. 162. *Ill.*—*Frothingham v. Petty*, 197 Ill. 418, 64 N. E. 270. *Pa.*—*Buehler's Heirs v. Buffington*, 43 Pa. 278. *Tex.*—*Grant v. McKinney*, 33 Tex. 62.

Erroneous Ground Recited in Decree. That the decree removing an administrator states a reason for discharge which is not, under the statute, a cause for discharge, does not vitiate

III. DISCOVERY OF ASSETS.—A. NATURE, FORM AND EXTENT OF REMEDY.—Statutes usually authorize the courts which have jurisdiction of the settlement of decedents' estates, upon affidavit that assets of the estate are being concealed, to compel parties to discover any property held or concealed by them belonging to a decedent's estate.⁹⁵ Statutes allowing discovery sometimes empower the court to compel delivery of the property concealed to the personal representative,⁹⁶ but are not intended to invest the probate court with jurisdiction in matters of litigation relative to the title of property,⁹⁷ and are not designed as a means of enforcing the payment of debts due estates.⁹⁸

Statutory Remedy Cumulative.—The summary remedy conferred by statute is not exclusive of the original jurisdiction in equity and a court having equitable jurisdiction may compel one alleged to be indebted to an estate to disclose facts which will enable decedent's representative to bring action.⁹⁹

the decree in a collateral proceeding. *Simpson v. Cook*, 24 Minn. 180.

Removal After Judgment.—A judgment cannot be collaterally attacked merely because the person in whose favor it was rendered has been dismissed from the office of administrator which he held when judgment was rendered. *Martin v. Dix*, 134 Ga. 481, 68 S. E. 80. See, also *McFarland's Admr. v. Louisville & N. R. Co.*, 130 Ky. 172, 113 S. W. 82; *Tapley v. McPike*, 50 Mo. 589.

95. Consult local statutes.

For cases construing statutes allowing discovery, see *Cal.*—*Ex parte Casey*, 71 Cal. 269, 12 Pac. 118. *Ill.*—*Day v. Bullen*, 226 Ill. 72, 80 N. E. 739; *Wahl v. Jacobs*, 146 Ill. App. 71. *Mich.* *Perrin v. Calhoun Circuit Judge*, 49 Mich. 342, 13 N. W. 767. *N. Y.*—*Public Admr. v. Elias*, 4 Dem. Sur. 139.

See generally the title "Discovery."

Proceedings brought under statutory provisions, should be governed by the principles and practice in equity. *Mohlke v. The People*, 117 Ill. App. 595; *Adams v. Adams*, 81 Ill. App. 637.

96. *Ex parte Moran*, 83 Kan. 615, 112 Pac. 94; *In re Estate of Huffman*, 132 Mo. App. 44, 111 S. W. 848.

Power To Examine Only.—Under New Hampshire statute (G. L. c. 197, §1), providing that one complained of as concealing assets of an estate "may be cited before the judge and be examined upon oath for the discovery of the same," the court can only take the examination of the person complained of to the end that measures

may be taken in the proper court for the recovery of the property disclosed. *Dodge v. McNeil*, 62 N. H. 168. For case taking same view, see *Saddington's Estate v. Hewitt*, 70 Wis. 240, 35 N. W. 552.

Judgment for Value Unauthorized. In Missouri, under §§74-77, Rev. St. 1899 (Ann. St. 1906, p. 362), the court is authorized to compel a delivery to administrator of the property belonging to the estate but no authority is given to render judgment for the value of the property in controversy upon failure to produce it in compliance with court's order. *Williams v. Williams*, 145 Mo. App. 382, 129 S. W. 454.

97. *Moss v. Sandefur*, 15 Ark. 381.

98. *Ill.*—*Williams v. Conley*, 20 Ill. 643. *Kan.*—*Humbarger v. Humbarger*, 72 Kan. 412, 83 Pac. 1095. *N. Y.* *In re White's Estate*, 119 App. Div. 140, 103 N. Y. Supp. 868; *In re Stewart's Estate*, 77 Hun 564, 28 N. Y. Supp. 1048.

In Illinois, the provisions of the Administration Act (Hurd's St. 1895, p. 122, §§80, 81), for summary proceedings against any person having property "belonging to any deceased person," which he refuses to disclose or deliver to the administrator, apply only to money or property remaining unchanged and in specie, and not to the proceeds of collections made by attorney under an employment by administration. *Dinsmoor v. Bressler*, 164 Ill. 211, 45 N. E. 1086.

99. *Ill.*—*Grimes v. Hilliary*, 38 Ill.

B. PARTIES TO PROCEEDINGS. — PLAINTIFF. — The statutes usually authorize the executor or administrator to file a petition or affidavit preliminary to proceedings for the discovery of assets,¹ and sometimes authorize any "person interested" to institute such proceedings.²

All the administrators should be made parties in a proceedings for the discovery of assets and a petition signed by one of two administrators will be dismissed.³

Defendant. — The statutes usually provide that proceedings for discovery may be brought against any one having knowledge of personal property belonging to the estate which he withholds,⁴ and such statutes are usually construed as giving authority for the bringing of proceedings against executors or administrators who conceal assets.⁵

When a bill for discovery is brought in equity, the distributees are neither necessary nor proper parties.⁶

App. 246. **N. J.**—Schrafft v. Wolters, 61 N. J. Eq. 467, 48 Atl. 782. **R. I.** Starkweather v. Williams, 21 R. I. 55, 41 Atl. 1003.

Eisentraut v. Cornelius, 134 Wis. 532, 115 N. W. 142, where the court says, "Though discovery in county courts may be had under such circumstances pursuant to section 3825, St. 1898, yet the necessity of bringing an action, either at law or in equity, as exigency may demand, to enforce delivery or restoration to the estate of property discovered, results in such circuity and multiplicity of actions that it is sufficient ground for suing in equity."

1. See local statutes.

2. In Missouri, under Rev. St. 1899, §74, requiring as preliminary to proceedings to discover assets that an affidavit be filed by the executor, administrator, "or some other person interested in the estate," the order of the county court issuing such citation on the affidavit of husband of testatrix is a decision that such husband is interested in the estate, although will made no provision for him. *Ex parte Gfeller*, 178 Mo. 248, 77 S. W. 552.

Where the probate court by issuing a citation in proceedings for discovery of assets has decided that the moving party is "a party interested," that decision can not be reviewed by writ of prohibition, since such writ is not designed to serve the purpose of a writ of error or appeal. *Eckerle v. Wood*, 95 Mo. App. 378, 69 S. W. 45.

3. *Matter of Slingerland*, 36 Hun (N. Y.) 575.

4. See local statutes.

Who Are Proper Parties Defendant.

The executor of a former administrator may be cited to produce the books of a partnership composed of the deceased and the former administrator. *Perrin v. Calhoun* Circuit Judge, 49 Mich. 342, 13 N. W. 767. Foreign temporary administrator of a resident decedent may be compelled to disclose information. *In re O'Brien*, 34 Misc. 436, 69 N. Y. Supp. 1022. Resident of a different and distant county may be made defendant. *Pierpont v. Threlkeld*, 13 Tex. 244.

5. **Conn.**—Case's Appeal from Probate, 35 Conn. 115. **Ill.**—*Martin v. Martin*, 170 Ill. 18, 48 N. E. 694. **Me.** *O'Dee v. McCrate*, 7 Me. 467. **Md.** *Linthicum v. Polk*, 93 Md. 84, 48 Atl. 842. **Mo.**—*Estate of Huffman*, 132 Mo. App. 44, 111 S. W. 848.

But a personal representative cannot be compelled, in such a proceeding, to litigate the question whether he has discharged a debt to the estate or whether he is the owner of specific property which he in good faith claims as his own. *Mitchell v. Bay* Probate Judge, 155 Mich. 550, 119 N. W. 916; *Wilson v. Ruthrauff*, '82 Mo. App. 435.

Bill in Equity Against Administrator.

Where assets are withheld by an administrator, the chancellor may compel a discovery of assets. *Blakey v. Heirs of Blakey*, 9 Ala. 391. But mere failure of a personal representative to return an inventory of the personal property within the time allowed by law will not sustain a bill for discovery. *Price v. Laing*, 67 W. Va. 373, 68 S. E. 24.

6. *Smith v. Smith*, 92 Va. 696, 24 S. E. 280.

C. PLEADINGS.—1. Petition or Affidavit.—The petition or affidavit for discovery must show that petitioner or affiant is one of those authorized to institute proceedings according to the provisions of the statute.⁷

Petitioner should allege the grounds for the inquiry but his allegations may be exclusively on information and belief and need not disclose the sources thereof.⁸

Amendment.—When necessary, the court should allow the filing of an amended petition or affidavit for discovery.⁹

2. Answer.—The statutes generally do not require respondent to file an answer.¹⁰

7. *Arnold v. Sabin*, 4 Cush. (Mass.) 46.

Shaw v. Groomer, 60 Mo. 495, deciding that where one not shown to have an interest in the estate files an affidavit, a party interested cannot, on appeal of the case to the circuit court, appear for the first time and file a new affidavit, and compel the party accused to proceed to trial thereon, since this would be the introduction of a new party and a change in the cause of action.

8. *Estate of Walsh*, 3 Dem. Sur. (N. Y.) 202.

Sufficient Allegations.—A complaint for discovery is sufficient when it alleges petitioner's right to bring proceedings, that respondent has in his possession property of the estate to which petitioner, as administratrix, is entitled, a demand, and the refusal of respondent to account. *Shrum v. Simpson*, 155 Ind. 160, 57 N. E. 703. For petition sufficient under Wis. Rev. St. §3825, see *Saddington's Estate v. Hewitt*, 70 Wis. 240, 35 N. W. 552.

Insufficient Allegations.—A petition by an administrator alleging that decedent had conveyed certain property to a bank which refused to reconvey and "that the following named persons have some knowledge relating to the title to these interests in the said property" is defective in not alleging that any one of relators has in his possession or knowledge any instruments in writing which contain evidence or discloses the interest of decedent in the real estate. *State v. District Court*, 35 Mont. 318, 89 Pa. 62.

9. *Blair v. Sennott*, 134 Ill. 78, 24 N. E. 969.

Waiver of Defects.—When affidavit for discovery did not state in what

way affiant was interested in the estate but respondent appeared and went to trial on the merits, he will be treated as having waived any defects in the affidavit and cannot later insist that the proceedings be dismissed for want of jurisdiction. *Wade v. Pritchard*, 69 Ill. 279. It is immaterial on appeal that affidavit charged only the concealing of assets while the interrogatories and the answers made no reference to concealing but only to withholding, when no objection was made in the trial court. *Tygard v. Falor*, 163 Mo. 234. A respondent who interposes a motion to quash and upon its being overruled, files an answer, is deemed to have waived an objection to the sufficiency of the affidavit to petition. *Mohlke v. People*, 117 Ill. App. 595.

Citation to Defendant Necessary.—In a discovery proceeding, "a citation must issue upon the filing of the petition, and all subsequent steps in such a proceeding await the return of the citation." *Estate of Paramore*, 15 N. Y. St. 449.

When Citation To Be Issued.—Under N. Y. Code Civ. Proc. §3706, authorizing citation on petition of personal representative to person concealing assets "if the surrogate is satisfied, upon the paper so presented, that there are reasonable grounds for the inquiry," a special direction by the surrogate, after examination of the petition, is requisite, and a clerk is not authorized to issue the citation as of course. *Mauran v. Hawley*, 2 Dem. Sur. (N. Y.) 396.

10. "The statute provides for no bill, or petition or affidavit, no demurrer or answer, yet it is an equitable proceeding, and when papers are filed,

D. HEARING AND EXAMINATION.—In some jurisdictions the examination of respondent must be made upon written interrogatories and answers¹¹ while in others the court may orally examine the person against whom proceedings are instituted.¹²

In proceedings for discovery respondent is not entitled to a trial by jury, unless the statute so provides,¹³ but he may be assisted by counsel in responding to the charges in the complaint and in making answers to interrogatories.¹⁴

E. ORDER.—Where the court is authorized by statute to compel the respondent to deliver over property, the order should specify with certainty the property to be turned over,¹⁵ but the court is generally

we think they should be considered and treated as pleadings in equity.” *Mohlke v. People*, 117 Ill. App. 595.

New York Practice.—Under Code Civ. Proc. §2709, the person cited is authorized to interpose a written answer, duly verified, that he is the owner or entitled to the possession of the property alleged to belong to decedent's estate, and the surrogate must then dismiss the proceedings as to the property claimed. *In re Basch's Estate*, 24 Civ. Proc. 264, 33 N. Y. Supp. 424. But see *Gick v. Stumpf*, 113 App. Div. 16, 98 N. Y. Supp. 961, decided under §2710, Code Civ. Proc., as amended by Laws 1903, p. 1195, ch. 526, and holding that surrogate may examine a person proceeded against although he files such answer.

Insufficient Answer.—When an administrator of a resident decedent applies for discovery against a foreign temporary administrator, an answer by respondent that he has no assets except in the foreign state and that he is entitled to the possession of those, is insufficient, since his answer does not set forth the nature and extent of his special property or sufficiently describe the property as to which the dismissal of proceedings is asked. *In re O'Brien*, 34 Misc. 436, 69 N. Y. Supp. 1022.

11. *Palmer v. Peck*, 90 Mich. 1, 50 N. W. 1086.

Under Mo. Rev. St. §§74, 75, if administrator declines to file interrogatories, the distributees of estate are not authorized to do so. *Brotherton v. Spence*, 52 Mo. App. 664.

Scope of Examination.—Under §§2366, 2367, of Iowa statutes, the examination must be confined to the person against whom proceedings are had and it is

not proper to introduce other evidence to contradict his statements or to establish administrator's claim to property. *Smyth v. Smyth*, 24 Iowa 491.

12. *Mahoney v. The People*, 98 Ill. App. 241; *Estate of Kraher v. Launtz*, 90 Ill. App. 496.

Motion for Further Examination. When a proceeding for discovery has never been ended by a decree or regularly discontinued, a motion may be made for an order requiring a further attendance and examination of respondent. *Estate of Mary Spreen*, 1 Civ. Proc. (N. Y.) 375.

Attachment To Compel Attendance. The probate court may by attachment and imprisonment compel a person to appear before it and disclose the property in his possession belonging to the estate. *Welsh v. Lloyd*, 5 Ark. 367.

13. *Mahoney v. The People*, 98 Ill. App. 241; *Seavey v. Seavey*, 30 Ill. App. 625.

14. *Martin v. Clapp*, 99 Mass. 470.

15. *Mahoney v. The People*, 98 Ill. App. 241.

Mapes v. Fleming, 6 N. Y. St. 668, holding too general an order which required not only that specific money be given up but also requiring the delivery of all other sums in defendant's possession belonging to estate. *Tilton v. Ormsby*, 10 Hun (N. Y.) 7.

Order as Evidence.—Under S. D. Comp. Laws §5776, the order directing the delivery of assets to administrator is prima facie evidence of the administrator's right to recover the property and is competent evidence to charge respondent in a subsequent action by administrator to recover value of assets. *Bright v. Ecker*, 9 S. D. 192, 68 N. W. 326.

not authorized to order a delivery to petitioner if the right to the property in question is in dispute.¹⁶

Costs. — In proceedings for discovery of assets costs may be awarded against an unsuccessful respondent.¹⁷

F. APPEAL. — An appeal will lie from the decision of the court in a proceeding for the discovery of assets,¹⁸ but the rights of property between *bona fide* disputants cannot be determined finally by the appellate court.¹⁹

IV. INVENTORY AND APPRAISEMENT. — **A. NECESSITY FOR FILING.** — The policy of the statutes in most jurisdictions in the United States is to require that both executors and administrators return an inventory of the property belonging to the estate, and frequently also an appraisement on oath by competent persons.²⁰

B. PROCEEDINGS TO COMPEL. — Any one interested in the settlement of an estate may apply for an order requiring a personal representative to file an inventory,²¹ or the court may make such order upon its

16. *In re Carey's Estate*, 11 App. Div. 289, 42 N. Y. Supp. 346; *In re McGee's Estate*, 63 Misc. 494, 118 N. Y. Supp. 423; *In re Stien's Estate*, 60 Misc. 631, 113 N. Y. Supp. 1105.

17. *De Lamater v. McCaskie*, 5 Dem. Sur. (N. Y.) 8. See generally the title "Costs."

18. *Ia.*—*Barto v. Harrison*, 116 N. W. 317; *Estate of Behrens*, 104 Iowa 29, 73 N. W. 351. *Mass.*—*McFeely v. Scott*, 128 Mass. 16. *Mo.*—*Clinton v. Clinton*, 223 Mo. 371, 123 S. W. 1.

When discovery by answer is the only relief sought in a court of equity, a rule to answer is in effect a final decree from which an appeal will lie. *Grimes v. Hilliary*, 38 Ill. App. 246.

In Michigan, an order for oral examination, although unauthorized, is not appealable, and if an appeal is taken, *mandamus* will lie to compel the circuit judge to dismiss the appeal. *Palmer v. Jackson*, 90 Mich. 1, 50 N. W. 1086.

Interlocutory Order.—An order of the probate court sustaining a demurrer to a petition against an administrator for a discovery of assets is not appealable where it is incidental to a proceedings to compel an addition to the inventory filed by the administrator. *Mitchell v. Bay Probate Judge*, 155 Mich. 550, 119 N. W. 916.

19. *Johnson v. Johnson*, 82 Mo. App. 350.

20. *Ark.*—*Lambert v. Tucker*, 83 Ark. 416, 104 S. W. 131. *Ind.*—*Pace v. Oppenheim*, 12 Ind. 533. *Ill.*—*May-*

rand v. Mayrand, 96 Ill. App. 478, where court ordered inventory although all property given to widow and refused to allow appeal from order appointing appraisers. *Ia.*—*Duncanson v. Duncanson*, 141 Iowa 564, 120 N. W. 88; *Poole v. Burnham*, 99 Iowa 493, 68 N. W. 816. *Mass.*—*Jones v. Richardson*, 5 Mete. 247; *Walker v. Hall*, 1 Pick. 20. *Miss.*—*Turner v. Ellis*, 24 Miss. 173. *N. Y.*—*Matter of McIntyre*, 4 Redf. Sur. 489. *Ore.*—*Conser's Estate*, 40 Ore. 138, 66 Pac. 607. *Pa.* *Estate of Langton*, 16 Phila. 368.

When Executor Need Not File.—In Massachusetts, a residuary legatee and executor who avails himself of the privilege of giving bond to pay debts and legacies exempts himself from the duty of returning an inventory. *Clark v. Wells*, 71 Mass. 69; *Stebbins v. Smith*, 21 Mass. 96. In New York, under Code Civ. Proc. §§2715, 2726, 2727, requiring surrogate, upon application of party interested, to compel executor found in default to file a sufficient inventory, the surrogate need not order an inventory when it appears that estate has been accounted for and distributed among those entitled thereto, although the accounting and distribution were made out of court. *Estate of Wagner*, 119 N. Y. 28, 23 N. E. 200.

21. *La.*—*Le Boeuf v. Webre*, 4 So. 223, holding that creditor has sufficient interest and that he need not allege or prove the insolvency of the succession. *Md.*—*Fowler v. Brady*, 110 Md. 204,

own motion upon learning from any source that the statute requiring inventory is being evaded.²²

The petition to compel the returning of an inventory should be filed in the court which has jurisdiction of the settlement of decedent's estates.²³

73 Atl. 15. **N. Y.**—*In re* Huntington's Estate, 39 Misc. 477, 80 N. Y. Supp. 220; *Eager v. Roberts*, 2 Redf. Sur. 247 (where court says that an executor who is obstructed by his co-executors in the performance of his duties in making an inventory, may enforce a full and complete inventory).

Who Is Not Interested.—Although Iowa Code, §3310 makes it the duty of an administrator to file an inventory of the personal effects of deceased, the state treasurer is not such a party in interest as can compel the filing of an inventory when the beneficiaries under the will contracted for the disposition of the property of decedent in such a way as to deprive the state of its right to an inheritance tax. *In re* Stone's Estate, 132 Iowa 136, 109 N. W. 455.

New York Code. Civ. Proc., §2514, subd. 11, provides that, where a person interested applies for an inventory, "an allegation of his interest, duly verified, suffices, although his interest is disputed." *In re* Comins' Estate, 9 App. Div. 492, 41 N. Y. Supp. 323, holds that the surrogate need not grant the application unless he is satisfied that petitioner is "interested."

Necessary Allegations By Creditor. A creditor seeking an order requiring an inventory by virtue of §2715, N. Y. Code Civ. Proc., giving "a creditor or person interested in the estate" the right of enforcing the filing of an inventory, must distinctly declare himself to be a creditor or allege facts which show him to be entitled as such. *Pendle v. Waite*, 3 Dem. Sur. (N. Y.) 261. But a creditor who alleges that the estate is indebted to him need not state the exact character of the indebtedness, nor is it necessary that the exact amount of the debt be alleged. *Langley v. Harris*, 23 Tex. 564.

22. *Poole v. Burnham*, 99 Iowa 493, 68 N. W. 816.

23. *Killcrease v. Killcrease*, 7 How. (Miss.) 311; *Walter v. Ford*, 74 Mo. 195.

Jurisdiction of Equity.—In New

York, unless some allegation is made showing the necessity for equitable interference, "the administration and settlement of decedents' estates must be deemed to belong exclusively to the surrogate's court" and proceedings to compel the filing of an inventory should be there instituted. *Morse v. Smith*, 17 N. Y. Supp. 385.

Practice in Illinois.—Under §§51, 52, ch. 3, Ill. Rev. St., a petition lies "to compel an administrator to inventory property in his hands which he obtained during the lifetime of deceased." No answer or other pleadings are necessary and a jury is not required, nor is a party to such a proceeding entitled to a trial by jury. *Kepple v. Crabb*, 152 Ill. App. 149.

Mandamus To Compel Inventory. Under Ky. St. §§3855, 3857, requiring every personal representative to file an inventory and also providing that a personal representative failing to return an inventory within six months may be fined by the county court, the duty of the county court to require executors and administrators to file inventories is not a matter of judicial discretion but is mandatory and the commonwealth may maintain mandamus to compel the enforcement of the statute, though its sole object in obtaining relief is to secure information for collecting inheritance tax. *Com. v. Peter*, 136 Ky. 689, 124 S. W. 896.

Appeal.—Under Kan. Gen. St. 1909, §3624, providing for an appeal "where there shall be a final decision of any matter arising under the jurisdiction of the probate court," an appeal will lie from a decision denying the application of an interested party for an order requiring the return of an additional inventory. *Dobson v. Holmes*, 83 Kan. 476, 112 Pac. 131.

Review.—Mandamus will not lie to compel the annulment of an interlocutory decree requiring an executor to file a statement showing all property which has come into his hands as executor. "While it may be conceded that no appeal lies from the decree,

Jurisdiction To Determine Title. — In a proceeding to obtain an order requiring the administrator to inventory certain property omitted, the court has jurisdiction to determine *prima facie* whether or not the property is an asset of the estate. "This adjudication is not binding upon any person afterwards claiming the property in another form, but is for the purpose only of determining whether the administrator shall be forced to make an inventory thereof."²⁴

C. SUFFICIENCY. — The inventory should contain a specific enumeration of the goods, chattels and credits of the decedent,²⁵ and in some jurisdictions it is the duty of the personal representative to make an inventory of all the real estate.²⁶

The inventory must be signed by the personal representative.²⁷ Although it is usual to verify the inventory the absence of the verification will not vitiate it.²⁸

D. CORRECTION. — An inventory may be amended by striking out any item when it appears that the property therein mentioned does not belong to decedent's estate,²⁹ and amendment is not impossible because inventory has been sworn to,³⁰ or because the personal rep-

yet it may be assigned as error, on appeal from a final decree, if one should be rendered against the petitioner." *Ex parte Hurt*, 157 Ala. 368, 47 So. 264.

24. *In re Belt's Estate*, 29 Wash. 535, 70 Pac. 74. See also *Miers v. Betterton*, 18 Tex. Civ. App. 430, 45 S. W. 430.

For practice in Louisiana, where title to property is contested, see *Succession of Krantz*, 115 La. 545, 39 So. 594.

25. *Pursel v. Pursel*, 14 N. J. Eq. 514; *Vanmeter v. Jones*, 3 N. J. Eq. 520, where the court said that a paper containing items, "Cash, bonds, notes, etc. \$13,993;" "Household goods and kitchen furniture, \$298," is not strictly speaking an inventory, but rather an abstract of one, and that surrogates should reject such papers as inventories.

Property in Different Jurisdictions. When letters of administration are granted in different jurisdictions, an administrator need include in his inventory only the property within the jurisdiction where his letters are granted, since that is the property for which he is accountable. *Normand's Admr. v. Grogard*, 17 N. J. Eq. 425; *Sherman v. Page*, 85 N. Y. 123. In *Estate of Butler*, 38 N. Y. 397, and *Goods of Butler*, 1 Tuck. Sur. (N. Y.) 87, where a contrary conclusion was reached, it did not appear that a per-

sonal representative have been appointed in any other jurisdiction.

For practice where personal representative claims as his own certain property found among decedent's effects, consult *Hartwig v. Flynn*, 79 Kan. 595, 100 Pac. 642, where the court says that executor should not be compelled to make an unqualified return of such property as that of the estate.

26. *Lewis v. Carson*, 93 Mo. 587, 3 S. W. 483, 6 S. W. 365.

27. *Park's Admr. v. Rucker*, 5 Leigh (Va.) 149; *Carr's Exr. v. Anderson*, 2 Hen. & M. (Va.) 361, refusing to treat as an inventory an appraisement signed by the appraisers but not bearing the signature of the personal representative.

28. *Phelan v. Smith*, 100 Cal. 158, 34 Pac. 667. See, however, *Loesche v. Griffin*, 3 Dem. Sur. (N. Y.) 358.

Verification by One of Two Executors.—Where but one of two executors swears to the correctness of an inventory which appears on its face to be returned by both executors, the inventory will be considered as the act of both. *Hamilton v. Serra*, 6 Mackey (D. C.) 168.

29. *McWilliams v. Ramsay*, 23 Ala. 813.

30. *In re Payne's Estate*, 78 Hun 292, 28 N. Y. Supp. 911.

representative by mistake included property which belonged to him personally.³¹

Conclusiveness of Inventory. — While the inventory is presumed to be a full and correct account of all the personal property belonging to the estate,³² it is not conclusive but is open to explanation on final account, although it was never amended.³³

Appeal. — An appeal may be taken from a decree of the probate court refusing the application of a personal representative for the correction of an error made in the inventory.³⁴

E. SUPPLEMENTAL INVENTORY. — An administrator or executor may file an additional inventory of property not included in his original inventory,³⁵ and any person interested may make application for an order requiring such supplemental inventory when there are assets which should be included.³⁶

V. CLAIMS AGAINST ESTATES. — **A. NOTICE TO CREDITORS.** In nearly all jurisdictions the statutes require that notice to present claims be given to creditors by the personal representative.³⁷

Notice must be given in the manner and within the time prescribed by the statute or the personal representative cannot avail himself of the special provisions barring claims not presented which are usually contained in the statute,³⁸ unless creditors having actual notice waive, by their conduct, any irregularity in the notice.³⁹

31. Hallstead's Estate, 2 Kulp (Pa.) 508.

32. *In re Mullon's Estate*, 74 Hun 358, 26 N. Y. Supp. 683.

33. Estate of Fletcher, 83 Neb. 156, 119 N. W. 232. See also *Routledge v. Elmendorf*, 54 Tex. Civ. App. 174, 116 S. W. 156.

34. *Cronshaw v. Cronshaw*, 21 R. I. 54, 41 Atl. 563.

35. Cal.—*Phelan v. Smith*, 100 Cal. 158, 34 Pac. 667. Pa.—*Com. v. Bryan*, 8 Serg. & R. 128; *Administrators of Bradford*, 1 Browne 87. Tex.—*Texas Loan Agency v. Dingee*, 33 Tex. Civ. App. 118, 75 S. W. 866.

36. Matter of McIntyre, 4 Redf. Sur. (N. Y.) 489; *Moore v. Mertz*, 38 Tex. Civ. App. 283, 85 S. W. 312. But in *Hooker v. Bancroft*, 4 Pick. (Mass.) 50, the court held that an administrator need file but one inventory although bound to account for property subsequently coming into his hands.

37. Consult local statutes.

In Washington, notice to creditors is not necessary when testator has vested his executor with full power to administer the estate without the intervention of the probate court.

Moore v. Kirkman, 19 Wash. 605, 54 Pac. 24.

38. Miss.—*Branch Bank of Alabama v. Windham*, 31 Miss. 317. Mo.—*Munday v. Leeper*, 120 Mo. 417, 25 S. W. 481; *Wilson v. Gregory*, 61 Mo. 421. N. C.—*Valentine v. Britton*, 127 N. C. 57, 37 S. E. 74. N. J.—*Petrie v. Voorhees' Exr.*, 18 N. J. Eq. 285. N. Y. *Hardy v. Ames*, 47 Barb. 413.

Signature by Attorney.—The fact that the personal representative authorized his attorney to sign the notice to creditors in his name and in his behalf, did not affect the sufficiency of notice. *Meikle v. Cloquet*, 44 Wash. 513, 87 Pac. 841.

Defects Held Immaterial.—The notice is not rendered inoperative because the word "file" is used instead of "register" as required by statute (*Stokes v. Lemon and Gale Co.*, 96 Miss. 868, 52 So. 457); or because an executor signed the notice as "administrator" under the caption "administrator's notice" (*Finney v. Barnes*, 97 Mass. 401).

39. *Collamore v. Wilder*, 19 Kan. 67; *Robertson v. Agricultural Bank*, 28 Miss. 237.

B. PRESENTATION FOR ALLOWANCE. — 1. Necessity in General. The general rule is that all claims and demands against a decedent's estate must be presented to the personal representative or to the court for allowance⁴⁰ or suit cannot be instituted thereon and they will be barred at the expiration of the time limited by statute.⁴¹ Claims secured by mortgage should be presented, if resort is to be had to personality;⁴² and unmatured demands running to certain maturity,⁴³ or debts which are to be used by way of set-off⁴⁴ must be exhibited for allowance.

The state is generally not required to present its claim for taxes,⁴⁵ and statutes are usually construed as not requiring the presentation of contingent claims⁴⁶ or claims arising upon a liability incurred by

Notice by a special administrator does not cause the short term statute of limitations to run, since he is not authorized to allow claims. *Pickering v. Weiting*, 47 Iowa 242. Consult, also, *Ex parte Worthington*, 54 Md. 359.

40. **Ala.**—*Fretwell v. McLemore*, 52 Ala. 124. **Ark.**—*Watkins v. Parker*, 134 S. W. 1187; *Walker v. Byers*, 14 Ark. 246 (presentation must be made of "all claims capable of being asserted in any court of justice, either of law or equity, existing either at the time of the death of the deceased or coming into existence at any time after the death"). **Ind.**—*Wilson v. Fahnestock*, 44 Ind. App. 35, 86 N. E. 1037. **Me.**—*Marshall v. Perkins*, 72 Me. 343, nonsuited plaintiff who sued without having made proper presentation. **Mo.**—*Wernse v. McPike*, 100 Mo. 476, 13 S. W. 809. **N. Y.**—*In re Brown's Estate*, 60 Misc. 35, 112 N. Y. Supp. 599. **Tex.**—*Converse & Co. v. Sorley*, 39 Tex. 515. **Utah.**—*Clayton v. Dinwoody*, 33 Utah 251, 93 Pac. 723. **Wis.**—*Barry v. Minahan*, 127 Wis. 570, 107 N. W. 488.

41. Consult local statutes.

Suit Must Be On Claim Presented. The plaintiff cannot recover against the estate of a decedent upon any other cause of action than the one set up in the claim which he presented. *Bechtel v. Chase*, 156 Cal. 707, 106 Pac. 81.

The fact that the will directs that all testator's debts should be paid does not prevent the barring of a claim not presented as required by statute. *Kaufman Bros. v. Redwine (Ark.)*, 134 S. W. 1193.

Equity will not interfere at the suit of a creditor who has neglected to

present his claim so that it has become barred by the statute. *Bauer v. Gray*, 18 Mo. App. 173. Compare *Asher v. Pegg*, 146 Iowa 541, 123 N. W. 739.

42. **Kan.**—*Andrews v. Morse*, 51 Kan. 30, 32 Pac. 640. **Mich.**—*Willard v. Van Leeuwen*, 56 Mich. 15, 22 N. W. 185; *Clark v. Davis*, 32 Mich. 154. **N. J.**—*Mutual Benefit Life Ins. Co. v. Howell*, 32 N. J. Eq. 146. **S. D.**—*Kelsey v. Welch*, 8 S. D. 255, 66 N. W. 390.

Presentation is unnecessary to preserve a mortgage or judgment lien. **N. Y.**—*In re Eadie*, 39 Misc. 117, 78 N. Y. Supp. 967. **Ohio.**—*Ambrose v. Byrne*, 61 Ohio St. 146, 55 N. E. 408. **Wash.**—*Scammon v. Ward*, 1 Wash. 179, 23 Pac. 439. But a judgment obtained in the courts of another state must be presented for allowance or it will be barred as are other claims. *Fields v. Estate of Munday*, 106 Wis. 383, 82 N. W. 343, 80 Am. St. Rep. 39.

43. *Watkins v. Parker (Ark.)*, 134 S. W. 1187; *Garesche v. Lewis*, 93 Mo. 197, 6 S. W. 54.

44. *Emson v. Allen*, 62 N. J. L. 491, 41 Atl. 703.

A claim for breach of warranty in the sale of personal property by a deceased vendor must be presented for allowance to avoid the statutory bar. *Clark v. Gates*, 84 Minn. 381, 87 N. W. 941.

45. *Graham v. Russell*, 152 Ind. 186, 52 N. E. 806; *Cullop v. City of Vincennes*, 34 Ind. App. 667, 72 N. E. 166; *State v. Tittmann*, 119 Mo. 661, 24 S. W. 1032.

46. **Minn.**—*In re Martin's Estate*, 56 Minn. 420, 57 N. W. 1065, liability of estate because deceased a stockholder in an insolvent corporation.

the administrator on a contract made for the benefit of the estate.⁴⁷

A claim of ownership of property in the hands of an administrator or executor is not such a claim as must be presented for allowance within the time fixed by a statute.⁴⁸

Revivor Without Presentation. — Presentation is not a necessary prerequisite to revivor of an action against personal representative, when decedent dies pending the action and before final judgment.⁴⁹

Excuses For Not Presenting. — In most jurisdictions, the fact that the personal representative has knowledge of the existence of the claim,⁵⁰ or that suit is pending against the estate,⁵¹ does not dispense with presentation in accordance with the statutory requirements.

2. Who May Present. — Presentment must be made by someone having an interest in the claim or by one authorized by the person interested therein.⁵²

Tex.—National Guarantee, etc. Co. v. Fly, 29 Tex. Civ. App. 533, 69 S. W. 231. **Wis.**—South Milwaukee Co. v. Murphy, 112 Wis. 614, 88 N. W. 583.

In Mississippi, a claim for damages for assault and battery is not within §1993, Code 1892, providing that all claims against estate must be probated, since section refers only to contractual claims. Feld v. Borodofski, 87 Miss. 727, 40 So. 816.

47. Cal.—Potter v. Lewin, 123 Cal. 146, 55 Pac. 783, claim for funeral expenses. **Ind.**—Rush v. Kelley, 34 Ind. App. 449, 73 N. E. 130, claim arising out of widow's statutory allowance. **Ore.**—In re Murray's Estate, 56 Ore. 132, 107 Pac. 19.

48. Order of St. Benedict v. Steinhäuser, 179 Fed. 137; Athearn v. Ryan, 154 Cal. 554, 98 Pac. 390; Brown v. Town of Sevastopol, 153 Cal. 704, 93 Pac. 363.

49. Fla.—Anderson v. Agnew & Co., 38 Fla. 30, 20 So. 766. **Ind.**—Clodfelter v. Hulet, 92 Ind. 426. **Ky.**—Gray's Exr. v. Patton's Admr., 3 Ky. L. Rep. 393. **Ohio.**—Musser's Exr. v. Chase, 29 Ohio St. 577. **Wash.**—Strong v. Eldridge, 8 Wash. 595, 36 Pac. 696.

After judgment is revived, no presentation of it to the administrator for allowance is required. Eddins v. Graddy, 28 Ark. 500; and a revivor of a suit against personal representative dispenses with further presentation. Moss v. Mosley, 148 Ala. 168, 41 So. 1012.

Executors of an appellant who died pending an appeal cannot, after they have been substituted by stipulation,

demand a nonsuit on ground that claim was not presented to them as executors. Mcgrath v. Gilmore, 15 Wash. 558, 46 Pac. 1032.

50. Ala.—Borum v. Bell, 132 Ala. 85, 31 So. 454; Allen v. Elliott, 67 Ala. 432; Jones' Exrs. v. Lightfoot, 10 Ala. 17. **Ill.**—Morse v. Pacific Ry. Co., 191 Ill. 356, 61 N. E. 104. **N. Y.**—In re Brown's Estate, 60 Misc. 35, 112 N. Y. Supp. 599; In re Morton's Estate, 7 Misc. 343, 28 N. Y. Supp. 82. **Utah.** Clayton v. Dinwoodey, 33 Utah 251, 93 Pac. 723.

Contra.—Perry v. West, 40 Miss. 233; Branch Bank v. Rhew, 37 Miss. 110; Ellis v. Carlisle, 8 Smed. & M. (Miss.) 552; Miller v. Trustees, 5 Smed. & M. (Miss.) 651. Consult also Brown v. Brown, 58 Conn. 85, 19 Atl. 236; Matter of Gill, 199 N. Y. 155, 92 N. E. 390.

51. Frazier v. Murphy, 133 Cal. 91, 65 Pac. 326; Vermont Marble Co. v. Black, 123 Cal. 21, 55 Pac. 599; Morse v. Pacific R. Co., 191 Ill. 356, 61 N. E. 104.

Where the same person is administrator of the creditor as well as of the debtor estate, no presentation is necessary. Thomas v. Chamberlain, 39 Ohio St. 112.

52. Ala.—Jones & Co. v. Peebles, 130 Ala. 269, 30 So. 564; Rayburn v. Rayburn, 130 Ala. 217, 30 So. 365; Allen v. Elliott, 67 Ala. 432. **Conn.**—Meriden Steam Mill Lumb. Co. v. Guy, 40 Conn. 163, holding that indorser and not indorser must present when note not yet due. **Ill.**—Botto v. Ringwald, 60 Ill. App. 415. **Me.**—Marshall v. Perkins, 72

A claim assigned after presentation may be prosecuted in the name of the person by whom it was filed.⁵³

Premature Presentation.—The fact that creditor presented his claim to one named as executor thirteen days before his appointment is immaterial where claim was retained one year after executor's appointment and then rejected.⁵⁴

Second Presentation.—If a party attempts to present his claim but fails to do so properly, he is not estopped from presenting it again, if within the proper time.⁵⁵

3. Sufficiency of Presentation or Filing.—When presentation to the personal representative is required, the claim may be presented to one of two or more executors or administrators,⁵⁶ or to the authorized agent of the personal representative,⁵⁷ and it is not necessary to make another presentation when there is a change in administrators.⁵⁸

When the statute requires filing in court, the mere placing of the claim in the office of the probate judge, without bringing it to the notice of the court, is insufficient.⁵⁹

Presentation must be with a view to securing the allowance of the claim against the state.⁶⁰

4. Statement of Claim.—a. *Form and Sufficiency.*—The state-

Me. 343. **Mo.**—*Jenkins v. Morrow*, 131 Mo. App. 288, 109 S. W. 1051, where claim was called to court's attention by administrator and court said, "It is for the claimant of a demand against an estate to present it for allowance and no such duty is imposed upon administrator."

Presentation To Court.—A presentation of a claim by an administrator whose appointment is absolutely void is not made by a party having an interest and will not avoid the statute of non-claim (*McDowell v. Jones*, 58 Ala. 25); and an executor representing debtor estate is not a proper person to act as agent of claimant in presenting claim for adjustment and his failure to do so at claimant's request is no excuse for latter's failure to present his claim to court (*Hobson v. Hobson*, 40 Colo. 332, 91 Pac. 929).

53. *Estate of Fitzgerald v. Union Sav. Bank*, 65 Neb. 97, 90 N. W. 994.

54. *Scott Stamp & Coin Co. v. Leake*, 9 Cal. App. 511, 99 Pac. 731.

55. *Patrick & Co. v. Austin* (N. D.), 127 N. W. 109.

56. *Ala.*—*Carrington v. Odom*, 124 Ala. 529, 27 So. 510. *Cal.*—*Willis v. Farley*, 24 Cal. 490. *Fla.*—*Barnes v. Scott*, 29 Fla. 285, 11 So. 48. *Kan.*

Clark's Admr. v. Parkville & G. R. R., 5 Kan. 654.

Presentation to ancillary administrator in another state is not equivalent to presentation to the original administrator. *Turner v. Risor*, 54 Ark. 33, 15 S. W. 13.

57. *Cal.*—*Roddan v. Doane*, 92 Cal. 553, 28 Pac. 604. *Ill.*—*Wells v. Miller*, 45 Ill. 33. *N. Y.*—*Johnson v. Myers*, 103 N. Y. 666, 9 N. E. 55.

58. *Ala.*—*Floyd v. Clayton*, 67 Ala. 265. *Fla.*—*McHardy v. McHardy's Exr.*, 7 Fla. 301. *Tex.*—*Parks v. Lubbock* (Tex. Civ. App.), 50 S. W. 466.

59. *Phillips v. Beene's Admr.*, 38 Ala. 248; *Beene's Admr. v. Phillips*, 37 Ala. 312.

Filing claim with the clerk is a sufficient presentation of it to the court. *Keys v. Keys' Estate*, 217 Mo. 48, 116 S. W. 537.

Mailing to administrator who failed to file is insufficient when statute requires that claim be filed with court. *Cory v. Gillespie*, 94 Iowa 347, 62 N. W. 537.

60. *Smith v. Fellows*, 58 Ala. 467; *Pfeiffer v. Suss*, 73 Mo. 245, holding insufficient an exhibition solely with a view to compromise.

ment of claim filed in court need not be formal or observe the certainty of description usually essential in pleading;⁶¹ but it must set forth the amount, nature and owner of claim so that it may be properly investigated and defended against, if desired.⁶²

The demand, whether presented to the court or to the personal representative, must be reduced to writing, a verbal statement being insufficient.⁶³ Where the claim is based on an open account, the statement should give the items of which it is composed,⁶⁴ and if it is based on a negotiable instrument, the filing of a copy is sufficient.⁶⁵

b. *Verification.*—The statutes generally require in substance that an affidavit accompany the claim stating that the amount is justly due, that there are no offsets, and that no payments have been made thereon which are not credited.⁶⁶

61. *Ala.*—Floyd *v.* Clayton, 67 *Ala.* 265; Flinn *v.* Shackelford, 42 *Ala.* 202. *Cal.*—Pollitz *v.* Wickersham, 150 *Cal.* 238, 88 *Pac.* 911. *Ind.*—Leimgruber *v.* Leimgruber, 172 *Ind.* 370, 86 *N. E.* 73, 88 *N. E.* 593; Hileman *v.* Hileman, 85 *Ind.* 1; Hyatt *v.* Bonham, 19 *Ind. App.* 256, 49 *N. E.* 361; Gibbs *v.* Ely, 13 *Ind. App.* 130, 41 *N. E.* 351. *Mo.*—State *v.* Seahorn, 139 *Mo.* 582, 38 *S. W.* 809 (where tax collector simply filed tax bill in probate court); Corson *v.* Waller, 104 *Mo. App.* 621, 78 *S. W.* 656; Monumental Bronze Co. *v.* Doty, 99 *Mo. App.* 195, 73 *S. W.* 234, 78 *S. W.* 850; Walker *v.* Gay's Estate, 73 *Mo. App.* 89. *Neb.*—Estate of Fitzgerald *v.* Union Savings Bank, 65 *Neb.* 97, 90 *N. W.* 994. *Vt.*—Batchelder *v.* White's Admr., 82 *Vt.* 132, 71 *Atl.* 1111.

62. *Ala.*—Borum *v.* Bell, 132 *Ala.* 85, 31 *So.* 454. *Conn.*—Hoskins *v.* Saunders, 80 *Conn.* 19, 66 *Atl.* 785. *Ill.*—Carter *v.* Pierce, 114 *Ill. App.* 589. *Ind.*—Lockwood *v.* Robbins, 125 *Ind.* 398, 25 *N. E.* 455; Walker *v.* Heller, 104 *Ind.* 327, 3 *N. E.* 114; Woods *v.* Matlock, 19 *Ind. App.* 364, 48 *N. E.* 384; Cooper *v.* Griffin, 13 *Ind. App.* 212, 40 *N. E.* 710. *Me.*—Hurley *v.* Farnsworth, 78 *Atl.* 291.

63. *Me.*—Millett *v.* Millett, 72 *Me.* 117. *Mo.*—Williams *v.* Gerber, 75 *Mo. App.* 18. *N. Y.*—*In re* Morton's Estate, 7 *Misc.* 343, 28 *N. Y. Supp.* 82; King *v.* Todd, 15 *N. Y. Supp.* 156.

Consult, also, Pipe *v.* Thorp, 44 *Conn.* 450.

64. *Ind.*—Dodds *v.* Dodds, 57 *Ind.* 293. *Mich.*—McHugh *v.* Dowd's Estate, 86 *Mich.* 412, 49 *N. W.* 216. *Mo.*—Roethlisberger *v.* Caspari, 12 *Mo. App.* 514.

Claim Cannot Be Made Piecemeal.

Where the whole indebtedness is one account, the creditor should not divide his account into several parts and exhibit it to the administrator or present it to the court for allowance by piecemeal. Pfeiffer *v.* Suss, 73 *Mo.* 245.

65. *Ala.*—Agnew *v.* Walden, 95 *Ala.* 108, 10 *So.* 224; Flinn *v.* Shackelford, 42 *Ala.* 202. *Cal.*—Crocker-Woolworth Nat. Bank *v.* Carle, 133 *Cal.* 409, 65 *Pac.* 951; Landis *v.* Woodman, 126 *Cal.* 454, 58 *Pac.* 857. *Conn.*—White *v.* Brown, 19 *Conn.* 577. *Ind.*—Garrigus *v.* The Home Frontier and F. M. Soc., 3 *Ind. App.* 91, 28 *N. E.* 1009, 50 *Am. St. Rep.* 262; Pulley *v.* Perfect, 30 *Ind. 379.* *N. H.*—Tebbetts *v.* Tilton, 31 *N. H.* 273.

66. Cases requiring substantial compliance with statutory requirements: *Ark.*—Eddy *v.* Lloyd, 90 *Ark.* 340, 119 *S. W.* 264. *Cal.*—Richards *v.* Blaisdell, 12 *Cal. App.* 101, 106 *Pac.* 732; Maier Packing Co. *v.* Frey, 5 *Cal. App.* 80, 89 *Pac.* 875 (holding defective affidavit on behalf of corporation). *Ky.*—Lancaster's Exr. *v.* O'Brien, 136 *Ky.* 589, 124 *S. W.* 854; Crane & Breed Mfg. Co. *v.* Staggs' Admr., 135 *Ky.* 428, 122 *S. W.* 225 (holding insufficient under circumstances an affidavit of employee); Spradlin *v.* Stanley's Admr., 30 *Ky. L. Rep.* 928, 99 *S. W.* 965. *Miss.*—Walker *v.* Nelson, 87 *Miss.* 268, 39 *So.* 809; Cheairs *v.* Cheairs, 81 *Miss.* 662, 33 *So.* 414. *Mo.*—Waltemar *v.* Schmick's Estate, 102 *Mo. App.* 133, 76 *S. W.* 1053. *Tex.*—Dowell *v.* Collin County Nat. Bank (Tex. Civ. App.), 126 *S. W.* 29; Whitmire *v.* Powell (Tex. Civ. App.), 117 *S. W.* 433.

In Kentucky, the claim must also be

The attorney or agent of a creditor is frequently authorized to authenticate claims, when acquainted with the facts or when sufficient reason exists why the claimant cannot make affidavit.⁶⁷

c. *Amendment*.—After a claim against estate has been filed, an amendment restating the claim or supplying deficiencies or omissions may be made.⁶⁸

verified by a person other than the claimant who must give his reasons why he believes claim to be just and correct. *Dewhurst v. Shepherd's Exr.*, 102 Ky. 239, 43 S. W. 253.

Verification Jurisdictional.—Verification has been held a condition precedent to the exercise of jurisdiction over the demand by the probate court. *Fitzpatrick v. Stevens*, 114 Mo. App. 497, 89 S. W. 897. *Contra*, *Gutierrez v. Scholle*, 12 N. M. 328, 78 Pac. 50.

A copy of the original affidavit is insufficient when presented with claim. *Ash v. Clark*, 32 Wash. 390, 73 Pac. 351.

Independent Demand.—Claimant need not specify in his affidavit an independent demand due from him to estate which personal representative may or may not plead as a counterclaim, at his option. *Osborne v. Parker*, 66 App. Div. 277, 72 N. Y. Supp. 894.

Verification by Assignee.—Where debt is assigned after it has been properly verified and presented, no further authentication need be made by assignee. *Collier v. Trice*, 79 Ark. 414, 96 S. W. 174.

67. See *Orene Parker Co. v. Emerson*, 91 Ark. 256, 120 S. W. 968, construing Arkansas Laws 1866-7, p. 318, so as to allow an agent or attorney to authenticate; and *Empire State Min. Co. v. Mitchell*, 29 Mont. 55, 74 Pac. 81, where claimant a corporation and officers non residents.

Affidavit by creditor's husband as her agent is insufficient, when statute requires affidavit by creditor. *Saunders v. Stephenson*, 94 Miss. 676, 47 So. 783.

Oral Authentication.—Statutes sometimes permit the verification of claim by oath in open court. See *Wagoner Undertaking Co. v. Jones*, 134 Mo. App. 101, 114 S. W. 1049, where appellate court under such statute presumed an oral verification in absence of proof to the contrary.

Waiver of Verification.—The formal

authentication of claim may be deemed waived by failure to object to sufficiency of affidavit before court considers claim on its merits. **Ky.**—*Lyons Exrx. v. Logan Co. Bank's Assignee*, 25 Ky. L. Rep. 1668, 78 S. W. 454; *Albertson v. Prewitt*, 20 Ky. L. Rep. 1309, 49 S. W. 196. **N. J.**—*Seymour v. Goodwin*, 68 N. J. Eq. 189, 59 Atl. 93. **Ohio.**—*Morgan v. Bartlette*, 2 Ohio Cir. Dec. 244.

See also, *Guerian v. Joyce*, 133 Cal. 405, 65 Pac. 972.

68. **Conn.**—*Merwin's Appeal*, 72 Conn. 167, 43 Atl. 1055, allowing amendment after original claim held insufficient on demurrer. **Ill.**—*McCall v. Lee*, 24 Ill. App. 585, *affirmed*, 120 Ill. 261, 11 N. E. 522. **Ind.**—*Peden's Admr. v. King*, 30 Ind. 181. **Ia.**—*In re Blackman's Estate*, 143 Iowa 553, 120 N. W. 664; *Wise v. Outtrim*, 139 Iowa 192, 117 N. W. 264 (allowing amendment after expiration of period for filing claims). **Mo.**—*Corson v. Waller*, 104 Mo. App. 621, 78 S. W. 656, refusing to allow amendment in appellate court when original demand a mere nullity. **Nev.**—*Kirman v. Powning*, 25 Nev. 378, 60 Pac. 834, 61 Pac. 1090.

Amendment Not in Writing.—The fact that the amendment was not reduced to writing was immaterial when the court allowed amendment and the cause proceeded to the end on the theory that amendment had been made. *Longwell v. Mierow*, 130 Wis. 208, 109 N. W. 943.

Verification of Amended Claim. When claim has been transferred to the issue docket for trial, the fact that amended claim was not accompanied by an affidavit is not ground for demurrer. *Pence v. Young*, 22 Ind. App. 427, 53 N. E. 1060.

Order Not Appealable.—An order denying a motion to amend claim as presented by adding thereto the fact that it is secured by mortgage is not appealable. *Estate of Turner*, 128 Cal. 388, 60 Pac. 967.

A defect in the verification may also be cured by amendment.⁶⁹

A substantial change in the claim by amendment will not be allowed after the expiration of the time for the presentation of claims.⁷⁰

5. Claims of Personal Representatives.—In many jurisdictions executors and administrators are now required to present their own claims against estate to the court for allowance or credit therefore cannot be taken on final settlement.⁷¹ But in the absence of a statute requiring presentation to court, the executor or administrator may ask credit in his account for the amount of his claim upon the final settlement of estate.⁷²

C. ALLOWANCE BY COURT. — 1. Notice to Personal Representative. In jurisdictions where the court allows claims, notice to the personal representative of the filing of claim against estate is usually essential before the court is authorized to adjudicate thereon.⁷³ Where the statute requires notice of the presentation of claim, service upon one of two executors or administrators is sufficient.⁷⁴

69. *Gillespie v. Campbell*, 149 Ala. 193, 43 So. 28; *Wagoner Undertaking Co. v. Jones*, 134 Mo. App. 101, 114 S. W. 1049 (allowing amendment although court held to have no jurisdiction to allow an unverified claim); *Dawson v. Wombles*, 104 Mo. App. 272, 78 S. W. 823.

70. *Estate of Turner*, 128 Cal. 388, 60 Pac. 967; *In re Sullenberger*, 72 Cal. 549, 14 Pac. 513; *Dickey v. Dickey*, 8 Colo. App. 141, 45 Pac. 228.

71. *In re Hildebrandt*, 92 Cal. 433, 28 Pac. 486; *Estate of Taylor*, 16 Cal. 434; *Estate of Taylor*, 10 Cal. 482; *Nealley v. Nealley*, 89 N. Y. 352; *Smith v. Christopher*, 3 Hun (N. Y.) 585; *Treat v. Fortune*, 2 Brad. Sur. (N. Y.) 116; *Hanlon v. Wheeler* (Tex. Civ. App.), 45 S. W. 821 (stating, however, that administrator may include as items in his final account his claims for expenses in administration, without having filed them for allowance).

Where but one of two executors is a creditor of estate, the claim of executor need not be presented to the court, although statute requires presentation where personal representative is a creditor. *Gallivan v. Jones*, 102 Fed. 423, 42 C. C. A. 408.

In Michigan, claims due administrator must be presented to commissioners appointed under 3 Comp. Laws, §9380, or they can not be allowed on final accounting. *In re Hodges' Estate*, 157 Mich. 198, 121 N. W. 748. In Vermont, also, personal representative must present his claim to com-

missioners or his claim will be barred like that of any other creditor. *Riley v. McInlear's Estate*, 61 Vt. 254, 17 Atl. 729, 19 Atl. 996.

Verification.—Administrators and executors are required to verify their claims upon presentation to court. *Hood v. Maxwell*, 23 Ky. L. Rep. 1791, 66 S. W. 276; *In re Clapsaddle's Estate*, 4 Misc. 355, 24 N. Y. Supp. 313; *Terry v. Dayton*, 31 Barb. (N. Y.) 519.

Specific Performance.—An administratrix with whom, as an individual, decedent made a written contract to convey land, may petition the court for an order directing her, as administratrix, to execute a conveyance of the real estate to herself. *Estate of Garnier*, 147 Cal. 457, 82 Pac. 68.

72. **Fla.**—*Sanderson's Admsrs. v. Sanderson*, 17 Fla. 820. **Md.**—*State v. Reigart*, 1 Gill 1, 39 Am. Dec. 628. **Mass.**—*Buckley v. Buckley*, 157 Mass. 536, 32 N. E. 863.

73. **Ill.**—*Wallace v. Gatchell*, 106 Ill. 315; *Hales v. Holland*, 92 Ill. 494 (holding adjudication without notice a nullity and subject to collateral attack). **Ia.**—*Ashton v. Miles*, 49 Iowa 564. **Kan.**—*Scroggs v. Tutt*, 20 Kan. 271, although claim allowed by court was a certified transcript of judgment against decedent. **N. M.**—*Chaves v. Perea*, 3 N. M. 84.

74. *Tewalt v. Irwin*, 164 Ill. 592, 46 N. E. 13; *Clark's Admr. v. Parkville & G. R. Co.*, 5 Kan. 654.

2. Pleadings.—Formal pleadings are usually not required in raising objections to the allowance of claims presented to court.⁷⁵

3. Order.—The order should be for the allowance of the claim at a certain sum or for disallowance,⁷⁶ and upon a finding for claimant, he is entitled to an allowance of his costs.⁷⁷

The order will not be rendered ineffective because of a merely formal defect.⁷⁸ Upon notice to the parties affected, the court may correct an error made in its order.⁷⁹

75. Ark.—*Leake v. Sutherland*, 25 Ark. 219, permitting reliance on any meritorious defense in probate court without formal or written pleadings. **Colo.**—*Alvater v. First Nat. Bank*, 45 Colo. 528, 103 Pac. 378; *Hobson v. Hobson*, 40 Colo. 332, 91 Pac. 929 (where court says that plea of statute of limitations or other objection might be orally interposed before or at the hearing). **Ill.**—*Bromwell v. Estate of Bromwell*, 139 Ill. 424, 28 N. E. 1057 (allowing advantage to be taken of statute of limitations without its being specially pleaded); *Wolf v. Beard*, 123 Ill. 585, 15 N. E. 161; *Thorpe v. Goewey*, 85 Ill. 611.

Failure To Deny.—Where administrator failed to file a denial in a district court of Iowa sitting as a court of probate, the court said: "As there was no written answer to the claim, in accord with the practice in such cases, wherein no formal pleadings are required, the resistance of the defendant put in issue all matters upon which a defense to the claim might be based, usually set up in a general denial. It is not to be presumed that defendant admitted plaintiff's right to recover, or the validity of his claim." *Scoville v. Fisher*, 77 Iowa 97, 41 N. W. 583.

Statutes Frequently Dispense With Answers.—See *Pence v. Young*, 22 Ind. App. 427, 53 N. E. 1060, quoting Ind. St. §2479, Burns 1894, relating to claims against estate which provides that "it shall not be necessary for executor or administrator to plead any matter by way of answer, except a set-off or a counterclaim."

76. La Roe v. Freeland, 8 Mich. 531. See also, *Dick v. Dumbauld*, 10 Ind. App. 508, 38 N. E. 78, where court held that a decree directing payment of "balance due" was too indefinite to be effectual because not purporting to ascertain and determine the sum due.

Order for Payment in Stock.—Where decedent had an option to pay a note by delivery of certain corporate stock, the court, upon allowing claim as a valid claim against estate, might order personal representative to pay the note by delivery of stock. *In re Vance's Estate*, 152 Cal. 760, 93 Pac. 1010.

When Claim Not Due.—An order of allowance may be made against estate with a proviso that claim shall be paid when due. *Kavanaugh v. Shaughnessy*, 41 Mo. App. 657.

77. Brown v. First Nat. Bank, 49 Colo. 393, 113 Pac. 483; *Maddox v. Maddox*, 97 Ind. 537.

78. West v. Krebaum, 88 Ill. 263 (order allowing claim entitled against estate instead of against administrator); *Johnson v. Gillett*, 52 Ill. 358 (deciding that no particular form is required to make order binding); *In re Bradley*, 25 Misc. 261, 54 N. Y. Supp. 555 (where decree established right but did not direct payment of money).

Failure of judge to sign order of allowance does not invalidate or render allowance of no effect. *McCormick v. McCormick*, 53 Neb. 255, 73 N. W. 693.

Insufficient Proof of Allowance.—In *Gentile v. Kennedy*, 8 N. M. 347, 45 Pac. 879, the court said: "Proceedings in the probate court are not conducted with a very strict regard to forms but it would be too unsafe to hold that a mere indorsement upon an account of its approval by some one styling himself probate judge was sufficient evidence of its allowance by the probate judge."

79. Page v. Ralph, 55 Ark. 52, 17 S. W. 365, holding resort to equity unnecessary and improper.

Notice Necessary.—It is error to alter decree without notice to party affected, even if at the same term.

4. Setting Aside Order. — a. *Jurisdiction.* — The court which allows or disallows claim usually has power to vacate or set aside its order upon motion or petition.⁸⁰ And when ground for equitable relief exists, a bill to set aside an allowance of a claim against the estate may be filed in a court of equity.⁸¹

b. *Who May Institute Proceedings.* — The heirs or devisees,⁸² creditors,⁸³ or other persons whose interests are affected,⁸⁴ may institute proceedings to vacate allowance or have it set aside.

c. *Sufficiency of Grounds.* — Fraud or mistake is a sufficient ground upon which to obtain a decree vacating or setting aside the order of allowance.⁸⁵ But an allegation that a claim allowed by the probate court was barred by statute of limitations does not set forth a sufficient ground for equitable relief.⁸⁶

Ault v. Bradley, 191 Mo. 709, 90 S. W. 775.

A *nunc pro tunc* order may be made correcting mistake when there is a discrepancy between judgment of the probate court allowing demand and the entries made on the back of demand and in the book of abstracts of allowances. *Ritchey v. Withers*, 72 Mo. 556.

80. Cal.—*In re Sullenberger*, 72 Cal. 549, 14 Pac. 513. **Colo.**—*Clemes v. Fox*, 25 Colo. 39, 53 Pac. 225, allowing vacation at a subsequent term. **Idaho.**—*Estate of Coryell*, 16 Idaho 201, 101 Pac. 723. **Ill.**—*Whitemore v. Coleman*, 144 Ill. App. 109 (at any time during administration); *Schlink v. Maxton*, 48 Ill. App. 471. **Ia.**—*In re Douglas' Estate*, 140 Iowa 603, 117 N. W. 982; *Estate of Davenport*, 85 Iowa 293, 52 N. W. 197. **Kan.**—*Lutz v. Bolton*, 59 Kan. 777, 53 Pac. 523. **Minn.**—*In re Gragg*, 32 Minn. 142, 19 N. W. 651, vacation by probate court. **Mo.**—*Mason v. Gaither's Estate*, 106 Mo. App. 354, 80 S. W. 277, vacation by probate court. **Neb.**—*In re Brusha's Estate*, 87 Neb. 254, 126 N. W. 1079, petition for vacation filed in probate court at same term.

81. Ark.—*Scott v. Penn*, 68 Ark. 492, 60 S. W. 235. **Mich.**—*Lyle v. Anderson*, 123 Mich. 601, 82 N. W. 246. **Mo.**—*Walther v. Null*, 233 Mo. 104, 134 S. W. 993; *Purdy v. Gault*, 19 Mo. App. 191. **Tex.**—*Cone v. Crum*, 52 Tex. 348; *Giddings v. Steele*, 28 Tex. 732.

Statutory Remedy Not Exclusive. The fact that the statute authorizes the probate court to vacate its order improperly allowing claim does not deprive a court of equity of its jurisdic-

tion to set aside an order fraudulently obtained. *Walther v. Null*, 233 Mo. 104, 134 S. W. 993; *Fitzpatrick v. Stevens*, 114 Mo. App. 497, 89 S. W. 897.

82. Ill.—*Schlink v. Maxton*, 153 Ill. 447, 38 N. E. 1063. **Mo.**—*Keele v. Keele*, 118 Mo. App. 262, 94 S. W. 775; *Martin v. Estate of Nichols*, 63 Mo. App. 342 (although heir has sold his interest in decedent's estate). **Neb.**—*In re Brusha's Estate*, 87 Neb. 254, 126 N. W. 1079. **Tex.**—*Giddings v. Steele*, 28 Tex. 732, 91 Am. Dec. 336.

83. Mason v. Gaither's Estate, 106 Mo. App. 354, 80 S. W. 277.

84. Sherman v. Whiteside, 190 Ill. 576, 60 N. E. 838 (legatees); *In re Douglas' Estate*, 140 Iowa 603, 117 N. W. 982; *Estate of Davenport*, 85 Iowa 293, 52 N. W. 197 (distributee).

85. Ark.—*Davis v. Rhea*, 90 Ark. 261, 119 S. W. 271; *Scott v. Penn*, 68 Ark. 492, 60 S. W. 235. **Colo.**—*Clemes v. Fox*, 25 Colo. 39, 53 Pac. 225. **Ill.**—*Schlink v. Maxton*, 48 Ill. App. 471. **Ia.**—*In re Douglas' Estate*, 140 Iowa 603, 117 N. W. 982; *Estate of Davenport*, 85 Iowa 293, 52 N. W. 197. **Mo.**—*Fitzpatrick v. Stevens*, 114 Mo. App. 497, 89 S. W. 897. **Neb.**—*Estate of McKenna v. McCormick*, 60 Neb. 595, 83 N. W. 844. **Tex.**—*Cone v. Crum*, 52 Tex. 348; *Giddings v. Steele*, 28 Tex. 732. **Wis.**—*McLachlan v. Staples*, 13 Wis. 448.

86. Dyer v. Jacoway, 50 Ark. 217, 6 S. W. 902; *Campbell v. Shotwell*, 51 Tex. 27; *Lott v. Cloud*, 23 Tex. 254.

The probate court may set aside an order allowing claim, if motion is filed during term in which allowance was

5. Appeals From Order.—*a. Right of Appeal.*—When the court passing on the validity of a claim has jurisdiction to make a final order, an appeal may be taken from an order allowing⁸⁷ or disallowing⁸⁸ a claim against the estate. But where the claim is single in character, although comprising several items, the appeal must embrace the whole decision and not be restricted to the portion disallowing certain specified items.⁸⁹ If order of disallowance is not a final adjudication of claimant's rights and he may, after rejection of his claim, sue to establish his demand in another court, such order is not appealable.⁹⁰

Appeal From Decision of Commissioners.—When the statute authorizes the submission of claims against the estates to commissioners for allowance or disallowance, an appeal may be taken from their decision.⁹¹

made and shows that claim was barred by statute. *In re Brusha's Estate*, 87 Neb. 254, 126 N. W. 1079.

Suit and Application.—For distinction between suit in equity to set aside and application to probate court, as to necessary grounds for relief, see *Hendron v. Kinner*, 110 Iowa 544, 80 N. W. 419, 81 N. W. 783.

A motion to set aside at a term subsequent to one in which claim was allowed will not be granted on the ground that personal representative had a valid defense against claim. *McGrew v. State Bank*, 60 Neb. 716, 84 N. W. 99. See also, *Hicks v. Oliver*, 78 Tex. 233, 14 S. W. 575.

87. Conn.—*Peck v. Sturges*, 11 Conn. 420, appeal from order accepting report of commissioners. **Ill.**—*Grier v. Cable*, 159 Ill. 29, 42 N. E. 395. **Minn.**—*State v. Probate Court of Hennepin County*, 28 Minn. 381, 10 N. W. 209, refusing to review on writ of certiorari. **Mo.**—*Estate of McCune*, 76 Mo. 200. **Neb.**—*Yeatman v. Yeatman*, 35 Neb. 422, 53 N. W. 335. **N. H.**—*Harmon v. Haines*, 68 N. H. 28, 38 Atl. 734; *Sawyer v. Copp*, 6 N. H. 42. **Pa.**—*Phillips v. Allegheny Valley R. Co.*, 107 Pa. 465.

When Certiorari Proper.—When the action of court directing the payment of claims is extra-judicial and void, a writ of certiorari is the proper remedy, since there is no appeal from an order of this nature. *Clarke v. Probate Court of Town of Richmond*, 29 R. I. 37, 69 Atl. 4.

88. Ark.—*Wyatt v. Burr*, 25 Ark. 476, appeal and not certiorari. **Colo.**—*Corning v. Ryan*, 3 Colo. 525. **Ind.**—*McCurdy v. Love*, 97 Ind. 62, appeal

proper and not a complaint for the review of judgment. **N. H.**—*Chapman v. Gale*, 32 N. H. 141.

Attorney's Fee.—An order of court refusing to allow a claim for attorney's fees is not one disallowing a claim of creditor against estate, within Minn. Gen. St., 1894, §4665, and therefore is not appealable. *Smith v. Pence*, 62 Minn. 321, 64 N. W. 822.

89. Stellmacher v. Bruder, 93 Minn. 98, 100 N. W. 473; *St. Paul Trust Co. v. Kittson*, 84 Minn. 493, 87 N. W. 1012; *Capehart v. Logan*, 20 Minn. 442.

Appeal from Order Vacating.—In Illinois, the order of the probate court setting aside its judgment allowing claim against estate is interlocutory only, and no appeal can be prosecuted from such order. *De Clerque v. Campbell*, 231 Ill. 442, 83 N. E. 224. But in Nebraska, the statute has been construed as authorizing an appeal where order allowing claim is vacated. *Estate of McKenna v. McCormick*, 60 Neb. 595, 83 N. W. 844.

Writ of Review.—In Oregon, a writ of review will be allowed where probate court approves a claim of administrator against estate which was not presented within the time limited by statute. *Farrow v. Nevin*, 44 Ore. 496, 75 Pac. 711.

90. Mont.—*In re Barker's Estate*, 26 Mont. 279, 67 Pac. 941. **Tex.**—*Campbell v. Tackaberry*, 51 Tex. 37. **Wash.**—*Wilkins v. Wilkins*, 1 Wash. 87, 23 Pac. 411.

91. Jenks v. Judge of Probate, 96 Mich. 122, 55 N. W. 563; *Lothrop v. Conely*, 39 Mich. 757; *Patton v. Bostwick*, 39 Mich. 218 (dismissing bill in

b. *Persons Entitled to Appeal.*—In most jurisdictions administrators or executors are authorized to prosecute an appeal from an order finally allowing a claim;⁹² but, unless expressly authorized by statute, personal representatives have no right to appeal, on behalf of creditors, from an order disallowing a claim against the estate.⁹³ Statutes relative to appeals are usually sufficiently liberal to permit appeals by creditors⁹⁴ and heirs,⁹⁵ especially where the personal representative

chancery to set aside order of disallowance); *Parry v. Wright*, 20 Wis. 483.

92. *Ala.*—*Pearson v. Darrington*, 32 Ala. 227. *Ark.*—*Hall v. Rutherford*, 89 Ark. 553, 117 S. W. 548; *Scott v. Penn*, 68 Ark. 492, 60 S. W. 235. *Me.*—*Reed v. Foster*, 54 Me. 499. *Mo.*—*Estate of McCune*, 76 Mo. 200. *Neb.*—*Herman v. Beck*, 68 Neb. 566, 94 N. W. 512, "either by appeal or error." *Tex.*—*Harper v. Stroud*, 41 Tex. 367, although administrator had himself also allowed claim.

Insolvency of the estate does not prevent an appeal by an executor or administrator from an order allowing claims. *Reid's Admr. v. Windsor*, 111 Va. 825, 69 S. E. 1101.

"One of two administrators may appeal from order allowing claims, although his co-administrator withholds his consent to such appeal." *Hammond v. Wayne Circuit Judge*, 140 Mich. 371, 103 N. W. 996.

A special administrator may appeal from an order allowing claim without special authority from the probate court. *In re McNamara's Estate*, 148 Mich. 346, 111 N. W. 1066.

In Alaska, an administrator has no authority as a matter of course to appeal from an order of the district court allowing or rejecting a claim against an estate, but, on proper application, the court may allow him to appeal on behalf of an heir or creditor. *Estate of Gladough*, 1 Alaska 649.

In Pennsylvania, if the court confirms the report of the auditor allowing claim, the executor has no standing, on appeal, to object to the allowance of claim. *Mays' Estate*, 25 Pa. Super. 267.

In South Dakota, an administrator can not appeal when order allowing claim against estate was made upon his default. *In re Carver's Estate*, 10 S. D. 609, 74 N. W. 1056.

93. *In re Carroll's Estate* (Iowa),

128 N. W. 929, where court refusing appeal by administratrix says: "It was to her interest, therefore, as administratrix, and to the protection of the estate in her hands, that the claims should be disallowed. Whether the order was in fact erroneous or otherwise, she at least, has no ground of complaint." And see *Succession of Henderson*, 113 La. 101, 36 So. 904; *Succession of Trouilly*, 52 La. Ann. 276, 26 So. 851; *Succession of Pettis*, 11 La. Ann. 177.

Where administrator's own claim against estate is disallowed by the court, he cannot appeal in his official capacity since, as administrator, he is not aggrieved by the judgment of which he complains. *In re Barker's Estate*, 26 Mont. 279, 67 Pac. 941.

94. *Ala.*—*Pearson v. Darrington*, 32 Ala. 227. *Minn.*—*Lake v. Albert*, 37 Minn. 453, 35 N. W. 177. *Neb.*—*Harman v. Harman*, 62 Neb. 452, 87 N. W. 177, appeal by assignee of claimant. *Vt.*—*Admr. of Gilbert's Estate v. Howe's Estate*, 47 Vt. 402.

In California, under Code Civ. Proc. §1616, as amended, an attorney may appeal from an order denying him compensation for services rendered to an executor or administrator, although not strictly a creditor of estate. *In re Hite's Estate*, 155 Cal. 448, 101 Pac. 448.

95. *Colo.*—*Denison v. Jerome*, 43 Colo. 456, 96 Pac. 166. *Ia.*—*Burns v. Keas*, 20 Iowa 16. *Tex.*—*Farmer v. Saunders* (Tex. Civ. App.), 128 S. W. 941; *Glenn v. Kimbrough*, 70 Tex. 147, 8 S. W. 81 (although heir had not appeared and contested claim).

In Maine, the courts have held that the statute does not authorize an appeal by heirs, either in their own name or in the name of the personal representative when the latter does not consent. *Burrows v. Bourne*, 67 Me. 225; *Reed v. Foster*, 54 Me. 499.

An administrator of an heir may ap-

refuses or fails to prosecute an appeal from the order.⁹⁶

c. *Time for Appeal*.—The time within which an appeal may be taken is usually prescribed by statute and an appeal not taken within the time prescribed will be dismissed.⁹⁷ Relief is sometimes given by statute to one who has been prevented from taking an appeal within the prescribed time by fraud, accident or mistake.⁹⁸

d. *Bond and Notice*.—**Bond**.—In order to perfect an appeal, an appeal bond is necessary, as in other cases,⁹⁹ except where appeal is by

peal from an order of allowance where the heir would have had right of appeal. *Hammers v. Sanders*, 106 Mo. App. 100, 80 S. W. 16; *Arnold v. Waldo*, 36 Vt. 204.

Distributee.—A distributee of estate, although not a party to the record, is a party in interest and may appeal from an order allowing claim. *Murphy v. Murphy*, 2 Mo. App. 156.

Devisees.—In Arkansas, devisees cannot appeal from an order allowing claim against estate, since they are not parties to record. *Scott v. Penn*, 68 Ark. 492, 60 S. W. 235.

96. *King v. Gridley*, 69 Mich. 84, 37 N. W. 50; *Daniels v. Stevens*, 60 Mich. 219, 27 N. W. 1; *Crouch v. Circuit Judge of Wayne County*, 52 Mich. 596, 18 N. W. 374, where court says: "The statute, however, gives an appeal to another only when the administrator declines to take it; but we think the right is to be liberally construed, and if the probate judge allows the appeal, he thereby passes upon the question of fact."

What Amounts to Refusal.—Although there has been no express demand and refusal, an administrator is to be regarded as having "declined to appeal" when he has failed to appeal within the time allowed by law. *Matter of Groner v. Hield*, 22 Wis. 200.

Proof of refusal may be made at any time when fact is questioned and need not be made or filed as a prerequisite to the right of appeal. *Schultz v. Brown*, 47 Minn. 255, 49 N. W. 982.

In Arkansas, heirs at law who are not parties to the record in probate court, can not appeal from a judgment of that court allowing a claim and their only remedy is a suit in equity to set aside for fraud in procurement of the allowance. *Davis v. Rhea*, 90 Ark. 261, 119 S. W. 271.

97. **Ark.**—*Green as Guardian v.*

Ford, 17 Ark. 586, no appeal after expiration of term in which claim allowed. **Ill.**—*Darwin v. Jones*, 82 Ill. 107, within twenty days, "as in other cases." **Ind.**—*Miller v. Carmichael*, 98 Ind. 236 (within twenty days); *Bell v. Mousset*, 71 Ind. 347. **Md.**—*Porter v. Timanus*, 12 Md. 283, within thirty days. **Mich.**—*Bartlett v. Wayne Circuit Judge*, 133 Mich. 604, 95 N. W. 721. **Minn.**—*Estate of Charles*, 35 Minn. 438, 29 N. W. 170 (within sixty days); *Auerbach v. Gloyd*, 34 Minn. 500, 27 N. W. 193. **Neb.**—*Baacke v. Dredla*, 57 Neb. 92, 77 N. W. 341. **Vt.** *Robinson v. Robinson's Exrs.*, 32 Vt. 738, within twenty days.

98. For allegations sufficient to sustain a petition for leave to enter an appeal under such a statute, see *Congdon v. Congdon*, 59 Vt. 597, 10 Atl. 732; *Cossar v. Truesdale*, 69 N. H. 490, 45 Atl. 252.

In Vermont, a petition for leave to enter an appeal after the time prescribed by statute must be brought to the next term, or the next term but one, after the happening of the fraud, accident or mistake. *Cilley v. Flander's Estate*, 62 Vt. 82, 19 Atl. 116.

99. **Ind.**—*Dallam v. Stockwell's Estate*, 33 Ind. App. 620, 71 N. E. 911. **Mich.**—*Bartlett v. Wayne Circuit Judge*, 133 Mich. 604, 95 N. W. 721; *Home Savings Bank v. Circuit Judge*, 113 Mich. 385, 71 N. W. 638. **Vt.** *Arnold v. Waldo*, 36 Vt. 204.

See the titles "Appeal Bonds;" "Appeals."

Approval of Bond.—Appeal bond must be approved by the county judge and court properly dismissed appeal when bond was approved by the county clerk. *Sullivan v. Breen*, 93 Ill. App. 526.

Obligee in Bond.—Bond by appealing creditor properly runs to the personal representative, although other creditors of estate are contesting appeal.

personal representative under a statute exempting executors or administrators from giving bond on appeal.¹

Notice. — Notice of appeal should be given to the opposing party.²

e. Proceedings in Court of Appeal. — Where formal pleadings are not required in courts of probate,³ the usual practice is to dispense with formal pleadings in the appellate court.⁴ The cause is tried *de novo* in the appellate court, as if no judgment had been rendered.⁵

lant's claim. *Home Savings Bank v. Wayne Circuit Judge*, 113 Mich. 385, 71 N. W. 638; *Daniels v. Stevens*, 60 Mich. 219, 27 N. W. 1.

Bond executed by a stranger and not by appellant is insufficient to give jurisdiction to appellate court. *Dickinson's Appeal*, 2 Mich. 337.

When bond is defective, under Michigan statute the remedy is not by dismissing appeal absolutely, but conditionally, in case an amended or new bond is not filed within a reasonable time to be fixed by the court. *King v. Gridley*, 69 Mich. 84, 37 N. W. 50.

1. *Adoue v. Gonzales* 22 Tex. Civ. App. 73, 54 S. W. 367.

Administrator Pendente Lite. — A person appointed by the court to conduct the defense against claim of administrator is not required to give bond on appeal. *Smith v. Smith's Estate*, 131 Mo. App. 201, 110 S. W. 662.

2. **Kan.**—*McIntosh v. Wheeler*, 58 Kan. 324, 49 Pac. 77. **Mich.**—*Home Savings Bank v. Wayne Circuit Judge*, 113 Mich. 385, 71 N. W. 638, deciding notice by appealing creditors to other creditors unnecessary, unless probate judge so direct. **Minn.**—*Schultz v. Brown*, 47 Minn. 255, 49 N. W. 982.

See the title "**Appeals.**"

Notice Unnecessary.—In a few jurisdictions, a person interested is bound to follow the case to the appellate court without notice of appeal. *Ford v. First Nat. Bank*, 201 Ill. 120, 66 N. E. 316; *Glenn v. Kimbrough*, 70 Tex. 147.

3. See *supra*, V, C, 2.

4. **Ill.**—*Thompson v. Black*, 200 Ill. 465, 65 N. E. 1092 (disregarding technical pleas when filed); *Thorp v. Goewey*, 85 Ill. 611. **Mich.**—*Westra v. Estate of Westra*, 101 Mich. 526, 60 N. W. 55; *Hoffman v. Estate of Pope*, 74 Mich. 235, 41 N. W. 907; *Kroll v. Ten Eyck's Estate*, 48 Mich. 230, 12 N. W. 164; *Comstock v. Smith*, 26 Mich. 306.

Mo.—*Wencker v. Thomson's Admr.*, 96 Mo. App. 59, 69 S. W. 743, allowing statute of limitations to be invoked without written plea. **Neb.**—*Estate of Fitzgerald v. Union Savings Bank*, 65 Neb. 97, 90 N. W. 994, pleadings unnecessary unless directed by appellate court.

In Vermont, although claims are received and disposed of without formal pleadings in the first instance, on appeal there must be a declaration and trial upon an issue regularly formed. *Thorp v. Thorp's Estate*, 75 Vt. 34, 52 Atl. 1051.

In Minnesota, the trial in appellate court without pleadings was held to be a mere irregularity not going to the jurisdiction of the court. *Lake v. Albert*, 37 Minn. 453, 35 N. W. 177.

No transcript of evidence need be filed, since case is at law and not in equity. *Johnson v. Shofner*, 23 Ore. 111, 31 Pac. 254.

Notice of Set-Off.—"An administrator is not required to give notice of set-off until the court, upon notice, shall order him to do so." *Westra v. Estate of Westra*, 101 Mich. 526, 60 N. W. 55.

5. **Ark.**—*Randolph v. Ward*, 29 Ark. 238; *Smith & Bro. v. Van Gilder*, 26 Ark. 527. **Ill.**—*Thorp v. Goewey*, 85 Ill. 611. **Kan.**—*Morgan v. Saline Valley Bank*, 4 Kan. App. 668, 46 Pac. 61. **Mo.**—*Watkins v. Donnelly*, 88 Mo. 322; *Wencker v. Thompson's Admr.*, 96 Mo. App. 59, 69 S. W. 743. **Ore.**—*Johnston v. Shofner*, 23 Ore. 111, 31 Pac. 254, deciding appellant entitled to jury trial. **Vt.**—*Lynde v. Davenport*, 57 Vt. 597, appellant entitled to jury trial; *Woodbury v. Woodbury's Estate*, 48 Vt. 94. **Wis.**—*York v. Orton*, 65 Wis. 6, 26 N. W. 166.

The order of the trial court allowing or disallowing claim can not be read to the jury during the hearing on appeal. *Central Bank v. St. John*, 17 Wis. 157.

The trial in the appellate court must proceed upon the same issues as those presented below⁶ and, although the court may allow amendment to statement of claim to supply deficiencies and omissions,⁷ the claimant cannot, by amendment, enlarge his claim on appeal.⁸

The personal representative is not allowed to urge on appeal formal objections of which he failed to avail himself on the trial below.⁹

Presumptions.—In the absence of proof to the contrary, the regularity of the proceedings in the lower court will be presumed on appeal.¹⁰

f. Decree.—The judgment should not be for an amount greater than the claim presented below¹¹ and should not award execution against the personal representative.¹²

Where appeal is from an order refusing permission to file claim

6. *Raub v. Nisbett*, 111 Mich. 38, 69 N. W. 77; *Hatheway's Appeal*, 52 Mich. 112, 17 N. W. 718; *Estate of Fitzgerald v. Union Savings Bank*, 65 Neb. 97, 90 N. W. 994; *Graham v. Estate of Townsend*, 62 Neb. 364, 87 N. W. 169.

Proof Required.—Claimant must establish his demand by competent testimony as originally required in the probate court. *Phillips v. Faherty*, 9 Kan. App. 380, 58 Pac. 801; *Morgan v. Saline Valley Bank*, 4 Kan. App. 668, 46 Pac. 61.

On an appeal from a refusal to grant an order to pay demand against estate in pursuance of a judgment allowing claim, the validity of the judgment of the probate court allowing claim can not be questioned. *Dooley v. Ryan's Estate*, 153 Mo. App. 669, 134 S. W. 30.

7. *Corson v. Waller*, 104 Mo. App. 621, 78 S. W. 656; *Cutting v. Estate of Ellis*, 67 Vt. 70, 30 Atl. 688.

Executor may move appellate court to have statement of claim made more definite and certain. *Watkins v. Donnelly*, 88 Mo. 322.

8. *Luizzi v. Brady's Estate*, 140 Mich. 73, 103 N. W. 574; *Dayton v. Estate of Dakin*, 103 Mich. 65, 61 N. W. 349; *Patrick v. Howard*, 47 Mich. 40, 10 N. W. 71; *Hillebrands v. Nibelink*, 40 Mich. 646; *In re Taylor's Estate*, 111 N. W. 229, refusing to allow amendment adding new items. *Compare, Killpatrick v. Helston*, 25 Ill. App. 127.

9. *Thompson v. Black*, 200 Ill. 465, 65 N. E. 1092; *King v. Brewer*, 121 Mich. 339, 80 N. W. 238, objection that

claim framed in indefinite language first raised on appeal.

Set-Off.—If administrator fail to take advantage of a set-off in the probate court, he cannot set it up at the trial in appellate court. *Berry v. Shackelford's Admr.*, 38 Mo. 392.

On Appeal.—Objection that claim is barred by the statute of limitations may be raised by the administrator upon appeal, although he failed to take advantage of the statute in the lower court, when administrator was without authority to waive statute. *Reay v. Heazleton*, 128 Cal. 335, 60 Pac. 977.

Dismissal of Appeal.—An heir who has perfected an appeal from an order allowing claim may dismiss his appeal, although other heirs object to dismissal, and mandamus will not lie to compel the appellate court to permit the other heirs to prosecute appeal. *Comstock v. St. Clair Circuit Judge*, 95 Mich. 48, 54 N. W. 635.

10. *Ala.*—*Boggs' Admr. v. Branch Bank*, 12 Ala. 494. *Ind.*—*Rodman v. Rodman*, 54 Ind. 444. *Ia.*—*Kilbourn v. Anderson*, 77 Iowa 501, 42 N. W. 431. *Ky.*—*Cox v. Higginbotham's Admr.*, 25 Ky. L. Rep. 1057, 76 S. W. 1079, presuming lost affidavit sustained claim. *Mo.*—*Gentry v. Field*, 143 Mo. 399, 45 S. W. 286; *Million v. Ohnsorg*, 10 Mo. App. 432 (presuming that necessary affidavit was orally made).

11. *White v. Allen*, 18 Mich. 194.

12. *Ia.*—*Voorhies v. Eubank*, 6 Iowa 274. *Mich.*—*Tyler v. Gallop Estate*, 68 Mich. 185, 35 N. W. 902. *Mo.*—*Wood v. Flanery*, 89 Mo. App. 632; *Amb's v. Caspari*, 13 Mo. App. 587. *Neb.*—*Bennett's Estate v. Taylor*, 4 Neb. (Unof.) 800, 96 N. W. 669.

because presented too late, the appellate court should not direct that lower court "permit the filing of the claims, and to set a day for hearing," but should render its decision as though the appeal had been from an order disallowing the claim.¹³

Review of Decree on Appeal. — Certiorari will not lie to review a judgment of the appellate court allowing a claim, writ of error being the proper remedy.¹⁴

6. Collateral Attack. — Although an order allowing or rejecting a claim against an estate is not strictly a common law judgment,¹⁵ if the court has jurisdiction, the order adjudicating a claim has the force of a judgment unless appealed from, vacated or set aside,¹⁶ and cannot be attacked in a collateral proceeding.¹⁷

D. ARBITRATION. — At common law, an administrator or executor might submit to arbitration a claim in favor of or against the estate¹⁸ without first obtaining the consent of the probate court,¹⁹ and a stat-

13. *Ribble v. Furmin*, 71 Neb. 108, 98 N. W. 420.

14. *Hancock Mut. Life Ins. Co. v. Hill's Estate*, 108 Mich. 129, 65 N. W. 748.

15. *Cal.*—*Magraw v. McGlynn*, 26 Cal. 420. *Ind.*—*Hight v. Taylor*, 97 Ind. 392 (no lien created and no right to issue of execution); *City of La Porte v. Organ*, 5 Ind. App. 369, 32 N. E. 342. *Ia.*—*Smith v. Shawhan*, 37 Iowa 533; *Little v. Sinnett*, 7 Iowa 324. *Mich.*—*McKinney v. Curtiss*, 60 Mich. 611, 27 N. W. 691.

16. *Ark.*—*Davis v. Rhea*, 90 Ark. 261, 119 S. W. 271; *Jessup v. Spears*, 38 Ark. 457. *Ill.*—*Atherton v. Hughes*, 249 Ill. 317, 94 N. E. 546 (as against personal estate); *Ford v. First Nat. Bank*, 201 Ill. 120, 66 N. E. 316; *Sanger v. Palmer*, 36 Ill. App. 485 (refusing to allow foreclosure in equity of a mortgage securing claim which had been disallowed by court). *Mich.*—*Chapoton v. Prentis*, 144 Mich. 283, 107 N. W. 879; *Flynn v. Lorimer's Estate*, 141 Mich. 707, 105 N. W. 37; *Finley v. Dubay*, 112 Mich. 334, 70 N. W. 885 (refusing foreclosure of mortgage securing note disallowed by commissioners). *Minn.*—*McCord v. Knowlton*, 79 Minn. 299, 82 N. W. 589. *Mo.*—*Moody v. Peyton*, 135 Mo. 482, 36 S. W. 621, 58 Am. St. Rep. 604; *McKinney's Admr. v. Davis*, 6 Mo. 501. *N. Y.*—*In re Bradley*, 25 Misc. 261, 54 N. Y. Supp. 555. *Wash.*—*Nash v. Wakefield*, 30 Wash. 581, 71 Pac. 33.

An allowance by the personal representative is not like an order of court and is not final. *McDermott v.*

McDermott's Estate, 138 Iowa 351, 116 N. W. 122; *Thomas v. Chamberlain*, 39 Ohio St. 112.

17. *Ark.*—*James v. Gibson*, 73 Ark. 440, 84 S. W. 485; *Jackson v. Gorman*, 70 Ark. 88, 66 S. W. 346; *Stokes v. Pillow*, 64 Ark. 1, 40 S. W. 580. *Cal.*—*Shiels v. Nathan*, 12 Cal. App. 604, 108 Pac. 34. *Kan.*—*Van Dusen v. Topeka Woolen Mill Co.*, 74 Kan. 437, 87 Pac. 74. *Mich.*—*Palms' Appeal*, 44 Mich. 637, 7 N. W. 200. *Mo.*—*Walther v. Null*, 233 Mo. 104, 134 S. W. 993; *Clark v. Thias*, 173 Mo. 628, 73 S. W. 616; *Clark v. Bettelheim*, 144 Mo. 258, 46 S. W. 135; *State v. Shipman*, 87 Mo. App. 569. *Neb.*—*Yeatman v. Yeatman*, 35 Neb. 422, 53 N. W. 385. *N. M.*—*Gutierrez v. Scholle*, 12 N. M. 328, 78 Pac. 50. *N. J.*—*Seymour v. Goodwin*, 68 N. J. Eq. 189, 59 Atl. 93. *N. Y.*—*Sutherland v. St. Lawrence County*, 42 Misc. 38, 85 N. Y. Supp. 696. *Tex.*—*Bloom v. Oliver*, 56 Tex. Civ. App. 391, 120 S. W. 1101. *W. Va.*—*Hurxthal v. St. Lawrence Broom Co.*, 53 W. Va. 87, 44 S. E. 520, 97 Am. St. Rep. 954. *Wis.*—*Carpenter v. U. S. Fidelity & Guaranty Co.*, 123 Wis. 209, 101 N. W. 404.

18. *Conn.*—*Alling v. Munson*, 2 Conn. 691. *Ga.*—*Merchants Bank of Macon v. Rawls*, 21 Ga. 334. *Me.*—*Kendall v. Bates*, 35 Me. 357. *Mass.*—*Bean v. Farnam*, 6 Pick. 269; *Coffin v. Cottle*, 4 Pick. 454. *N. Y.*—*Wood v. Tunnicliff*, 74 N. Y. 38. *Ohio.*—*Child's Exr. v. Updyke*, 9 Ohio St. 333. *Vt.*—*Powers v. Douglass*, 53 Vt. 471.

19. *Admr. of Dickinson v. Dutcher*, *Brayton (Vt.)* 104.

ute which simply authorizes submission of a disputed claim to referees does not take away the common law right.²⁰ Statutes sometimes expressly authorize the submission to arbitration of claims against an estate.²¹

E. REFERENCE.—1. In General.—In a number of jurisdictions the court is given authority to refer disputed claims against an estate to a referee.²²

A substantial compliance with the statutory provisions concerning reference is required.²³

Claims Referable.—Reference is usually not restricted to any particular class of claims and may be of any disputed claim legal or equitable,²⁴ but the claim must be one which accrued against the decedent in his lifetime or would have accrued against him, if he had lived.²⁵

Consent.—A reference cannot be made under the usual statutory provisions unless the claimant and personal representative consent,²⁶

20. **N. Y.**—Wood *v.* Tunncliffe, 74 N. Y. 38. **Ohio.**—Child's Exr. *v.* Updyke, 9 Ohio St. 333. **S. D.**—Untermyer *v.* Seelig, 13 S. D. 148, 82 N. W. 394.

21. For cases construing such a statute, see McLeod *v.* Graham, 132 N. C. 473, 43 S. E. 935; Dunn *v.* Beaman, 126 N. C. 766, 36 S. E. 172.

In Illinois, the courts have held that the administrator or executor cannot submit a claim to arbitration so as to bind estate. Clark *v.* Hogle, 52 Ill. 427; Reitzell *v.* Miller, 25 Ill. 67.

22. **Cases Deciding Reference Proper.**—Cal.—Hall *v.* Superior Court, 69 Cal. 79, 10 Pac. 257. **Mo.**—Estate of Jarboe, 227 Mo. 59, 127 S. W. 26. **N. H.**—McLaughlin *v.* Newton, 53 N. H. 531. **N. Y.**—Klein *v.* Runk, 130 App. Div. 474, 114 N. Y. Supp. 1062. **Vt.**—Noyes *v.* Phillips, 57 Vt. 229.

23. Bucklin *v.* Chapin, 53 Barb. (N. Y.) 488, 35 How. Pr. 155.

Estoppel To Require Compliance. A party who consents to the appointment of two referees and submits to them the matter in controversy is estopped to question the regularity of appointment, although statute provides for submission to one or three persons. Shepherd *v.* Shepherd's Estate, 108 Mich. 82, 65 N. W. 580.

24. Dickinson *v.* Hoes, 84 N. Y. Supp. 152, 33 N. Y. Civ. Proc. 101 (where question arose concerning an alleged gift *causa mortis*); Fowler *v.* Hebbard, 40 App. Div. 108, 57 N. Y.

531; White *v.* Story, 43 Barb. (N. Y.) 124; Francisco *v.* Fitch, 25 Barb. (N. Y.) 130; Noyes *v.* Phillips, 57 Vt. 229.

25. Dana *v.* Prescott, 1 Mass. 200 (holding void reference of demand of executor as such); *In re* Mudge, 118 N. Y. Supp. 568; Genet *v.* Willock, 93 App. Div. 588, 87 N. Y. Supp. 938 (holding improper reference of claim for funeral expenses); Shorter *v.* Mackey, 13 App. Div. 20, 43 N. Y. Supp. 112; Godding *v.* Porter, 17 Abb. Pr. (N. Y.) 374.

Judgment Not Referable.—A judgment entered against decedent in his lifetime is not a claim which may be referred within New York Code Civ. Proc. §§1822, 2718. *In re* Browne, 35 Misc. 362, 71 N. Y. Supp. 1034.

26. Hall *v.* Superior Court, 69 Cal. 79, 10 Pac. 257; Roe *v.* Boyle, 81 N. Y. 305; Bucklin *v.* Chapin, 53 Barb. (N. Y.) 488, 35 How. Pr. 155 (consent in writing required); *In re* Kirby's Estate, 36 Misc. 312, 73 N. Y. Supp. 509.

Executor or administrator may agree to a reference of claim without first requiring vouchers or an affidavit of the justice of claim. Russell *v.* Lane, 1 Barb. (N. Y.) 519.

Effect of Consent.—The objection that the claim is not one which may be referred is not waived by consent of executor to a reference of claim. Shorter *v.* Mackey, 13 App. Div. 20, 43 N. Y. Supp. 112.

and neither party being bound to refer, if a reference is desired there must first be an offer to refer.²⁷

2. Approval of Reference.—Approval by the court of the agreement to refer and an order of reference are necessary,²⁸ but the court must allow the reference when creditor and administrator or executor agree to submit to referees.²⁹

3. Pleadings and Hearing.—**Pleadings.**—No formal pleadings are necessary when the trial is before a referee,³⁰ but the agreement to refer must present substantially the issue between the parties.³¹

Amendment of Claim.—The referee has no authority to allow a creditor to amend the claim so as to vary the matter referred.³²

Hearing.—The referee is restricted on the hearing to the precise claim referred,³³ and the executor or administrator may avail himself of any legal defense as though the same had been properly pleaded.³⁴

4. Report and Action Thereon.—The referee must make his report to the court³⁵ and this report must be confirmed before judgment can be entered.³⁶

The court may set aside the report of the referee³⁷ and appoint another referee in his place.³⁸

27. *Proude v. Whiton*, 15 How. Pr. (N. Y.) 304.

In New York, offer to refer claim need not be in writing under 4 Rev. St. N. Y. (8th ed.) p. 2561, §36, which provides for reference "in writing." *Roberts v. Pike*, 13 N. Y. Supp. 559, 19 Civ. Proc. 422.

Consent of Distributee Insufficient. A reference must be on application of the personal representative and is void, if made on the application of distributee. *Boyd v. Lowry*, 53 Miss. 352.

28. *Roe v. Boyle*, 81 N. Y. 305; *Burnett v. Gould*, 27 Hun (N. Y.) 366; *Bucklin v. Chapin*, 53 Barb. (N. Y.) 488; *Tracy v. Suydam*, 30 Barb. (N. Y.) 110.

Revocation of Order of Reference. The probate court may revoke an order of reference on petition of one not a party to reference on proof that reference is collusive as between administrator and claimant. *Lathrop v. Hitchcock*, 38 Vt. 496.

29. *Kingman v. Judge of Probate*, 31 N. H. 171.

30. *Roe v. Boyle*, 81 N. Y. 305; *Klein v. Runk*, 130 App. Div. 474, 114 N. Y. Supp. 1062; *Rutherford v. Soop*, 85 Hun 119, 32 N. Y. Supp. 636; *Tracy v. Suydam*, 30 Barb. (N. Y.) 110.

31. *Woodin v. Bagley*, 13 Wend. (N. Y.) 453.

Matters of defense to claim need not be stated in agreement to refer. *Tracy v. Suydam*, 30 Barb. (N. Y.) 110.

32. *Eldred v. Eames*, 115 N. Y. 401, 22 N. E. 216; *Von Hermann v. Wagner*, 81 Hun 431, 30 N. Y. Supp. 991. *Contra*, *Lounsbury v. Sherwood*, 53 App. Div. 318, 65 N. Y. Supp. 676.

33. *Roulston v. Roulston*, 5 Misc. 569, 26 N. Y. Supp. 667.

34. *Tracy v. Suydam*, 30 Barb. (N. Y.) 110.

35. *Burnett v. Gould*, 27 Hun (N. Y.) 366.

36. **N. Y.**—*Smith v. Velie*, 60 N. Y. 106; *Baumann v. Moseley*, 63 Hun 492, 18 N. Y. Supp. 563; *Burnett v. Gould*, 27 Hun (N. Y.) 366. But see **N. Y.** *Jenkinson v. Harris*, 27 Misc. 714, 59 N. Y. Supp. 548, deciding confirmation unnecessary under present N. Y. St. §2718. **Tenn.**—*Allen v. Shanks*, 90 Tenn. 359, 16 S. W. 715. **Vt.**—*Noyes v. Phillips*, 57 Vt. 229.

37. *Fullerton Lumb. Co. v. Massard*, 144 Mo. App. 31, 128 S. W. 831.

Upon setting aside report, the court cannot, under New York statute, pronounce the judgment which the referee should have given. *Coe v. Coe*, 37 Barb. (N. Y.) 232.

38. *Adams v. Brady*, 67 Hun 521, 22 N. Y. Supp. 466; *Masten v. Budington*, 18 Hun (N. Y.) 105.

VI. SALES OF PROPERTY UNDER ORDER OF COURT. — A. PROCEEDINGS TO SELL REAL ESTATE. — 1. Necessity for Judicial Proceedings. — Since the title to the real estate of a decedent vests in the heirs at law or devisee, the executor or administrator has no power over it except that given by statute or by the will,³⁹ but modern statutes authorize the personal representative to bring proceedings to sell real estate when personalty is insufficient to pay debts and legacies and sometimes for the purpose of securing proper distribution.⁴⁰

The court's jurisdiction to order a sale of decedent's land being statutory, proceedings must be commenced by an application disclosing statutory grounds for sale before a valid order of sale can be obtained;⁴¹ although in a few jurisdictions the statute authorizes the court to order a sale on its own motion when the accounts of the personal representative show that personalty is insufficient.⁴²

39. Ala.—*Taylor v. Crook*, 136 Ala. 354, 34 So. 905; *Hall's Heirs v. Hall*, 47 Ala. 290. **Ga.**—*Burke v. Huff*, 103 Ga. 598, 30 S. E. 546. **Ill.**—*Le Moyne v. Quimby*, 70 Ill. 399. **Ind.**—*Hankin's Admr. v. Kimball*, 57 Ind. 42. **Mass.**—*Drinkwater v. Drinkwater*, 4 Mass. 354. **Mich.**—*Sheldon v. Estate of Rice*, 30 Mich. 296. **Miss.**—*Ashley v. Young*, 79 Miss. 129, 29 So. 822. **Mo.**—*Smith v. Black*, 231 Mo. 681, 132 S. W. 1129. **N. H.**—*Lucy v. Lucy*, 55 N. H. 9. **N. Y.**—*Ballou v. Ballou*, 78 N. Y. 325. **Ohio.**—*Carr v. Hull*, 65 Ohio St. 394, 62 N. E. 439.

40. Consult local statutes.

"The right of an administrator to subject the lands of his intestate to the payment of the debts of the estate is superior to the right of the heirs at law to have partition of such lands." *Stout v. Stout*, 82 Ohio 358, 92 N. E. 465.

Where decedent left sufficient personalty to pay debts but the court ordered this personalty to be turned over to the representatives of the sole devisee, it having been represented to the court that all debts had been paid, creditors not in court when the order was made may resort to the real estate for the payment of debts, without suing the person who had received the personalty or the bondsmen of the personal representative. *Blickensderfer v. Hanna*, 231 Mo. 93, 132 S. W. 678.

41. Ala.—*Landford v. Dunklin*, 71 Ala. 594; *Robertson v. Bradford*, 70 Ala. 385; *Tyson v. Brown*, 64 Ala. 244. **Cal.**—*Gregory v. McPherson*, 13 Cal.

562. Idaho.—*Ethell v. Nichols*, 1 Idaho 741. **Ill.**—*Bostwick v. Skinner*, 80 Ill. 147; *Schnell v. City of Chicago*, 38 Ill. 382, 87 Am. Dec. 304. **Ia.**—*Long v. Burnett*, 13 Iowa 28.

42. Young v. Downey, 145 Mo. 250, 46 S. W. 1086; *Teverbaugh v. Hawkins*, 82 Mo. 180; *Garrett v. Bicknell*, 64 Mo. 404.

When Sale Authorized By Will.

The statutes authorizing the sale of decedent's realty for the payment of his debts are not intended to take the place of adequate testamentary provision and "if the necessity for the proceeding does not exist, jurisdiction under the statute does not exist or at least should not be exercised." *Personeni v. Goodale*, 199 N. Y. 323, 92 N. E. 754.

Place for Filing Petition.—The petition for the sale of decedent's real estate should be filed in the court which appointed the personal representative and the venue cannot be changed to another circuit. *Daniels v. Bruce* (Ind.), 93 N. E. 675. See also *Scott v. Royston*, 223 Mo. 568, 123 S. W. 454.

Sale in Equity.—Since §157 Ala. code, 1896 is the only source of authority for the sale of decedent's land for distribution, the statutory requirements applicable to such proceedings in the probate court must be observed in a court of equity administering an estate and a failure to observe them renders decree erroneous. *Hardwick v. Hardwick*, 164 Ala. 390, 51 So. 389; *Roy v. Roy*, 159 Ala. 555, 48 So. 793.

2. Petition for Order of Sale.—a. *Time for Filing.*—(I.) In **Absence of Statute.**—The personal representative should file his petition as soon as he ascertains that the personal property in his hands will be insufficient to pay debts and legacies,⁴³ and the petition must be filed before the creditors of the estate have lost the right to enforce their claims by lapse of time.⁴⁴ Where there is no statute of limitations relating to the matter, proceedings to sell can be maintained only when the petition is filed within a reasonable time, in view of all the circumstances of the case.⁴⁵

—(II.) **Effect of Statutory Provisions.**—The time for filing the petition to sell real estate is usually held to be unaffected by the general

43. *Estate of Godfrey*, 4 Mich. 308; *Stout v. Stout*, 82 Ohio 358, 92 N. E. 465.

Petitioner need not wait until claims which more than exhaust personalty have been filed, if such claims exist. *Ditton v. Hart* (Ind.), 95 N. E. 119.

44. **Mass.**—*Tarbell v. Parker*, 106 Mass. 347. **Mich.**—*Hoffman v. Beard*, 32 Mich. 218; *Estate of Godfrey*, 4 Mich. 308. **Miss.**—*Ferguson v. Scott*, 49 Miss. 500. **N. Y.**—*Skidmore v. Romaine*, 2 Bradf. Sur. 122.

45. **Ia.**—*Plummer v. Kennington*, 149 Iowa 419, 128 N. W. 552. **Kan.**—*Thomas v. Williams*, 80 Kan. 632, 103 Pac. 772. **Minn.**—*Mowty v. McQueen*, 80 Minn. 385, 83 N. W. 348. **N. H.**—*Hall v. Woodman*, 49 N. H. 295.

Cases holding petition filed within reasonable time. **Ark.**—*Brown v. Nelms*, 86 Ark. 368, 112 S. W. 373 ("in the absence of circumstances excusing the delay, seven years is the shortest period of delay which will bar the right to sell for the payment of debts"); *Mayo v. Mayo*, 79 Ark. 570, 96 S. W. 165 (delay of twelve years where by agreement executor took charge of land with a view to payment of debts); *Brogan v. Brogan*, 63 Ark. 405, 39 S. W. 58, 58 Am. St. Rep. 124 (delay excused because litigation pending). **Ill.**—*Frier v. Lowe*, 232 Ill. 622, 83 N. E. 1083 (delay of four years where no one had changed his position so as to be prejudiced); *Miller v. Hammond*, 126 Ill. App. 267 (delay while occupied as a homestead); *Thomas v. Waters*, 122 Ill. App. 434 (delay while subject to dower and homestead representing value of land). **Ia.**—*Milburn v. East*, 128 Iowa 101, 102 N. W. 1116 (a delay of three and one-half years when administrator was

without knowledge of decedent's ownership); *Schlarb v. Holderbaum*, 80 Iowa 394, 45 N. W. 1051 (lapse of nine years). **Me.**—*Lebroke v. Damon*, 89 Me. 113, 35 Atl. 1028, delay of two years. **Mass.**—*Abbott v. Downs*, 168 Mass. 481, 47 N. E. 94, where all claims barred except executors. **Mo.**—*Robbins v. Boulware*, 190 Mo. 33, 88 S. W. 674. **Ore.**—*In re Smith's Will*, 43 Ore. 595, 75 Pac. 133, 73 Pac. 336. **Pa.**—*Freker v. Berg*, 193 Pa. 442, 44 Atl. 580. **Tex.**—*Moody v. Looscan* (Tex. Civ. App.), 44 S. W. 621, delay of fifteen years.

Cases holding petition too late. **Ark.**—*Black v. Robinson*, 70 Ark. 185, 68 S. W. 489 (delay of more than seven years with no excuse other than litigation between heirs); *Mays v. Rogers*, 37 Ark. 155 (ten years without excuse). **Cal.**—*Estate of Crosby*, 55 Cal. 574, seventeen years after claim allowed. **Ill.**—*Graham v. Brock*, 212 Ill. 579, 72 N. E. 825; *Furlong v. Riley*, 103 Ill. 628, ten years; *Langworthy v. Baker*, 23 Ill. 484, twenty-seven years; *Digby v. Weber*, 149 Ill. App. 487, twenty-seven years. **Ia.**—*In re Brigham's Estate*, 144 Iowa 71, 120 N. W. 1054 (delay of ten years and possible enhancement in value an insufficient excuse); *Creswell v. Slack*, 68 Iowa 110, 26 N. W. 42 (four years after claim allowed).

Minn.—*State v. Probate Court*, 40 Minn. 296, 41 N. W. 1033, ten years. **N. Y.**—*Allen v. Sanford*, 55 Hun 607, 8 N. Y. Supp. 182, nine years.

In Iowa, the fact that decedent's real estate could not have been sold sooner without great sacrifice is sufficient excuse for not filing petition until some months after the expiration of the time allowed for filing claims against estate. *Conger v. Cook*, 56 Iowa 117, 8 N. W. 782.

statutes of limitations,⁴⁶ but the courts frequently hold that the reasonable time within which the power of the personal representative to apply must be exercised is to be fixed by analogy to some other statutory provision within the jurisdiction.⁴⁷ In some jurisdictions, there are express statutory provisions limiting the time within which a petition to sell decedent's real estate may be filed.⁴⁸

(III.) Collateral Attack Because of Time of Filing. — It is generally held that no advantage can be taken in a collateral proceeding of the fact that the petition for authority to sell was not filed at a proper time, since this did not deprive the trial court of jurisdiction,⁴⁹ but

46. III.—*People v. Lanham*, 189 Ill. 326, 59 N. E. 610. Ia.—*McCrary v. Tasker*, 41 Iowa 255, rule of reasonable time if statute contains no express limitation. N. Y.—*Skidmore v. Romaine*, 2 Bradf. Sur. 122, where court says that general statute of limitations applies only to actions and that "application for sale of real estate is in no strict sense an action." Ohio. *Lafferty v. Shinn*, 38 Ohio St. 46.

47. *Ricard v. Williams*, 7 Wheat. (U. S.) 59, 5 L. ed. 398, where after holding proceedings not within purview of general statute of limitations in Connecticut, Justice Story said: "But we do think that it is a case clearly within the same equity as those which are governed by the statute of limitations; and that by analogy to the cases where a limitation has been applied to other rights and equities not within the statute, the reasonable time within which the power should be exercised ought to be limited to the same period which regulates rights of entry."

In Illinois, the courts have held that in analogy to the statute of limitations relating to the lien of judgments, the period of seven years is the proper time within which the application should be made; but if the delay is satisfactorily explained, the mere lapse of time will not bar an application. *Bishop v. O'Connor*, 69 Ill. 431; *McCoy v. Morrow*, 18 Ill. 519; *Cruttenden v. Finlay*, 123 Ill. App. 523.

48. Cases Construing Such Statutes. *Slocum v. English*, 62 N. Y. 494 (holding sale void under New York Statute [2 Rev. St. 100, §1], where proceedings were not instituted within three years after the granting of original letters of administration); *Estate of Cornwall*, 1 Tuck. (N. Y.) 250; *In re Smith's Estate*, 25 Wash. 539, 66 Pac.

93 (construing Laws 1895, p. 197, providing that "no real estate of a deceased person shall be liable for his debts unless letters testamentary or of administration be granted within six years from the date of the death of such decedent)."

In Indiana, §2487, Burns' Rev. St. 1894, limiting to five years the time in which personal representative may bring proceedings to sell real estate fraudulently conveyed, while not strictly a statute of limitations precludes recovery where the condition has not been complied with. *Galentine v. Brubaker*, 147 Ind. 458, 46 N. E. 903.

In Arkansas, Kirby's Dig. §224, by which executors and administrators are required "to make final settlement of their administration within three years from the date of letters, is only directory, and does not divest the probate court of jurisdiction to complete the administration" of the estate after that time by entertaining a petition to sell real estate to pay debts. *Brown v. Nelms*, 86 Ark. 368, 112 S. W. 373.

49. Ia.—*Stanlay v. Noble*, 59 Iowa 666, 13 N. W. 839, where court doubted whether a jurisdictional question was raised by the claim that petition was filed before administrator had rendered a full statement of all claims against estate and an account of disposition of personalty, as required by statute. Mich.—*Pratt v. Houghtaling*, 45 Mich. 457, 8 N. W. 72, dictum. "An order granting the petition, at any time before the final settlement of the estate, doubtless could not be held void for want of jurisdiction or subject to an attack collaterally, on account of the delay in making the application." *State v. Probate Court of Ramsey County*, 40 Minn. 296, 41 N. W. 1033. N. H. *Hall v. Woodman*, 49 N. H. 295. N. Y. *Mooers v. White*, 6 Johnson Ct. 360.

in some jurisdictions the courts have permitted such collateral attack.⁵⁰

b. Parties. — (I.) Who May Be Applicants. (A.) ADMINISTRATOR OR EXECUTOR. — In the majority of jurisdictions, the statutes have been construed as authorizing the executor or administrator to make application for the sale of decedent's real estate,⁵¹ but a special administrator is usually given no authority to make such application.⁵²

(B.) CREDITORS. — Creditors are frequently given authority to institute proceedings for the sale of real estate belonging to a decedent's estate,⁵³ or to compel the personal representative of the deceased

50. *Heath v. Wells*, 5 Pick. (Mass.) 139; *Thompson v. Brown*, 16 Mass. 171 (see note in criticism of case at end of reported case).

51. *Ala.*—*Bolen v. Hoven*, 143 Ala. 652, 39 So. 379, petition filed by any other than the personal representative gives the court no jurisdiction; *Matheson's Heirs v. Hearin*, 29 Ala. 210. *Ky.*—*Huser v. Smith*, 1 Ky. L. Rep. 56. *La.*—*Savage v. Williams*, 15 La. Ann. 250. *N. C.*—*Town of Tarboro v. Pender*, 153 N. C. 427, 69 S. E. 425, administrator of judgment debtor is proper person to apply for sale of homestead lands for distribution among judgment creditors. *Tex.*—*Lee v. King*, 21 Tex. 577; *Allen v. Clark*, 21 Tex. 404; *Alexander v. Maverick*, 18 Tex. 179.

For cases holding personal representative not proper applicant, see *Washington v. McCaughan*, 34 Miss. 304 (sale sought to secure better distribution); *Peirce v. Graham*, 85 Va. 227, 7 S. E. 189 (sale to pay debts).

In *Pennsylvania*, although executor is not proper party plaintiff to sell lands charged with legacies, and proceedings should be instituted by the legatees themselves, if legatees are made parties defendant, the court has jurisdiction to order sale. *Littleton's Appeal*, 93 Pa. 177.

Joinder of Personal Representatives.

If there are two or more administrators or executors, all should join in the petition to sell decedent's real estate. *Hannum v. Day*, 105 Mass. 33. If all do not join, the record should show why those who do not apply, do not join in the application. *Personette v. Johnson*, 40 N. J. Eq. 173; *Fitch v. Witbeck*, 2 Barb. Ch. (N. Y.) 161.

Compare, *Grayson v. Weddle*, 63 Mo. 523, holding court not deprived of jurisdiction because suit instituted by one of two administrators where adminis-

trator who did not join never took any part in administration of estate. See, also *Jackson v. Robinson*, 4 Wend. (N. Y.) 436.

Joinder of Administrator and Heirs. In Alabama, the administrator and heir can not properly be joined as plaintiffs since statute does not authorize heir to ask for order of sale. *Kirkbride v. Kelly*, 167 Ala. 570, 52 So. 660.

Estoppel of Administrator.—The administrator is not prevented by estoppel from filing a petition for sale by reason of his having consented to the sale of the land by the heir when the rights of creditors are affected and the sale necessary to satisfy them. *Moncrief v. Moncrief*, 73 Ind. 587.

The appointment of plaintiff as administrator *de bonis non* instead of administrator *de bonis non* with the will annexed is not a fatal objection to plaintiff's petition to sell real estate when nothing remains to be done under and by virtue of the provisions of the will. *Frier v. Lowe*, 232 Ill. 622, 83 N. E. 1083.

52. *Long v. Burnett*, 13 Iowa 28, 81 Am. Dec. 420, holding void and subject to be impeached collaterally an order of the probate court directing the sale of decedent's real estate upon application of a special administrator.

53. *Md.*—*McGaw v. Gortner*, 96 Md. 489, 54 Atl. 133, creditor may institute such proceedings only where claim is for a debt due from decedent in his lifetime and not where claim is merely for breach of contract by decedent's heirs. *La.*—*Succession of Winn*, 30 La. Ann. 702 (only a creditor who has obtained a judgment or a legal acknowledgment of his debt); *Dubuch v. Wildermuth*, 3 La. Ann. 407. *Miss.*—*Cheairs v. Cheairs*, 81 Miss. 662, 33 So. 414 (holding that, under Code 1892, §1895,

debtor to sell the real estate in order to pay debts of the estate.⁵⁴

(C.) OTHER PERSONS INTERESTED.—In some jurisdictions the application for order of sale may be made by legatees⁵⁵ or other persons interested in the estate.⁵⁶

(II.) Who Should Be Defendants. — A proceeding to sell decedent's real estate is adversary in its nature and no valid order of sale can be obtained *ex parte*.⁵⁷

Although in a few jurisdictions the failure to make an heir a party does not invalidate the sale as to his interest because the proceedings are treated as *in rem*,⁵⁸ in nearly all jurisdictions the heirs or devisees

only creditor whose claim is properly registered, after having been probated and allowed, may file petition); Allen v. Hillman, 69 Miss. 225, 13 So. 871. N. Y.—*In re* Lowerre, 48 Misc. 317, 96 N. Y. Supp. 764; *In re* Buffalo State Hospital, 47 Misc. 33, 95 N. Y. Supp. 209. S. C.—*Scruggs v. Foot*, 19 S. C. 274.

Bill in Equity By Creditor.—Chancery will not decree sale of decedent's land at suit of a creditor, unless he has some specific lien or right therein (*McPike v. Wells*, 54 Miss. 136. Consult, also, *Ballard v. Kilpatrick*, 71 N. C. 281), dismissing for want of jurisdiction a civil action in the nature of a creditor's bill. But see, *Simpson v. Bockins*, 77 N. J. Eq. 339, 78 Atl. 758.

Joinder of Creditor and Personal Representative.—In North Carolina, a creditor of decedent's estate cannot become a party plaintiff with the personal representative in a proceeding to sell real estate to pay debts. *Strickland v. Strickland*, 129 N. C. 84, 39 S. E. 735; *Rawls v. Carter*, 119 N. C. 596, 26 S. E. 154; *Dickey v. Dickey*, 118 N. C. 956, 24 S. E. 715.

54. *Hobbs v. Cashwell*, 152 N. C. 183, 67 S. E. 495; *Yarborough v. Moore*, 151 N. C. 116, 65 S. E. 763 (a single creditor may compel the personal representative to act); *Pelletier v. Saunders*, 67 N. C. 261.

Who May Apply as Creditor.—A claimant who has rendered services to an estate during administration and whose claim has been allowed by the court, may apply for the sale of decedent's real estate, if administrator neglects to do so. *In re* Coutts, 87 Cal. 480, 25 Pac. 685.

Who Not Entitled as Creditor.—One who has bought the interest of an heir in the real estate of decedent can

not make such application. *Stark v. Kirchgraber*, 186 Mo. 633, 85 S. W. 868. One whose claim is for funeral expenses is not a "creditor of decedent" under §2750, N. Y. Code Civ. Proc., providing who may petition for sale. *In re* Corwin's Estate, 10 Misc. 196, 31 N. Y. Supp. 426. A creditor of estate who has assigned his interest in the debt is not authorized to petition for sale. *Butler v. Emmett*, 8 Paige (N. Y.) 12.

55. *Littleton's Appeal*, 93 Pa. 177 (legatees proper persons to petition for sale of land charged with legacies); *Estate of Park Hill Cassady*, 13 Phila. (Pa.) 383.

56. See *Stark v. Kirchgraber*, 186 Mo. 633, 85 S. W. 868, construing §150, Mo. Rev. St., providing that "If such executor or administrator do not make such application, any creditor or other person interested in the estate may make such application."

Widow is a "party interested" (*King v. Kent's Heirs*, 29 Ala. 542; *Martin's Estate*, 6 Pa. Dist. 58); but widow is not interested after assignment of her dower (*Lawrence v. Brown*, 5 N. Y. 394).

57. Ala.—*Taylor v. Crook*, 136 Ala. 354, 34 So. 905. La.—*Wright, Williams & Co. v. Steed*, 10 La. Ann. 238. N. C. *Davis v. Howcott*, 21 N. C. 436. Ohio. *Lessee of Adams v. Jeffries*, 12 Ohio 253.

58. *Howell v. Hughes* (Ala.), 53 So. 105; *Neville v. Kenney*, 125 Ala. 149, 28 So. 452; *Davis v. Tarver*, 65 Ala. 98 (where court says that if heirs or devisees intervene and contest application, proceedings then assumes character of a suit *in personam*).

For proceedings to sell in probate court held to be *in rem* under special statute, see *Davidson v. Koehler*, 76 Ind. 398.

are necessary parties, since the title vests in them upon the death of decedent.⁵⁹

The widow of decedent is a necessary party defendant, if her dower interest is to be affected⁶⁰ but purchasers of real estate from decedent's widow are not necessary parties.⁶¹

If the lien of a mortgagee of decedent's land is to be affected, the mortgagee must be made a party,⁶² and according to the usual practice, any person may be made a defendant who has or claims an interest in the land of decedent which is sought to be sold,⁶³ or such person may have himself made a party upon proper showing of his interest to the probate court.⁶⁴

Creditors of decedent⁶⁵ or of his heirs⁶⁶ are usually not proper parties defendant.

59. **Fla.**—Wilson v. Fridenburg, 19 Fla. 461. **Ill.**—Burr v. Bloemer, 174 Ill. 638, 51 N. E. 821; Eaton v. Bryan, 18 Ill. 525. **Ind.**—Wood v. Wood, 150 Ind. 600, 50 N. E. 573; Sherry v. Denn, 8 Blackf. 542. **Ia.**—Gladson v. Whitney, 9 Iowa 267. **Ky.**—Reaves v. Baker, 33 Ky. L. Rep. 1004, 112 S. W. 609. **Miss.**—Hargrove v. Baskin, 50 Miss. 194; Winston & Co. v. McLendon, 43 Miss. 254. **Neb.**—Holmes v. Columbia Nat. Bank, 4 Neb. (Unof.) 893, 97 N. W. 26. **N. Y.**—Holly v. Gibbons, 176 N. Y. 520, 68 N. E. 889; Jenkins v. Young, 35 Hun 569. **N. C.**—McNeill v. Fuller, 121 N. C. 209, 28 S. E. 299; Dickens v. Long, 109 N. C. 165, 13 S. E. 841. See also Harris v. Brown, 123 N. C. 419, 31 S. E. 877. **Ohio.**—Lessee of Adams v. Jeffries, 12 Ohio 253. **Tenn.**—Estes v. Johnson, 10 Humph. 223; Green v. Shaver, 3 Humph. 139.

Practice in Louisiana.—In Louisiana, the parties interested are considered as represented by the administrator and the heirs are not necessary parties. Irwin v. Flynn, 110 La. 829, 34 So. 794; Tertrou v. Comeau, 28 La. Ann. 633.

Administratrix of a deceased heir is not a necessary party in a proceeding to sell ancestor's real estate to pay debts. Wood v. Wood, 150 Ind. 600, 50 N. E. 573.

60. Kent v. Taggart, 68 Ind. 163; Simonton v. Brown, 72 N. C. 46 (deciding that where not a party, sale void as to her, and that after deed executed, no subsequent amendment by which she was made a party, could affect her right of dower). *Contra*, Smith's Estate, 43 Ore. 595, 73 Pac. 336, 75 Pac. 133.

61. Nix v. Mayer (Tex.), 2 S. W. 519.

62. **Ia.**—Iowa Loan & Trust Co. v. Holderbaum, 86 Iowa 1, 52 N. W. 550. **N. Y.**—Matter of Haig, 6 Dem. Sur. 454, 3 N. Y. Supp. 285, deciding that the holder of a mortgage upon the property, existing when decedent took title, who was not a creditor at the death of the latter, is not a necessary party, since disposition would be subject to the lien of his mortgage. **Ohio.**—Holloway v. Stuart, 19 Ohio St. 472.

63. Newell v. Montgomery, 129 Ill. 58, 21 N. E. 508; Doan v. Biteley, 49 Ohio St. 583, 32 N. E. 600.

Parties When Land Escheated. Since sale of land is void unless parties upon whom the law casts the estate are before the court, in Tennessee, the "Board of Common School Commissioners" must be a party when escheated land is to be sold. Hinkle's Lessee v. Shadden, 2 Swan (Tenn.) 46.

Contingent remaindermen *in esse* and within reach are necessary parties to a proceeding to sell land. Farr v. Gilreath, 23 S. C. 502, *approving* Moseley v. Hankinson, 22 S. C. 323.

The administrator of decedent is a proper party to an action brought by a creditor to subject land conveyed by decedent to his lien as a creditor. Simpson v. Bockins, 77 N. J. Eq. 339, 78 Atl. 758.

64. *Ex parte* Marr, 12 Ark. 84; Gibson v. Pitts, 69 N. C. 155.

65. Lewis v. McGraw, 19 Ill. App. 313; Costigan v. Truesdell, 119 Ky. 70, 83 S. W. 98.

66. Nichols v. Lee, 16 Colo. 147, 26 Pac. 157.

Substitution of Parties.—Where, after entry of a decree in a cause, wherein executor was a party defendant, the executor was relieved from duty by the court and an administrator with the will annexed appointed, such administrator might be substituted as a party defendant upon motion in the supreme court.⁶⁷

(III.) Guardian Ad Litem of Infants.—According to the practice in many jurisdictions, a decree for the sale of decedent's real estate will not be made without the previous appointment of a guardian *ad litem* for infant heirs,⁶⁸ but in the majority of jurisdictions the failure to appoint a guardian *ad litem* for minor heirs, who were duly cited to appear, does not affect the validity of the order of sale.⁶⁹

c. Contents.—**(I.) In General.**—Every petition must comply with statutory requirements and must allege or show the existence of a sufficient cause for sale,⁷⁰ and if proceedings are instituted by an

Mortgagee of the interest of an heir can not be admitted as a party defendant. *Battle v. Duncan*, 90 N. C. 546.

A mortgagor who has parted with his title to the land mortgaged, and is not in possession thereof, is not a necessary party to a proceeding brought by the executor of the purchaser to obtain an order to sell the land for the payment of debts. *Denison University v. Manning*, 65 Ohio St. 138, 61 N. E. 706.

67. *Iowa Loan & Trust Co. v. Holderbaum*, 86 Iowa 1, 52 N. W. 550.

68. *Ala.*—*Craig v. McGehee*, 16 Ala. 41. *Ill.*—*Whitney v. Porter*, 23 Ill. 445. But see *Gage v. Schroder*, 73 Ill. 44. *Ind.*—*Timmons v. Timmons*, 6 Ind. 8; *Comporet v. Randall*, 4 Ind. 55. *Miss.* *Billups v. Brander*, 56 Miss. 495. *N. Y.* *Schneider v. McFarland*, 2 N. Y. 459; *Corwin v. Merritt*, 3 Barb. 341. *N. C.* *Hyman v. Jarnigan*, 65 N. C. 96. *Ore.* *Fiske v. Kellogg*, 3 Ore. 503. *W. Va.* *Hart v. Hart*, 31 W. Va. 688, 8 S. E. 562.

Where administrator who was general guardian of the infant heirs of his intestate applied for leave to sell real estate to pay debts and the surrogate proceeded, without appointing any guardian for the infants and without any appearance of the infants, to order a sale of the property, the sale was void. *Havens v. Sherman*, 42 Barb. (N. Y.) 636.

After sale made, an order appointing a special guardian *nunc pro tunc* will not cure defects in the prior proceedings when guardian *ad litem* for infant

heirs was not properly appointed. *Matter of Mahoney*, 34 Hun (N. Y.) 501.

69. *U. S.*—*Parker v. Kane*, 22 How. 1, 16 L. ed. 286, following decision of supreme court of Wisconsin. *Ill.*—*Gage v. Schroder*, 73 Ill. 44, "the failure of the court to appoint a guardian *ad litem*, or when appointed his failure to answer, while it may be error, can not be jurisdictional." *Mass.*—*Holmes v. Beal*, 9 Cush. 223. *Neb.*—*McClay v. Foxworthy*, 18 Neb. 295, 25 N. W. 86. *N. H.*—*Boody v. Emerson*, 17 N. H. 577. *Wis.*—*Sitzman v. Pacquette*, 13 Wis. 291.

Where "one of the heirs was a minor and appeared by his guardian and next friend, who was the administrator of the intestate and was appointed commissioner to sell land," such irregularity did not vitiate title of purchaser. *Harris v. Brown*, 123 N. C. 419, 31 S. E. 877.

70. *Ala.*—*Hall v. Chapman's Admr.*, 35 Ala. 553. *Cal.*—*In re Bryne*, 112 Cal. 176, 44 Pac. 467. *Ind.*—*Warrum v. White*, 171 Ind. 574, 86 N. E. 959. *N. Y.*—*Allen v. Sanford*, 8 N. Y. Supp. 182. *Wash.*—*Prefontaine v. McMicken*, 16 Wash. 16, 47 Pac. 231.

For allegations necessary to give court jurisdiction, see *Hampton v. Murphy*, 45 Ind. App. 513, 86 N. E. 436, 88 N. E. 876; *Cahill v. Bassett*, 66 Mich. 407, 33 N. W. 722.

Substantial Compliance Sufficient.—A substantial compliance with the statute is sufficient and petition can not be assailed on appeal for any mere uncertainty or inaptness of expression which was not objected to by special de-

executor or administrator, there should be an allegation of the official capacity of petitioner.⁷¹

When the petition shows that there is a will, it should negative the conferring by it of a power to sell.⁷²

(II.) **Averment of Names and Interests of Defendants.** — The petition should set forth the names of the heirs at law and other parties defendant,⁷³ and should state which of the heirs are infants or otherwise under disability so that proper service may be made.⁷⁴ If the

murrer or otherwise in the trial court. Estate of Heydenfeldt, 127 Cal. 456, 59 Pac. 839. Consult, also, Plains Land & Imp. Co. v. Lynch, 38 Mont. 271, 99 Pac. 847, holding sufficient a substantial compliance with section 7562, Mont. Rev. Code, prescribing what petition shall contain.

71. *Moffitt v. Moffitt*, 69 Ill. 641, holding it unnecessary, however, for petitioner to state how he was appointed, or that he was appointed by a court having power. *In re Haig's Estate*, 6 Dem. Sur. 454, 3 N. Y. Supp. 285.

Creditor need not aver that the personal representative has refused to petition for sale. *Whisnand v. Small*, 65 Ind. 120.

72. *Howell v. Hughes* (Ala.), 53 So. 105; *Wilson v. Holt*, 83 Ala. 528, 3 So. 321, 3 Am. St. Rep. 768; *Arnett v. Bailey*, 60 Ala. 435. But see *In re Haig's Estate*, 6 Dem. Sur. 454, 3 N. Y. Supp. 285.

Allegation of Intestacy.—It is not essential to the jurisdiction of the court that the administrator in his petition allege in terms that it is an intestate estate, if he properly alleges that he is an administrator. *Deans v. Wilcoxon*, 18 Fla. 531.

73. *Ala.*—*Poole v. Daugdrill*, 129 Ala. 208, 30 So. 579; *Townsend v. Steel*, 85 Ala. 580, 5 So. 351 (holding sufficient an averment that Lewis N. and Nancy N. "claim to be the lawful heirs and distributees of said decedent, and he states to the best of his knowledge, information and belief, and after diligent search, that they are the only heirs at law and distributees of the said decedent"); *Bingham v. Jones*, 34 Ala. 202, 4 So. 409; *Eatman v. Eatman*, 83 Ala. 478, 3 So. 850 (holding sufficient a petition stating that there were children of two marriages, giving their names, and submitting to the court whether, on the facts stated, all of them were interested as heirs); *Mc-*

Corkle v. Rhea, 75 Ala. 213; *Hoard v. Hoard's Admr.*, 41 Ala. 590. *Ind.* *Rapp v. Matthias*, 35 Ind. 332. *Ia.* *Gladson v. Whitney*, 9 Iowa 267 (existence of heirs will be presumed unless contrary shown). *Ky.*—*Rodgers v. Rodgers*, 17 Ky. L. Rep. 358, 31 S. W. 139. *N. Y.*—*In re John's Estate*, 21 Civ. Proc. 326, 18 N. Y. Supp. 172.

Contra, *Stow v. Kimball*, 28 Ill. 93.

Under New York Code Civ. Proc. §2752, requiring that petition set forth the names of "all the heirs and devisees of the decedent," where the petition avers that certain named persons are heirs, the fair construction is that the persons named are "all the heirs" and so an express averment to that effect is not essential. *Greenblatt v. Hermann*, 144 N. Y. 13, 38 N. E. 966.

Insufficient Averment as to Heirs. An allegation "that the names and number of the heirs, if any, of decedent, are unknown to your petitioner, except that the name of each such heir when last heard of by your petitioner about seventeen years ago was O'Neill; and that your petitioner does not know whether there are any persons claiming under such heirs" is insufficient, since it fails to show that any effort has been made to ascertain the heirs. *In re O'Neill*, 49 Misc. 285, 99 N. Y. Supp. 237.

Waiver of Defect.—Although petition failed to state why certain parties named in the caption were made defendants, the written appearance of these parties named as defendants stating that they are the heirs, is a waiver of this defect in the petition. *Mitchell v. Hodges*, 87 Ind. 491.

74. *Bozeman v. Bozeman*, 82 Ala. 389, 2 So. 732; *Page v. Matthews' Admr.*, 41 Ala. 719; *Field's Heirs v. Goldsby*, 28 Ala. 218 (failure to state which of the heirs are of full age is not jurisdictional); *Cloud v. Barton*, 14

petition shows that decedent died testate leaving a widow, there should be an averment as whether or not the widow has elected to take under the will.⁷⁵

(III.) **Averments Showing Personalty Insufficient.**—The petition should state the amount of the indebtedness of the estate and show that there is insufficient personalty to pay it.⁷⁶ but a particular description of either the debts or the assets is not necessary, a statement of the ag-

Ala. 347; *Mead v. Sherwood*, 4 Redf. Sur. 352. Consult, also, *Billups v. Brand-er*, 56 Miss. 495.

Omission from the application of an averment stating that heirs or devisees are married women did not affect the jurisdiction of the court, if it did render application defective. *Curtis v. Hunt*, 158 Ala. 78, 48 So. 598.

Residence of Heirs.—In Alabama, the petition should state also the residence of the heirs. *Bingham v. Jones*, 84 Ala. 202, 4 So. 409; *Bozeman v. Bozeman*, 82 Ala. 389, 2 So. 732; *Noles' Heirs v. Noles' Admr.*, 40 Ala. 576.

75. *Meadows v. Meadows*, 73 Ala. 356; *Renner v. Ross*, 111 Ind. 269, 12 N. E. 508. See also *Archibald v. Long*, 144 Ind. 451, 43 N. E. 439.

76. **Cal.**—*In re Estate of Bentz*, 36 Cal. 687 (averments may be made sufficient by reference to inventory); *Haynes v. Meeks*, 20 Cal. 288; *Gregory v. Taber*, 19 Cal. 397, 79 Am. Dec. 219 (the filing of an account of the personal property at or about the time of filing petition for sale does not excuse failure to set forth in petition the amount of personalty); *Gregory v. McPherson*, 13 Cal. 562. **Colo.**—*Bateman v. Reitler*, 19 Colo. 547, 36 Pac. 548.

Ill.—*Lynch v. Hickey*, 13 Ill. App. 139. *Compare Moffitt v. Moffitt*, 69 Ill. 641. **Ind.**—*Maris v. Wolfe*, 46 Ind. App. 416, 92 N. E. 661; *Rapp v. Matthias*, 35 Ind. 332. **Ia.**—*Stanley v. Noble*, 59 Iowa 666, 13 N. W. 839; *Gladson v. Whitney*, 9 Iowa 267. **Kan.** *Johnson v. Clark*, 18 Kan. 157. **Ky.** *Row v. Back*, 115 S. W. 806. **Me.** *In re Snow*, 96 Me. 570, 53 Atl. 116. **N. Y.**—*In re Ibert*, 48 App. Div. 510, 62 N. Y. Supp. 1051; *In re Williams' Estate*, 1 Misc. 35, 22 N. Y. Supp. 906; *Ackley v. Dygert*, 33 Barb. 176. **N. C.**—*McNeill v. McBryde*, 112 N. C. 408, 16 S. E. 841; *Blount v. Pritchard*, 88 N. C. 445; *Wiley v. Wiley*, 63 N. C. 182. **Pa.**—*Torrance v. Torrance*, 53 Pa. 505. **Tex.**—*Jackson v. Houston*, 84

Tex. 622, 19 S. W. 799, holding merely directory the statutory requirement that administrator accompany his application with a statement of expenses and claims. **Utah.**—*Needham v. Salt Lake City*, 7 Utah 319, 26 Pac. 920. **Wash.**—*Wallace v. Grant*, 27 Wash. 130, 67 Pac. 578 (petition does not show insufficiency of personalty by alleging that "petitioner has sold all the personal property of said estate that in his judgment is advisable to sell at this time"); *Ackerman v. Orchard*, 7 Wash. 377, 34 Pac. 1106, 35 Pac. 605.

Failure to state amount of personalty is not a fatal objection where the petition also prayed for the sale for apportionment among the heirs, on the ground of indivisibility. *Rodgers v. Rodgers' Admr.* (Ky.), 31 S. W. 139.

If debts actually due are such as call for a sale, the fact that the petition may have set forth as due a larger amount than really existed is immaterial. *Heirs of Simonin v. Czajnowski*, 47 La. Ann. 1334, 17 So. 847.

Allegations Sufficient in Alabama. A petition by an administrator, under Alabama Code §§2104, 2106, alleging that "the personal property of the estate is insufficient to pay the debts of said estate," and "that it is necessary to sell said real estate of said decedent to pay the debts of said estate" is sufficient, it being unnecessary to allege the amount of the debts or the value of the personal property. *Cotton v. Holloway*, 96 Ala. 544, 12 So. 172, *overruling Peavey v. Griffin*, 152 Ala. 256, 44 So. 400; *Moore v. Cottingham*, 113 Ala. 148, 20 So. 994, 59 Am. St. Rep. 100; *Smith v. Brannon*, 99 Ala. 445, 12 So. 422; *Abernathy v. O'Reilly*, 90 Ala. 495, 7 So. 919. But an averment that petitioner is not informed as to whether property will be sufficient and believes that it will be necessary to sell decedent's land, is not equivalent to an averment that personal property is insufficient. *Sharp v. Sharp*, 76 Ala. 312.

gregate amount of the debts and assets being deemed sufficient.⁷⁷

(IV.) **Averments as to Property To Be Sold.**—The petition should show the right or interest which decedent had at the time of his death in the lands proposed to be sold,⁷⁸ and statutes usually require that the petition shall describe with certainty and definiteness the land which is to be sold.⁷⁹

77. **Ala.**—*Quarles v. Campbell*, 72 Ala. 64. **Ind.**—*Collins v. Farnsworth*, 8 Blackf. 575. **Minn.**—*State v. Probate Court of Ramsey County*, 19 Minn. 117.

The petition need not specify whether the debt was incurred as surety or principal. *Jackson v. Weaver*, 98 Ind. 307.

Failure of administrator to file with his petition the inventory, appraisal, lists and accounts of the estate, as required by the statute in such cases, does not deprive the court of jurisdiction. *Smith v. Black*, 231 Mo. 681, 132 S. W. 1129.

Under New York Code Civ. Proc. §§2752, 2756, a petition filed by a creditor must set forth the facts necessary to establish the existence of a debt, and an allegation that petitioner is a creditor of decedent to a certain amount with interest is insufficient. *In re Pirie*, 117 N. Y. Supp. 753.

For Pennsylvania practice when petition not accompanied by an inventory and schedule of debts, see *Crawford's Estate*, 221 Pa. 131, 70 Atl. 582.

78. *Pittit's Admr. v. Pittit's Distributees*, 32 Ala. 288, holding that court had no jurisdiction to order a sale when the petition failed to show that decedent, at the time of his death, owned some estate or interest, legal or equitable, which was in its nature descendible to this heirs. But see *Trent's Admr. v. Trent*, 24 Mo. 307, where court refused to dismiss administrator's petition for sale to pay debts for want of an averment that the lands mentioned in the petition belonged to intestate at the time of his death.

Under Illinois statute authorizing a sale of decedent's real estate and directing the executor or administrator to present a petition "stating therein what real estate the said testator or intestate dies seized of," a statement of the real estate which he died "leaving" is a sufficient compliance with the statute, the word "leaving" being

synonymous with owning. *McNitt v. Turner*, 16 Wall. (U. S.) 352, 21 L. ed. 341.

In Massachusetts, in an application to sell real estate of an intestate which stands in the name of a third person to whom the administrator contends it has been conveyed fraudulently, it is not necessary to allege that the record title of the premises is in a third person to whom it has been fraudulently conveyed, as the question can not be determined in that proceeding, but, after leave to sell has been obtained, can be determined in a way provided by R. L., c. 146, §17. *Tyndale v. Stanwood*, 182 Mass. 534, 66 N. E. 23.

General Averment Sufficient.—The petition need not set out the title more specifically than by the general averment that decedent was the owner in fee simple. *Jackson v. Weaver*, 98 Ind. 307.

Where Interest Not Known.—A petition sufficiently shows that decedent had an interest at his death when there is an averment that decedent died seized and possessed of certain interests and rights not known to petitioner, in certain properly described land. *Henley v. Johnston*, 134 Ala. 646, 32 So. 1009, 92 Am. St. Rep. 48.

79. For cases as to certainty of description required. See **Ala.**—*Little v. Marx*, 145 Ala. 620, 39 So. 517 (stating that "The purpose of the statute is to require such a description of the land in the application that a decree can be rendered thereon that will be so exact and accurate that a purchaser at a sale thereunder will know from the proceedings just what land he bought"); *Kornegay v. Mayer*, 135 Ala. 141, 33 So. 36; *Henley v. Johnston*, 134 Ala. 646, 32 So. 1009, 92 Am. St. Rep. 48; *Rainey v. McQueen*, 121 Ala. 191, 25 So. 920; *Gilechrist v. Shackelford*, 72 Ala. 7; *Money v. Turnipseed*, 50 Ala. 499; *De Bardelaben v. Stoudenmire*, 48 Ala. 643 (holding sufficient a description which omitted to state in

In California, the statute also requires that the petition shall contain a statement of the condition and value of decedent's real property.⁸⁰

(V.) **Prayer.** —Petitioner should ordinarily ask for the sale of sufficient real property to satisfy decedent's debts but where the nature of the realty is such that it cannot be divided without materially impairing its value, he may ask for the sale of the entire tract.⁸¹

words that lands were in county); *Smitha v. Fournoy's Admr.*, 47 Ala. 345 (imperfect description does not render order of sale absolutely void). *Cal.* *In re Estate of Roach*, 139 Cal. 17, 72 Pac. 393; *In re Estate of Cook*, 137 Cal. 184, 69 Pac. 968; *Haynes v. Meeks*, 20 Cal. 288; *Townsend v. Gordon*, 19 Cal. 189 (failure to describe deprives court of jurisdiction). *Ind.*—*Rapp v. Matthias*, 35 Ind. 332; *Weed v. Edmonds*, 4 Ind. 468. *Kan.*—*Bryan v. Bauder*, 23 Kan. 95 (holding sale good although made under a petition which merely alleged that property was within county, although statute directed a description, the court considering description unnecessary to give jurisdiction). *Mo.*—*Roberts v. Thomason*, 174 Mo. 378, 74 S. W. 624, deed of administrator based upon a petition which fails to describe land is void and does not affect title. *N. C.*—*Blount v. Pritchard*, 88 N. C. 445. *Pa.*—*Heffner's Appeal*, 119 Pa. 462, 13 Atl. 314. *Wash.*—*Hazelton v. Bogardus*, 8 Wash. 102, 35 Pac. 602.

Description in Exhibits.—The description may be in exhibits which are filed with the petition and the petition itself need not describe the land asked to be sold. *Bray v. Adams*, 114 Mo. 486, 21 S. W. 853.

In Maine, under Rev. St., ch. 71, §1, item 3, to authorize a sale of more realty than is necessary to pay debts, it must be averred and proved that by a sale of part, the residue would be greatly depreciated. *In re Snow*, 96 Me. 570, 53 Atl. 116.

Averment as to Value.—It is sometimes required that the estimated value of the realty be set forth. *In re McGee*, 5 App. Div. 527, 38 N. Y. Supp. 1062; *Blount v. Pritchard*, 88 N. C. 445. But even under N. Y. Code Civ. Proc., §2752, requiring that the value of each distinct parcel be given, the petition need not state the value of each parcel separately, where they all lie together. *In re Georgi's Estate*, 35 Misc. 685, 72 N. Y. Supp. 431.

What Is Sufficient Signing.—Where petition was in handwriting of administrator and his name appeared therein, the court held that there was a sufficient signing in the absence of a statute requiring that petition be subscribed by petitioner. *Carter v. Jackson*, 56 N. H. 364.

80. *In re Estate of Cook*, 137 Cal. 184, 69 Pac. 968, holding insufficient, upon direct attack by appeal an order of sale granted upon a petition alleging that land "is unimproved desert land" and "chiefly valuable for the possibility that it may contain petroleum." *Silverman v. Gundelfinger*, 82 Cal. 548, 23 Pac. 12, where petition deemed sufficient contained reference to a schedule which gave statement of condition and appraised value; *Estate of Boland*, 55 Cal. 310; *Gregory v. Taber*, 19 Cal. 397, 79 Am. Dec. 219. Consult, also, *Dane v. Layne*, 10 Cal. App. 366, 101 Pac. 1067, deciding that although §1537, Cal. Code Civ. Proc. requires that administrator state in his petition for sale of real estate "the condition and value thereof," the failure to make such statement will not invalidate the sale, if necessity appears at the hearing.

Incorporation by Reference.—A petition for the sale of real estate may refer to the inventory for a statement of the condition of the real estate and the value thereof, and petition and inventory may then be considered together. *Wilson v. Hastings*, 66 Cal. 243, 5 Pac. 217; *Stuart v. Allen*, 16 Cal. 474, 76 Am. Dec. 551. Consult, also, *Richardson v. Butler*, 82 Cal. 174, 23 Pac. 9, 16 Am. St. Rep. 101.

81. *Catlin v. United States Fidelity and Guaranty Co.*, 137 Ky. 208, 125 S. W. 297; *Foley v. Graham's Guardian*, 33 Ky. L. Rep. 627, 110 S. W. 838.

The failure of the petitioner to ask for the sale of but part of the real estate described in the petition does not deprive the court of its jurisdiction to make an order that part of decedent's realty be sold, in the absence

d. *Verification*.—The practice in most jurisdictions is to require that the petition for sale of decedent's land be verified.⁸² But failure to comply literally with a statute requiring verification does not deprive the court of jurisdiction to order sale.⁸³

e. *Amendment*.—Petitioner may amend his petition by inserting the name of one who should have been made a party,⁸⁴ or he may be permitted to supply other omissions and correct defects.⁸⁵

3. *Notice to Defendants*.—a. *Necessity in General*.—Notice of the filing of petition for sale is essential to vest the court with jurisdiction to make an order affecting the right or title of any person interested in decedent's real estate,⁸⁶ except in the few jurisdictions

of a statute limiting the court in its order of sale by the desire or prayer of the petition, and a sale made under such order can not be attacked collaterally. *Baum v. Roper*, 132 Cal. 42, 64 Pac. 128.

Multifarious Petition.—A petition seeking to have testator's land sold and to enforce a personal demand in favor of executrix against legatees is improper. *Green v. Green*, 3 Smed. & M. (Miss.) 256.

82. *Estate of Bolland*, 55 Cal. 310; *Weed v. Edmonds*, 4 Ind. 468.

Schedules Following Verification. Where statute requires verification of administrator's petition, the fact that schedules attached to a petition, and made part of it, are placed after the verification, does not affect the validity of the petition. *Richardson v. Butler*, 82 Cal. 174, 23 Pac. 9, 16 Am. St. Rep. 101.

83. *Robbins v. Boulware*, 190 Mo. 33, 88 S. W. 674, 109 Am. St. Rep. 746 (failure to verify a mere irregularity); *Wilkerson v. Allen*, 67 Mo. 502.

Where statute does not name an officer before whom the petition must be verified, it is sufficient if the petition is sworn to before a justice of the peace or other office authorized to administer oaths. *Richmond v. Foote*, 3 Lans. (N. Y.) 244.

84. *In re Wheeler*, 48 Misc. 323, 96 N. Y. Supp. 762; *In re Ibert*, 48 App. Div. 510, 62 N. Y. Supp. 1051.

85. *In re Miller*, 37 N. Y. Supp. 447; *In re Faulkner's Estate*, 10 N. Y. Supp. 325 (allowing names of creditors, not known when petition filed, to be added subsequently).

Proceedings Upon Amendment.—When petition is defective in not con-

taining a proper description of decedent's real estate is amended at the hearing, the amended petition becomes a new petition and proceedings *de novo* upon proper notice must be had. *Gharky v. Werner*, 66 Cal. 388, 5 Pac. 676. Consult, also, *Turney v. Turney*, 24 Ill. 625, and *Garner v. Tucker*, 61 Mo. 427.

Incorporation of Earlier Petition. When the administrator files a petition for the sale of real property totally insufficient for the purpose of conferring jurisdiction but expressly referring to a former application which remains unvacated and contains all necessary jurisdictional averments, the court may regard the two petitions as amendatory of each other and as constituting one petition. *Friedman v. Shamblin*, 117 Ala. 454, 23 So. 821.

Under Alabama Code, 1886, §2129, an amendment of the petition and decree to correct a defective description of the land sold must be made at the instance of the purchaser and an amended decree on petition of the administrator is void for want of jurisdiction. *Lee v. Williams*, 85 Ala. 189, 3 So. 718.

Where administrator dies after court has made an order of sale upon his petition describing land by metes and bounds, and after court has confirmed sale and ordered deed, the court has no authority to entertain a motion on behalf of purchaser to amend the pleadings so as to include another tract of land not mentioned therein. *Stafford v. Harris*, 72 N. C. 198.

86. **Cal.**—*Campbell v. Drais*, 125 Cal. 253, 57 Pac. 994. **Conn.**—*Dorrance v. Raynsford*, 67 Conn. 1, 34 Atl. 706, requiring public notice to parties adversely interested. **Ga.**—*Fussell v. Dennard*, 118 Ga. 270, 45 S. E. 247,

where proceedings of that character are treated as strictly *in rem*.⁸⁷

Waiver.—Parties interested may waive the issuing and service of notice and enter their appearance.⁸⁸

sale void when record shows order of sale granted by ordinary on the day petition was presented. **Ill.**—*Manternach v. Studdt*, 230 Ill. 356, 82 N. E. 829; *Marshall v. Rose*, 86 Ill. 374; *Herdman v. Short*, 18 Ill. 59 (the court saying, "although this proceeding partakes much of the character of proceedings *in rem*, if not strictly so, yet the court has no authority to act, except under and conformity with statute)." **Ind.**—*Martin v. Neal*, 125 Ind. 547, 25 N. E. 813; *Helms v. Love*, 41 Ind. 210 (deciding right of widow unaffected when no notice of sale given, although widow signed a writing containing a waiver of notice and consent to sale, as guardian of minor heirs but not in her own right); *Piatt v. Dawes*, 10 Ind. 60; *Doe v. Bowen*, 8 Ind. 197, 65 Am. Dec. 758; *Martin v. Starr*, 7 Ind. 224; *Babbitt v. Doe*, 4 Ind. 355. **Ia.**—*Mullin v. White*, 134 Iowa 681, 112 N. W. 164; *Good v. Norley*, 28 Iowa 188 (sale without notice not merely voidable but absolutely void). **Kan.** *Chicago, K. & N. R. Co. v. Cook*, 43 Kan. 83, 22 Pac. 988; *Mickel v. Hicks*, 19 Kan. 578, 21 Am. Rep. 161. **Miss.** *Martin v. Williams*, 42 Miss. 210, 97 Am. Dec. 456; *Hamilton & Young v. Lockhart*, 41 Miss. 460 (holding sale void as to all when one minor defendant not properly notified); *Laughman v. Thompson*, 6 Smed. & M. 259. **Mo.**—*Desloge v. Tucker*, 196 Mo. 587, 94 S. W. 283; *Young v. Downey*, 145 Mo. 250, 46 S. W. 1086, 68 Am. St. Rep. 568; *Teverbaugh v. Hawkins*, 82 Mo. 180; *Valle v. Fleming*, 19 Mo. 454, 61 Am. Dec. 566; *Hill v. Taylor*, 99 Mo. App. 524, 74 S. W. 9. **N. H.**—*Flanders v. George*, 55 N. H. 486; *French v. Hoyt*, 6 N. H. 370, 25 Am. Dec. 464. **N. Y.**—*In re Slater*, 17 Misc. 474, 41 N. Y. Supp. 534, 75 N. Y. St. 922. **Ore.** *Smith v. Whiting*, 55 Ore. 393, 106 Pac. 791. **Tex.**—*Texas Land & Loan Co. v. Estate of Dunovant*, 38 Tex. Civ. App. 560, 87 S. W. 208. **Wash.**—*Ball v. Clothier*, 34 Wash. 299, 75 Pac. 1099. **Wis.**—*Hume's Exr. v. Cox*, 1 Pinne 551.

Effect of Curative Statute.—**Wash.** *Bal. Code*, §6474, intended to cure irregularities and defects in administra-

tor's sales does not cure defects relating to the jurisdiction of the court over the persons of the parties in interest owing to the failure to give proper notice, the statutory requirements therefor being mandatory. *Ball v. Clothier*, 34 Wash. 299, 75 Pac. 1099.

In Pennsylvania it is not necessary that parties in interest be served with specific notice of application for sale, and failure to give such notice is not sufficient ground for a direct or collateral attack. *Irwin v. Guthrie*, 198 Pa. 267, 47 Atl. 992; *Smith's Estate*, 188 Pa. 222, 41 Atl. 542; *West Hickory Min. Assoc. v. Reed*, 80 Pa. 38; *Stiver's Appeal*, 56 Pa. 9; *Wall's Appeal*, 31 Pa. 62; *Weaver's Appeal*, 19 Pa. 416.

In Louisiana, the parties interested are considered as being represented in the proceedings by the administrator or executor, and heirs are not entitled to notice of the application. *Irwin v. Flynn*, 110 La. 829, 34 So. 794; *Tertrou v. Comeau*, 28 La. Ann. 633; *Carter v. McManus*, 15 La. Ann. 676.

The appointment of a guardian ad litem for a minor defendant who has not been properly served with notice will not give the court jurisdiction to make an order affecting minor's interest in the real estate of decedent. *Manternach v. Studdt*, 230 Ill. 356, 82 N. E. 829.

87. *Howell v. Hughes* (Ala.), 53 So. 105; *Neville v. Kenney*, 125 Ala. 149, 28 So. 452; *Friedman v. Shamblin*, 117 Ala. 454, 23 So. 821 (holding failure to give heirs notice of application, as required by statute, a mere irregularity and no ground for collateral attack on sale); *Lyons v. Hamner*, 84 Ala. 197, 4 So. 26; *Doe v. Riley & Dawson*, 28 Ala. 164; *Apel v. Kelsey*, 47 Ark. 413; *Montgomery v. Johnson*, 31 Ark. 74; *Rogers v. Wilson*, 13 Ark. 507.

88. *Davidson v. Koehler*, 76 Ind. 398; *Marshall v. Rose*, 86 Ill. 374; *Bowles' Heirs v. Rouse*, 8 Ill. 409.

Waiver by Appearance.—Creditors of an estate who appear and protest against an order for sale of decedent's real estate do not thereby waive their right to attack it on the ground that the notice of application required by statute was not given. *Texas Land &*

A subsequent notice cannot cure a void order of sale when there was a failure to give notice of the filing of petition.⁸⁹

b. *Who Must Be Given.*—Since the title to decedent's real estate vests in his heirs or devisees, notice to them of the filing of petition is required by the statutes in nearly all jurisdictions,⁹⁰ and if proceedings are instituted by a creditor, the executor or administrator must be given notice.⁹¹ If the lien of a mortgage creditor is to be affected, he should be given notice of the application to sell.⁹² Statutes generally require notice to all parties interested in the real estate to be sold.⁹³

It is not necessary to give notice of the application to the wife of a devisee,⁹⁴ to a tenant in possession of the property to be sold,⁹⁵ to

Loan Co. v. Estate of Dunovant, 38 Tex. Civ. App. 560, 87 S. W. 208.

Waiver by Guardian.—Where the statute requires personal service upon all defendants, a guardian of minor heirs can not waive service for minors. *Martin v. Starr*, 7 Ind. 224; *Doe v. Anderson*, 5 Ind. 33. But the statute may authorize the guardian to file such a waiver. *Smock v. Reichwine*, 117 Ind. 194, 19 N. E. 776.

89. *Hutchinson v. Shelley*, 133 Mo. 400, 34 S. W. 838; *In re Mahoney*, 34 Hun (N. Y.) 501.

90. Consult local statutes.

Cases Deciding Such Notice Necessary.—Ind.—*Hawkins v. Hawkins' Admr.*, 28 Ind. 66. Kan.—*Mickel v. Hicks*, 19 Kan. 578, 27 Am. Rep. 161. Miss.—*Picard v. Montross*, 17 So. 375; *McPike v. Wells*, 54 Miss. 136; *Gwin v. McCarroll*, 1 Smed. & M. 351. N. Y. *In re John's Estate*, 21 Civ. Proc. 326, 18 N. Y. Supp. 172; *Application of Dolan*, 88 N. Y. 309. N. C.—*Harrison v. Harrison*, 106 N. C. 282, 11 S. E. 356; *Shields v. Allen*, 77 N. C. 375. Tenn.—*Linnville v. Darby*, 1 Baxt. 306. Va.—*Menefee v. Marge*, 4 S. E. 726.

Notice Not Presumed.—In proceedings by administrator to sell decedent's real estate, it must affirmatively appear by the record that notice was given to the heirs as the statute requires and parol evidence is inadmissible to supply an omission in the record in this respect. *Root v. McFerrin*, 37 Miss. 17, 75 Am. Dec. 49; *Linnville v. Darby*, 1 Baxt. (Tenn.) 306.

Notice to Widow.—In Pennsylvania, notice to widow of application to sell is not required. *Stiver's Appeal*, 56 Pa. 9. And in *Ryan v. Fergusson*, 3 Wash. 356, 28 Pac. 910, the court held

personal notice to widow unnecessary in an administration proceedings to sell community property to pay a debt secured by mortgage upon the property asked to be sold.

91. *Kammerrer v. Ziegler*, 1 Dem. Sur. (N. Y.) 177.

92. *French v. Prieur*, 6 Rob. (La.) 299.

93. Under New York Code Civ. Proc. §2754, one who has purchased the property at a referee's sale in partition among the heirs, is a "person claiming an interest" and a necessary party to be addressed in the citation. *Kammerrer v. Ziegler*, 1 Dem. Sur. (N. Y.) 177.

Under Iowa Code §3324, requiring notice to "all persons interested in such real estate," one who attached certain real estate in which an heir had an interest and later reduced his claim against heir to judgment, was a person interested in a proceedings by administrator to sell to pay debts. *Mullin v. White*, 134 Iowa 681, 112 N. W. 164.

Disseisor Not Interested.—Although Mass. Rev. St., ch. 71, §8, required notice "to all persons interested in the estate," a disseisor in possession was not entitled to notice, since the word "estate" did not mean the land to be sold, but the title of the testator. *Yeomans v. Brown*, 8 Metc. (Mass.) 51.

Legatee Not Interested.—Mo. Rev. St., 1899, §148, providing for notice to "all persons interested" does not require that notice be served personally upon a mere resident legatee. *Desloge v. Tucker*, 196 Mo. 587, 94 S. W. 283.

94. *Harrington v. Harrington*, 13 Gray (Mass.), 513, 74 Am. Dec. 648.

95. *Rigney v. Coles*, 6 Bosw. (N. Y.) 479.

persons named as executors in decedent's will who have failed to qualify,⁹⁶ or to general creditors, unless expressly required by statute.⁹⁷

c. *Sufficiency*.—Statutory provisions usually govern the manner in which notice must be given.⁹⁸

4. **Objections and Defenses.**—a. *Who May Make*.—Any one of the heirs of decedent may object to the granting of an application for an order to sell realty belonging to the estate;⁹⁹ and a guardian of minor heirs¹ or other person interested² may oppose the application.

96. Application of Dolan, 88 N. Y. 309.

97. Thompson v. Cox, 53 N. C. 311.

98. Cases as to sufficiency of service, see Cal.—*In re Cunningham*, 73 Cal. 558, 15 Pac. 136. Ill.—*Harris v. Lester*, 80 Ill. 307. Mo.—*Desloge v. Tucker*, 196 Mo. 587, 94 S. W. 283 (notice by posting handbills sufficient in case of non-residents); *Robbins v. Boulware*, 190 Mo. 33, 88 S. W. 674, 109 Am. St. Rep. 746 (insufficiency of length treated as an irregularity not subjecting order of sale to collateral attack); *Young v. Downey*, 150 Mo. 317, 51 S. W. 751. N. J.—*Robison v. Furman*, 47 N. J. Eq. 307, 20 Atl. 898. N. Y. *In re Denton*, 40 Misc. 326, 81 N. Y. Supp. 1031; *In re Van Vleck's Estate*, 32 Misc. 419, 66 N. Y. Supp. 727. N. C. *Carter v. Rountree*, 109 N. C. 29, 13 S. E. 716; *Cates v. Pickett*, 97 N. C. 21, 1 S. E. 763. S. C.—*Rice v. Bamberg*, 59 S. C. 498, 38 S. E. 209.

A strict compliance with statutes providing for constructive service must be observed to give the court jurisdiction. *Blickensderffer v. Hanna*, 231 Mo. 93, 132 S. W. 678.

Notice of Purpose of Proceedings. Notice of an application by administrator to sell real estate to pay decedent's debts does not give the court jurisdiction to order administrator to mortgage and lease such real estate, and the order may be attacked collaterally by decedent's widow who had received no notice of the change in the relief sought. *Martin v. Neal*, 125 Ind. 547, 25 N. E. 813.

No jurisdiction is obtained by service upon personal representatives of deceased parties who were named in the citation, and service upon tenants not named in the citation does not confer jurisdiction over them. *In re Georgi's Estate*, 35 Misc. 685, 72 N. Y. Supp. 431.

California Probate Act, §157, Code

Civ. Proc. §1538, requiring personal service or the publication of the order to show cause, does not make it essential that the published order contain a description of the property to be sold, where order refers to a petition on file describing property. *Estate of Roach*, 139 Cal. 17, 72 Pac. 393.

99. Ga.—*Grant v. Noel*, 118 Ga. 258, 45 S. E. 279, deciding also that no notice by the objector to any of the other heirs is necessary. Ia.—*Duffield v. Walden*, 102 Iowa 676, 72 N. W. 278. Tenn.—*Shields v. Alsup*, 5 Lea 508.

Grantee of Heir.—Under §1540, Cal. Code Civ. Proc., the grantee of an heir may oppose an application for an order of sale of the realty purchased from the heir. *Estate of Steward*, 1 Cal. App. 57, 81 Pac. 728.

1. *Rogers v. Dickey*, 117 Ga. 819, 45 S. E. 71.

2. *Paine v. Pendleton*, 32 Miss. 320; *Texas Land & Loan Co. v. Estate of Dunovant*, 38 Tex. Civ. App. 560, 87 S. W. 208 (where creditors protested).

A purchaser of a homestead from decedent's widow may, under Ala. Code, §158, contest an application for the sale of decedent's land, although at the time of his purchase the property had not been set apart to the widow as a homestead. *Newell v. Johns*, 128 Ala. 584, 29 So. 609.

Under Georgia Civil Code, 1895, §4630, providing that any person who claims the property may file an affidavit stating his claim, one who is in possession claiming adversely to petitioner may contest application and have right to property determined. *Hull v. Watkins*, 134 Ga. 779, 68 S. E. 506.

One claiming a superior title cannot resist the order of sale as a party interested in the estate where court has

b. *Manner of Making.*—The technical rules of pleading are usually not applied strictly when objections to the sale of decedent's realty are made,³ although in some jurisdictions the practice is to require pleadings which have equitable form, and which set forth the facts requisite, to constitute a defense.⁴

A defendant may demur to the petition and if the demurrer is overruled, he should be given an opportunity to answer.⁵

c. *Sufficiency.*—A sufficient ground for refusing to grant the prayer of the petition for sale exists when it is made to appear that the personal estate will not be exhausted in the payment of *bona fide* debts,⁶ or that there is such a doubt concerning decedent's title to

no jurisdiction to try title to land. *Shields v. Ashley's Admr.*, 16 Mo. 471.

3. *Little v. Marx*, 145 Ala. 620, 39 So. 517; *Gayle's Admr. v. Johnston*, 72 Ala. 254.

Paine v. Pendleton, 32 Miss. 320, where court says: "No form of making their objections is established, nor does there appear any necessity that they should be made by formal answer. . . . It is sufficient if the objections be stated in such certain form as to enable the court to inquire into their sufficiency or their correctness, and to determine upon the facts made to appear, whether the lands ought to be decreed to be sold."

Failure To Verify.—The failure of a guardian to swear to a mere formal answer is immaterial. *Ridgely v. Bennett*, 13 Lea (Tenn.) 210.

Allegations not denied in a verified petition, may be taken as true, although no formal proof is offered in support of them. *In re Brannan's Estate* (Cal.), 51 Pac. 320.

Waiver.—"If parties go to a hearing without observing all the technical rules required for arriving at the issue, these requirements are waived." *Dauel v. Arnold*, 201 Ill. 570, 66 N. E. 846.

4. *Steffy & Shimp's Appeal*, 76 Pa. 94.

Replication.—In Pennsylvania, where petitioner files no replication, the answer must, under the rules of equity practice, be taken as true. *Estate of Eddy, Jr.*, 12 Phila. (Pa.) 55.

Pleadings in Chancery.—When an administrator files a bill to sell the lands of an intestate to pay debts on the ground that the personal assets are insufficient, the heirs may by answer, as well as by cross-bill or original bill,

contest the settlement made by the administrator in the county court. *Shields v. Alsop*, 5 Lea (Tenn.) 508.

Failure of Guardian To Answer.—Although §2778, Iowa Rev. St., 1860, required a defense by guardian before judgment against infant, the failure of the guardian to file an answer in writing did not affect the jurisdiction of the court to order sale. *Bickel v. Erskine*, 43 Iowa 213.

5. *Jones v. Hemphill*, 77 N. C. 42.

One who has filed only a general demurrer will not be permitted to urge in a reviewing court an objection which was ground only for a special demurrer. *Estate of Levy*, 141 Cal. 639, 75 Pac. 317.

For answers good on demurrer, see *Loftin v. Edgar*, 27 Ark. 410; *Finch v. Du Bignon*, 117 Ga. 113, 43 S. E. 423.

For practice in Georgia when it is sought to interpose a claim affidavit to prevent administrator's sale, consult *Beach v. Lott*, 132 Ga. 70, 63 S. E. 627.

6. **Ind.**—*Cole v. Lafontaine*, 84 Ind. 446. **Ia.**—*Duffield v. Walden*, 102 Iowa 676, 72 N. W. 278. **N. C.**—*Proctor v. Proctor*, 105 N. C. 222, 10 S. E. 1036, allowing heir to plead that outstanding indebtedness barred by statute of limitations. **Tenn.**—*Shields v. Alsop*, 5 Lea 508. See also *In re Topping's Estate*, 18 Civ. Proc. 115, 9 N. Y. Supp. 447, where grantee of heir was permitted to show that personal property not mentioned in inventory might be used to pay indebtedness of estate.

Plea of Statute of Limitations.—**N. Y.** Code Civ. Proc. §2755, enables an heir to plead the statute of limitations against a creditor who is seeking to have decedent's lands sold for the payment of debts. *In re Knapp*, 25 Misc.

the real estate asked to be sold that the property could be disposed of only at a sacrifice.⁷

Unreasonable delay in filing the petition may be taken advantage of by defendant.⁸ Advantage can be taken only of substantial causes why sale should not be made,⁹ and an objection because of the irregularity of administrator's appointment will not be considered.¹⁰

Pendency of Other Proceedings.—An objection that other proceedings are pending which involve the land sought to be sold is usually insufficient to prevent sale of decedent's realty to pay debts.¹¹ A sale may therefore be ordered although it is objected that the heirs at law are seeking to have partition of decedent's lands,¹² that creditor has levied upon land and is seeking to subject it to his judgment,¹³ or that the mortgagee has instituted proceedings on a mortgage covering land sought to be sold.¹⁴

5. Hearing.—a. *In General.*—On the hearing the court should seek to determine whether there is sufficient ground for the order prayed for by the petitioner,¹⁵ and should not enter upon an inquiry

133, 54 N. Y. Supp. 927. See also *Warren v. Hearne*, 82 Ala. 554, 2 So. 491, allowing heir to plead statute.

7. *In re Wood's Estate*, 138 Mo. App. 258, 120 S. W. 635.

8. *Cole v. Lafontaine*, 84 Ind. 446. Compare, *Turner v. Fell*, 142 Ill. App. 458.

An heir who had formerly been administrator and whose failure to act was the chief cause for delay, can not object because of the delay in subjection of land to payment of debts. *Black v. Robinson*, 70 Ark. 185, 68 S. W. 489.

9. *Ga.*—*Jackson v. Warthen*, 111 Ga. 834, 36 S. E. 214, objection that market depressed insufficient. *La.*—*Lehman v. Worley*, 40 La. Ann. 620, 4 So. 573, overruling objection made because at that season of year money scarce and bidders for value of property not probably obtainable. *Ore.*—*In re Estate of Houck*, 17 Pac. 461, refusing to consider dispute as to heirship.

Prior Sale by Heir.—The fact that heir has, without an order of court, sold decedent's land at private sale and applied the proceeds in the payment of preferred claims, is no bar to administrator's action. *Sidener v. Hawes*, 37 Ohio St. 532.

10. *Riser v. Snoddy*, 7 Ind. 442, 65 Am. Dec. 740; *Waldow v. Beemer*, 45 Neb. 626, 63 N. W. 918.

11. *Grider v. Apperson & Co.*, 38 Ark. 388 (where creditors petitioning for sale to pay debts were themselves

also suing the estate under a claim of ownership of an undivided half of land); *Clarkson v. Beardsley*, 45 Conn. 196.

12. *Succession of Brown*, 23 La. Ann. 308; *Stout v. Stout*, 82 Ohio 358, 92 N. E. 465. *Contra*, *Estate of Kennedy*, 17 Phila. (Pa.) 507.

A partition of land held in common after license given by the probate court to sell an undivided interest and before sale does not invalidate the license but sale thereunder may be made of land set off to heirs. *Rice v. Dieckerman*, 47 Minn. 527, 50 N. W. 698.

13. *Succession of Patrick*, 25 La. Ann. 154; *Bossier v. Kennedy*, 19 La. Ann. 107.

14. *Fitzsimmon's Appeal*, 40 Pa. 422; *Shaw v. Barksdale*, 25 S. C. 204 (where, however, mortgage was given by devisee).

Where property has already been sold in foreclosure proceedings on a mortgage claimed to be invalid by petitioner, the proceedings for sale to pay debts should not be dismissed but petitioner should be given a reasonable opportunity to attack, in the proper court, the foreclosure and sale. *Knickerbocker v. Decker*, 4 Dem. Sur. (N. Y.) 128.

15. *Hodgdon v. White*, 11 N. H. 208; *Smith v. Smith's Admr.*, 27 N. J. Eq. 445.

Court is not bound to hold an inquiry to determine whether the land which administrator seeks to sell is a

relative to disputes between heirs or personal representatives and third persons,¹⁶ or into an investigation of questions of title.¹⁷

Burden of Proof.—The burden is upon the petitioner to show the truth of the essential allegations of his petition,¹⁸ and when the action is against infant defendants, the allegations should be supported by proofs, even when no denial is filed.¹⁹

b. *Reference.*—The court may appoint a referee to take and report the evidence relative to the necessity for sale,²⁰ but whether or not there shall be a reference is a matter within the discretion of the court.²¹

c. *Determination of Necessity for Sale.*—(I.) **Proof of Claims.**—Before an order of sale is issued, the validity of claims against decedent's estate must be made to appear to court.²² The allowance of a claim by the personal representative or a judgment against him in his official capacity is sufficient *prima facie* proof of the validity of such claim,²³ but the allowance of claim or judgment thereon against the personal representative is not conclusive on the heir or devisee who may contest the claim on the hearing.²⁴ The consent of or admissions made by

homestead (*Randel v. Randel*, 64 Kan. 254, 67 Pa. 837); but should make inquiry as to the proper manner, terms and conditions of sale (*Haywood v. Haywood*, 80 N. C. 42).

16. *Theller v. Such*, 57 Cal. 447; *Clement v. Foster*, 71 N. C. 36 (refusing to consider questions arising because of trespass committed).

The court may consider a cross-complaint setting up reasons why the interest of a certain heir should be sold first. *Galvin v. Britton*, 151 Ind. 1, 49 N. E. 1064.

17. *In re Tuohy's Estate*, 33 Mont. 230, 83 Pac. 486.

18. *Mayer v. Kornegay*, 163 Ala. 371, 50 So. 880; *Garrett v. Garrett's Admr.*, 64 Ala. 263.

19. *Martin v. Starr*, 7 Ind. 224; *Tabb v. Wortham's Admr.*, 28 Ky. L. Rep. 260, 89 S. W. 191.

20. *In re Walker's Estate*, 43 Misc. 475, 89 N. Y. Supp. 459; *In re Liechtenstein's Estate*, 16 Misc. 667, 39 N. Y. Supp. 174.

Pending reference to a commissioner to determine sufficiency of the personal estate, it is error for the court to order a sale of deceased's land. *Thompson v. Joyner*, 71 N. C. 369.

21. *Ky.*—*Harlammert v. Moody's Admr.*, 26 S. W. 2. *Pa.*—*Lucas' Appeal*, 53 Pa. 404; *Fitzsimmons' Appeal*, 46 Pa. 422. *Tenn.*—*Bloom v. Cate*, 7 Lea 471.

22. *Carter v. Crowd's Admr.*, 130

Ky. 41, 112 S. W. 1098; *In re Pirie*, 133 App. Div. 431, 117 N. Y. Supp. 753.

23. *Cal.*—*Estate of Schroeder*, 46 Cal. 304. *Ill.*—*McGarvey v. Darnell*, 134 Ill. 367, 25 N. E. 1005 (refusing, however, to give such effect to a judgment recovered in another state); *Mason v. Blair*, 33 Ill. 194. *Ind.*—*Jackson v. Weaver*, 98 Ind. 307. *Ia.*—*Milburn v. East*, 128 Iowa 101, 102 N. W. 1116; *Willett v. Malli*, 65 Iowa 675, 22 N. W. 922. *Miss.*—*Yandell v. Pugh*, 53 Miss. 295. *Pa.*—*Steele v. Lineberger*, 59 Pa. 308. *Tex.*—*Henry v. Drought*, 10 Tex. Civ. App. 379, 30 S. W. 584.

Contra, *In re Pfohl*, 20 Misc. 627, 46 N. Y. Supp. 1086.

Order of Court of Another Jurisdiction.—By virtue of Kan. Gen. St., 1901, §2950, an allowance of a claim against the personal representative by a court having jurisdiction is *prima facie* evidence against the heirs or devisees of its validity and due presentation, even though the order was made by the court of another state. *Thomas v. Williams*, 80 Kan. 632, 103 Pac. 772.

24. *Cal.*—*Wingerter v. Wingerter*, 71 Cal. 105, 11 Pac. 853, *approving* *Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237; *Estate of Schroeder*, 46 Cal. 304. *Ill.*—*McGarvey v. Darnall*, 134 Ill. 367, 25 N. E. 1005; *Moline Water P. & Mfg. Co. v. Webster*, 26 Ill. 233. *Ind.*—*O'Haleran v. O'Haleran*, 115 Ind. 493, 17 N. E. 917; *Scherer v. Inger-*

an heir²⁵ or of a guardian *ad litem*²⁶ are insufficient to prove the validity of claims against decedents' estate.²⁷

(II.) **Insufficiency of Personal Assets.** — Proof must be presented of the amount of personalty applicable to the payment of debts so that the court may determine as to the necessity for sale,²⁸ but the filing of an inventory and appraisement of personalty,²⁹ or of an account of the administration,³⁰ is usually not required if a deficiency of personalty is otherwise made to appear.

d. **Discontinuance.** — A personal representative who has filed a petition for an order to sell real estate to pay debts and has obtained an order of sale cannot insist that the proceedings be discontinued.³¹

man, 110 Ind. 428, 11 N. E. 8, 12 N. E. 304; *Cole v. Lafontaine*, 84 Ind. 446. Ia.—*Willett v. Malli*, 65 Iowa 675, 22 N. W. 922. N. H.—*Nichols v. Day*, 32 N. H. 133. N. Y.—*Long v. Long*, 142 N. Y. 545, 37 N. E. 486; *Colson v. Brainard*, 1 Redf. Sur. 324. Ohio. *Sidener v. Hawes*, 37 Ohio St. 532, where attack on ground of fraud. Pa. *Dean's Appeal*, 87 Pa. 24; *Steele v. Lineberger*, 59 Pa. 308. Va.—*Garnett v. Macon*, 6 Call. 308.

Judgment on Claim Deemed Conclusive. — In a few jurisdictions, a judgment against the personal representative is deemed conclusive on the heirs or devisees, in the absence of fraud or collusion. *Mays v. Rogers*, 37 Ark. 155; *Carter v. Engles*, 35 Ark. 205; *Long v. Oxford*, 108 N. C. 280, 13 S. E. 112; *Proctor v. Proctor*, 105 N. C. 222, 10 S. E. 1036; *Speer v. James*, 94 N. C. 417. Compare, *Tilley v. Bivins*, 112 N. C. 348, 16 S. E. 759, where court allowed heir to show that administrator wrongfully suffered judgment to be taken against him.

Allowance by Probate Court. — An allowance by the probate court as well as by the public administrator does not prevent the heir from disputing the validity of claims on which petition to sell is based. *Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237. And see *Estate of Crosby*, 55 Cal. 582; *Estate of Schroeder*, 46 Cal. 317. On effect of allowance by court see also *Houck v. Houck*, 112 Md. 122, 76 Atl. 581.

If the heir or devisee appears and defends an action against the personal representative, he is bound by the judgment rendered and can not later contest the claim when administrator brings proceedings to have realty sold. *Nichols v. Day*, 32 N. H. 133, 64 Am. Dec. 358. See also *Appeal*

from Pike, 16 Ill. 177.

25. *Kornegay v. Mayer*, 135 Ala. 141, 33 So. 36.

26. *Hooper v. Hardie*, 80 Ala. 114.

27. **Practice Under Alabama Statute.** — Although Alabama Code, §164, requires that proof of the insufficiency of personal property be shown by the depositions of disinterested witnesses, it is not necessary that the existence of debts be so proved. *Hunt v. Curtis*, 151 Ala. 507, 44 So. 54; *Poole v. Daughdrill*, 129 Ala. 208, 30 So. 579, *overruling* *Quarles v. Campbell*, 72 Ala. 64.

28. Mo.—*Camden v. Plain*, 91 Mo. 117, 4 S. W. 86. N. Y.—*In re Van Vleck*, 32 Misc. 419, 66 N. Y. Supp. 727. Tenn.—*Wade v. Fisher*, 10 Heisk. 490; *Frazier v. Tulloss*, 1 Swan, 75. W. Va.—*Miller v. Mitchell*, 58 W. Va. 431, 52 S. E. 478.

In Alabama, the insufficiency of personal property must be shown by the depositions of disinterested witnesses, filed and recorded, before an order of sale can be made. *Little v. Marx*, 145 Ala. 620, 39 So. 517; *Alford v. Alford*, 96 Ala. 385, 11 So. 316; *Quarles v. Campbell*, 72 Ala. 64.

29. Colo.—*Nichols v. Lee*, 16 Colo. 147, 26 Pac. 157. Ill.—*Shoemate v. Lockridge*, 53 Ill. 503. Miss.—*Eldridge v. McMackin*, 37 Miss. 72. Mo.—*Grayson v. Weddle*, 63 Mo. 523; *Overton v. Johnson*, 17 Mo. 442; *Brown v. Woody*, 22 Mo. App. 253.

30. Cal.—*Abila v. Burnett*, 33 Cal. 658. Miss.—*Learned v. Mathew*, 40 Miss. 210. N. Y.—*In re Howard's Estate*, 11 Misc. 224, 32 N. Y. Supp. 1098; *In re Merchant's Estate*, 6 N. Y. Supp. 875. Consult, also, *Palmer v. Palmer*, 13 Gray (Mass.) 326.

31. *Farrington v. King*, 1 Bradf. Sur. (N. Y.) 182. See also, *Raven v. Norton*, 2 Dem. Sur. (N. Y.) 110, re-

6. Order of Sale.—a. *Necessity for Order.*—An order of sale is essential to give validity to a sale made in pursuance of proceedings to sell decedent's real estate in payment of debts.³²

b. *Contents and Sufficiency.*—The court must conform its order to the case and object set forth in the petition,³³ and if sale is to pay debts, should order for the payment of debts generally,³⁴ but need not set forth in the order the items constituting the debts.³⁵ The recitals in the record should show the existence of the facts necessary to give the court jurisdiction to make the order of sale.³⁶

Description of Real Estate.—The decree of sale should describe the real estate with sufficient definiteness so that the person directed to sell may ascertain the land to be sold,³⁷ but a reference to the petition

quiring administrator to proceed, when jurisdiction over parties once obtained, upon motion of a creditor.

32. Ala.—*Gilechrist v. Shackelford*, 72 Ala. 7. **Mo.**—*Evans v. Snyder*, 64 Mo. 516, where court says: "The order of sale in cases of this sort, occupies the same relation to a sale by the administrator, that a judgment or decree does to an execution sale by a sheriff." **N. H.**—*Foster v. Huntington*, 5 N. H. 108. **Ohio.**—*Lessee of Goforth v. Longworth*, 4 Ohio 129, 19 Am. Dec. 588; *Tiernan v. Beam*, 2 Ohio 383; *Newcomb's Lessee v. Smith*, Wright 208 (petition to sell with "allowed" written upon it by an associate judge, is not an order of sale). **Tex.**—*Cruse v. O'Gwin*, 48 Tex. Civ. App. 48, 106 S. W. 757. **Vt.**—*Doolittle v. Holton*, 28 Vt. 819, presuming order issued under circumstances, in the absence of record evidence respecting issue.

Presumption From Recital in Deed. A recital in administrator's deed of an order of sale may, after a lapse of forty or fifty years, be used as evidence of the facts recited. *Baeder v. Jennings*, 40 Fed. 199.

An order of sale issued to a temporary administrator on the day of his appointment is no authority for a sale by him after his appointment as permanent administrator. *Cruse v. O'Gwin*, 48 Tex. Civ. App. 48, 106 S. W. 757.

Effect of Order as Evidence.—In an action against a purchaser from heir of intestate, an order to sell to pay debts is prima facie evidence of the right of administrator to recover the land. *Cochran v. Bugg*, 131 Ga. 588, 62 S. E. 1048.

33. Mays v. Rogers, 37 Ark. 155 (holding it error to order the sale of

more land than is prayed for in petition); *Williams v. Childress*, 25 Miss. 78.

34. Taylor v. Hanford, 11 N. J. L. 341.

It is immaterial in this respect that application was made by some particular creditor or by administrator for some particular creditor. *Planters' Mut. Ins. Assn. v. Harris* (Ark.), 131 S. W. 949.

35. Estate of Roach, 139 Cal. 17, 72 Pac. 393; *Rhodes v. Bell*, 230 Mo. 138, 130 S. W. 465, where order sustained although no finding of amount of debts.

36. Ala.—*Summersett v. Summersett's Admr.*, 40 Ala. 596, 91 Am. Dec. 494; *Wyatt's Admr. v. Rambo*, 29 Ala. 510. **Conn.**—*Wattles v. Hyde*, 9 Conn. 10. **Fla.**—*Sloan v. Sloan*, 25 Fla. 53, 5 So. 603. **Ga.**—*Woods & Morris v. Crawford*, 18 Ga. 526. **Tenn.**—*Griffith v. Phillips*, 9 Lea 417.

Failure to enter upon the journal a finding of the truth of the allegations of the petition is not sufficient ground for a reversal of the order of sale. *Sidener v. Hawes*, 37 Ohio St. 532.

37. Ill.—*Tilton v. Pearson*, 67 Ill. App. 372. **Ky.**—*Noland v. Noland's Admr.*, 12 Bush. 426; *Harrison's Exrx. v. Taylor*, 19 Ky. L. Rep. 1191, 43 S. W. 723; *Bartlett's Admr. v. Gray*, 4 Ky. L. Rep. 615. **Mo.**—*Melton v. Fitch*, 125 Mo. 281, 28 S. W. 612. *Compare Camden v. Plain*, 91 Mo. 117, 4 S. W. 86. **N. C.**—*Blythe v. Hoots*, 72 N. C. 575. **Tex.**—*Graham v. Hawkins*, 38 Tex. 628.

For cases in which statutory requirement that order describe property is said to be merely directory, see *Davis*

or other document in the case which properly describes land, in an order of sale which fails to describe land, may identify the property with sufficient certainty.³⁸

Amount To Be Sold. — Where there is no proof that a sale of part of decedent's realty will satisfy the indebtedness of estate, the court may order all the realty sold,³⁹ and the court is not restricted in the granting of a license to sell to the exact amount which the petitioner may represent to be necessary.⁴⁰ But where realty is divisible and a sale of a part would furnish a sufficient sum to pay all debts, the court should direct a sale of so much as is necessary to raise the sum required.⁴¹ It is not necessary to determine and state in the order the particular interest which decedent had in the land to be sold.⁴²

Terms, Place and Time of Sale. — The order of sale should specify on what terms the land is to be sold⁴³ and the statutes sometimes require that the place of sale be specified in the order.⁴⁴ In some jurisdictions, the court also states in its order the time within which sale may be made.⁴⁵

Conditional Order. — An order authorizing administrator to sell "if,

v. McDaniel, 47 Ga. 195; *Davis v. Touchstone*, 45 Tex. 490.

38. **Ark.**—*Montgomery v. Johnson*, 31 Ark. 74. **Mo.**—*Adams v. Larrimore*, 51 Mo. 130. **Mont.**—*Plains L. & I. Co. v. Lynch*, 38 Mont. 271, 99 Pac. 847. **Tex.**—*Ferguson v. Templeton* (Tex. Civ. App.), 32 S. W. 148, where order omitting description referred to petition which had been lost and court allowed reference to other documents in case.

A mis-description in order of sale of land properly described in petition and deed to purchaser, will be treated as a mere clerical error in a collateral proceeding involving title. *Schnell v. City of Chicago*, 38 Ill. 382, 87 Am. Dec. 304. See also *Buntin v. Root*, 66 Minn. 454, 69 N. W. 330, where indefinite description in order made certain by accurate description in return.

39. *Johnson v. Porterfield*, 150 Ala. 532, 43 So. 228.

40. *Tenney v. Poor*, 14 Gray (Mass.) 500.

41. **Ky.**—*Carter v. Crow's Admr.*, 130 Ky. 41, 112 S. W. 1098. **Mass.** *Norton v. Norton*, 5 Cush. 524. **N. H.** *Merrill v. Harris*, 26 N. H. 142, 57 Am. Dec. 359. **N. J.**—*Furman v. Furman*, 45 N. J. Eq. 744, 18 Atl. 194. **Tenn.**—*Griffith v. Phillips*, 9 Lea 417.

42. *Bowles' Heirs v. Rouse*, 8 Ill. 409.

43. **Ala.** — *Weakley v. Gurley's*

Admr., 60 Ala. 399. **Ill.**—*Harding v. Le Moynes*, 114 Ill. 65, 29 N. E. 188 (court should also prescribe the manner of conducting sale, in so far as this is not done by the statute itself); *Moline Water Power & Mfg. Co. v. Webster*, 26 Ill. 233. **Ky.**—*Underwood's Admr. v. Cartwright*, 20 Ky. L. Rep. 809, 47 S. W. 580.

Failure to state the terms of sale in the order is an irregularity which is cured by the confirmation of sale. *Plains L. & I. Co. v. Lynch*, 38 Mont. 271, 99 Pac. 847.

Failure to specify whether the sale should be on credit or for cash does not affect the validity of order, since such order is, in effect, an order to sell for cash. *Weakley v. Gurley's Admr.*, 60 Ala. 399.

44. *Bozeman v. Bozeman*, 82 Ala. 389, 2 So. 732; *Brown v. Brown's Admr.*, 41 Ala. 215; *Underwood's Admr. v. Cartwright*, 20 Ky. L. Rep. 809, 47 S. W. 580.

45. *In re Dorsey*, 75 Cal. 258, 17 Pac. 209; *Title Guarantee & L. Co. v. Holverson*, 95 Ga. 707, 22 S. E. 533.

In Mississippi, it has been held that the probate court has no power to limit the time within which sale should be made or reported and that person ordered to sell may do so after the time prescribed in the order has elapsed. *Yerger v. Ferguson*, 55 Miss. 190.

in the settlement of the estate, it should be found necessary," is not a conditional judgment void as an attempt to vest in the administrator judicial powers.⁴⁶

A general authority to execute deeds given by the court to decedent's personal representative is void.⁴⁷

c. *Vacation and Amendment.*—The order of sale may be set aside by the court in the same manner as other decrees.⁴⁸ An order obtained by fraud or mistake may therefore be vacated.⁴⁹

An order of sale may be amended *nunc pro tunc* when such an amendment is required to make the record speak the truth.⁵⁰

46. *Sledge v. Elliott*, 116 N. C. 712, 21 S. E. 797.

47. *Tiernan v. Beam*, 2 Ohio 383. Compare *Runyon v. Newark India Rubber Co.*, 24 N. J. L. 467.

48. Ia.—*Huston v. Huston*, 29 Iowa 347. N. Y.—*Sheldon v. Wright*, 7 Barb. 39. N. C.—*Stradley v. King*, 84 N. C. 635. S. C.—*Radford v. Westcott*, 1 Desaus. 596. Tex.—*Wall v. Clark*, 19 Tex. 321.

Order of sale can be rescinded, vacated or revoked by the court only in the same manner as other judgments and therefore there must be notice to the petitioner and good cause shown. *Whitaker v. Smith*, 33 Ga. 237.

If letters of dismissal have been granted to the personal representative, the judgment discharging him must be re-opened before the motion to set aside the order of sale can be entertained, the administrator being a necessary party to the proceedings to set aside order of sale. *Whitley Grocery Co. v. Jones*, 128 Ga. 791, 58 S. E. 623.

In California, the court has no power to vacate an order of sale other than that conferred by Code Civ. Proc. §1552, which permits the court, upon the hearing when return is made, to vacate the sale and direct another to be had when a proper showing is made, as provided in section. *Estate of Leonis*, 138 Cal. 194, 71 Pac. 171.

Order Revoked.—A sale is void, if made under an order which has been revoked. *Radford v. Westcott*, 1 Desaus. (S. C.) 596.

An order refusing to decree sale is subject to vacation only by the statutory steps. *In re Barker's Estate*, 33 Wash. 79, 73 Pac. 796.

Stay of Order.—Where, after executor has been ordered to sell realty to pay debts, a devisee files a petition

asking that the property devised to him be distributed to him, the court may stay the order to the executor and order him to proceed no further until devisee's petition is passed upon. *State v. District Court*, 34 Mont. 345, 86 Pac. 268.

Who May Ask Vacation.—A person who claims a title superior to decedent in the land ordered sold, is not a person interested in the estate who may ask that the order of sale be vacated. *Shields v. Ashley's Admr.*, 16 Mo. 471.

Insufficient Grounds for Vacation. The court should not vacate order because of mere irregularities (*Carter v. Waugh*, 42 Ala. 452); or because a better offer made after order fully complied with (*State v. District Court*, 24 Mont. 1, 60 Pac. 489); or because decree failed to contain recitals as to the grounds upon which order was based (*Williams v. O'Neal*, 119 Ga. 175, 45 S. E. 978).

49. Ark.—*Adams v. Toomer*, 44 Ark. 271. Ind.—*Jones v. French*, 92 Ind. 138. Ky.—*May v. Vaughn*, 28 Ky. L. Rep. 1088, 91 S. W. 273. N. C.—*Carter v. Rountree*, 109 N. C. 29, 13 S. E. 716, where the court says: "It is well settled, that pending an action before the final judgment, an interlocutory order or judgment may be attacked for fraud by a motion or proceeding in the action, but after the final judgment the remedy for fraud is by an independent action brought for the purpose."

50. Ark.—*Bouldin v. Jennings*, 92 Ark. 299, 122 S. W. 639. Ga.—*Attaway v. Carswell*, 89 Ga. 343, 15 S. E. 472. N. J.—*Voorhees' Case*, 57 N. J. Eq. 291, 42 Atl. 567. N. Y.—*Palmer v. Terwilliger*, 95 App. Div. 35, 88 N. Y. Supp. 526. N. C.—*Maxwell v. Blair*, 95 N. C. 317.

d. *Collateral Attack*.—Where the court has jurisdiction of the parties and of the subject-matter, an order directing the sale of decedent's realty cannot be attacked collaterally.⁵¹ Mere irregularities

An invalid order of sale cannot be corrected by order *nunc pro tunc* upon application made after land sold. *In re Streiff's Estate*, 146 Wis. 230, 131 N. W. 358.

An order of the probate court, made twenty-seven years after the sale, purporting to correct the order or license so as to describe the land of the intestate is void. *Hanson v. Ingwaldson*, 77 Minn. 533, 80 N. W. 702, 77 Am. St. Rep. 692, following *Kurtz v. St. Paul & D. R. Co.*, 65 Minn. 60, 67 N. W. 808.

Modification of Order.—The court may modify and change the order which it has made so as to change the terms of sale from a private to a public sale. *Rhodes v. Bell*, 230 Mo. 138, 130 S. W. 465, approving *Tutt v. Zenir*, 51 Mo. 431.

51. **Ala.**—*Cobb v. Garner*, 105 Ala. 467, 17 So. 47, 53 Am. St. Rep. 136; *Kent v. Mansel*, 101 Ala. 334, 14 So. 489. **Cal.**—*Ions v. Harbison*, 112 Cal. 260, 44 Pac. 572; *Spriggs' Estate*, 20 Cal. 121; *Dane v. Layne*, 10 Cal. App. 366, 101 Pac. 1067. **Ga.**—*Martin v. Dix*, 134 Ga. 481, 68 S. E. 80; *Adams v. Adams*, 113 Ga. 824, 39 S. E. 291. **Ill.**—*Reinhardt v. Seaman*, 208 Ill. 448, 69 N. E. 847; *Bradley v. Drone*, 187 Ill. 175, 58 N. E. 304, 79 Am. St. Rep. 214. **Ind.**—*Thomas v. Thompson*, 149 Ind. 391, 49 N. E. 268; *Lantz v. Maffett*, 102 Ind. 23, 26 N. E. 195; *Gavin v. Graydon*, 41 Ind. 559. **Ia.**—*Rice v. Bolton*, 126 Iowa 654, 100 N. W. 634, 102 N. W. 509. **Kan.**—*Watkins Land Mortgage Co. v. Mullen*, 62 Kan. 1, 61 Pac. 385. **Ky.**—*Dennis v. Alves*, 113 S. W. 483; *Blackwell v. Townsend*, 91 Ky. 609, 16 S. W. 587; *Smith v. Hardesty*, 26 Ky. L. Rep. 1266, 83 S. W. 646. **Me.**—*Lebroke v. Damon*, 89 Me. 113, 35 Atl. 1028. **Md.**—*Simpson v. Bailey*, 80 Md. 421, 30 Atl. 622. **Mass.**—*Thayer v. Winchester*, 133 Mass. 447; *Perkins v. Fairfield*, 11 Mass. 227. **Mich.**—*Pratt v. Houghtaling*, 45 Mich. 457, 8 N. W. 72. **Miss.**—*Shannon v. Summers*, 86 Miss. 619, 38 So. 345. **Mo.**—*Covington v. Chamblin*, 156 Mo. 574, 57 S. W. 728; *Howell v. Jump*, 140 Mo. 441, 41 S. W. 976. **Neb.**—*Schroeder v. Wilcox*, 39 Neb. 136, 57 N. W.

1031. **N. H.**—*Merrill v. Harris*, 26 N. H. 142, 57 Am. Dec. 359. **N. Y.**—*Smith v. Blood*, 106 App. Div. 317, 94 N. Y. Supp. 667. **N. C.**—*Barefoot v. Musselwhite*, 153 N. C. 208, 69 S. E. 71; *Dickens v. Long*, 109 N. C. 165, 13 S. E. 841. **Ore.**—*Smith v. Whiting*, 55 Ore. 393, 106 Pac. 791. **Pa.**—*Snyder v. Markel*, 8 Watts 416; *Fox v. Winters*, 4 Rawle 174. **S. C.**—*Epperson v. Jackson*, 83 S. C. 157, 65 S. E. 217; *Hodge v. Fabian*, 31 S. C. 212, 9 S. E. 820. **Tex.**—*Ross v. Martin* (Tex. Civ. App.), 128 S. W. 718; *Flenner v. Walker*, 5 Tex. Civ. App. 145, 23 S. W. 1029; *Lyne v. Sanford*, 82 Tex. 58, 19 S. W. 847, 27 Am. St. Rep. 852. **Va.**—*Peirce v. Graham*, 85 Va. 227, 7 S. E. 189; *Woodhouse v. Tillbates*, 77 Va. 317. **Wash.**—*McKenna v. Cosgrove*, 41 Wash. 332, 83 Pac. 240.

Collateral Impeachment for Fraud.

An order of sale cannot be impeached collaterally, in a proceeding in equity, when the facts constituting the fraud charged were directly in issue and must have been determined by the court where proceedings to sell were heard, before the order to sell could be granted legally. *Gordon v. Gordon*, 55 N. H. 399. Fraud in procurement of order cannot avail upon a mere collateral attack in an ejectment suit by one claiming as legatee. *Martin v. Dix*, 134 Ga. 481, 68 S. E. 80.

Estoppel.—A devisee obtained a decree partitioning real estate and quieting title and later he was made a defendant in a proceedings by administrator for sale of this land to pay debts. Devisee pleaded the former proceeding but was defeated. Held, that devisee is estopped from attacking the title of the purchaser at administrator's sale. *Thomas v. Thompson*, 149 Ind. 391, 49 N. E. 268.

Where No Jurisdiction.—If court has no jurisdiction to make order, order is of course void and subject to attack in any collateral proceeding. *Cal. In re Devincenzi's Estate*, 119 Cal. 498, 51 Pac. 845; *Townsend v. Tallant*, 33 Cal. 45, 91 Am. Dec. 617. **Ky.**—*Blackwell v. Townsend*, 91 Ky. 609, 16 S. W. 587. **Mass.**—*Thayer v. Winchester*, 133 Mass. 447; *Heath v. Wells*, 5

and errors are not sufficient to avoid the decree upon the ground of want of jurisdiction,⁵² and the fact that the order was made although sufficient personalty existed to pay debts,⁵³ that petition or notice, although sufficient to give jurisdiction, was defective,⁵⁴ or that there was some defect in the proceedings for the appointment of the personal representative who petitioned for the sale,⁵⁵ are deemed irregularities.

Pick. 140, 16 Am. Dec. 383. **Neb.** Tindall v. Peterson, 71 Neb. 160, 98 N. W. 688, 99 N. W. 659. **N. Y.**—Pensoni v. Goodale, 199 N. Y. 323, 92 N. E. 754. **Tex.**—Ross v. Martin (Tex. Civ. App.), 128 S. W. 718.

52. **U. S.**—Kretsinger v. Brown, 165 Fed. 612, 91 C. C. A. 450. **Ala.**—Gartman v. Lightner, 160 Ala. 202, 49 So. 412. **Cal.**—Dane v. Layne, 10 Cal. App. 366, 101 Pac. 1067. **Ga.**—Adams v. Adams, 113 Ga. 824, 39 S. E. 291. **Mont.** Plains Land & Imp. Co. v. Lynch, 33 Mont. 271, 99 Pac. 847. **Tex.**—Saul v. Frame, 3 Tex. Civ. App. 596, 22 S. W. 984.

The motive prompting the personal representative to institute proceedings for sale will not be inquired into in a collateral proceeding. Disman v. Flippin's Admx. (Ky.), 116 S. W. 740.

53. **Ala.**—Neville v. Kenney, 125 Ala. 149, 28 So. 452, 82 Am. St. Rep. 230; Foxworth v. White, 72 Ala. 224. **Cal.**—McCauley v. Harvey, 49 Cal. 497; Boyd v. Blankman, 29 Cal. 19, 87 Am. Dec. 146 (refusing to allow collateral attack although order procured to pay a debt which administrator had previously paid with funds of estate). **Ill.**—Stow v. Kimball, 28 Ill. 93. **Ia.**—Little v. Sinnett, 7 Iowa 324. **Mich.**—Long v. Landman, 118 Mich. 174, 76 N. W. 374 (mortgage to pay debts); King v. Nunn, 99 Mich. 590, 58 N. W. 636; Norman v. Olney, 64 Mich. 553, 31 N. W. 555; Blanchard v. DeGraff, 60 Mich. 107, 26 N. W. 849. **Minn.**—Curran v. Kuby, 37 Minn. 330, 33 N. W. 907. **Mo.**—Blickensderfer v. Hanna, 231 Mo. 93, 132 S. W. 678; Macey v. Stark, 116 Mo. 481, 21 S. W. 1088. **N. Y.**—Wood v. McChesney, 40 Barb. 417. **Ore.**—Lawrey v. Sterling, 41 Ore. 518, 69 Pac. 460, where court refused to consider in a collateral proceeding, an objection that record itself disclosed that it was unnecessary to raise so large a sum. **Tex.**—Looney v. Linney (Tex. Civ. App.), 21 S. W.

409. **Va.**—Lawson v. Moorman, 85 Va. 880, 9 S. E. 150.

The decree of the judge of probate, unappealed from, is conclusive upon the question whether a sufficient part of the land might have been sold without injury to the residue. Allen v. Trustees of Ashley School Fund, 102 Mass. 262.

54. **Ala.**—Goodwin v. Sims, 86 Ala. 102, 5 So. 587, 11 Am. St. Rep. 21. **Cal.**—In re Devincenzi's Estate, 119 Cal. 498, 51 Pac. 845. **Colo.**—Bateman v. Reitler, 19 Colo. 547, 36 Pac. 548. **Ill.**—Andrews v. Bernhardt, 87 Ill. 365. **Ia.**—Stanley v. Noble, 59 Iowa 666, 13 N. W. 839; Lees v. Wetmore, 58 Iowa 170, 12 N. W. 238; Myers v. Davis, 47 Iowa 325; Hilton v. Budgett, 43 Iowa 684. **Kan.**—Fleming v. Bale, 23 Kan. 88. **Minn.**—Rumrill v. First National Bank, 28 Minn. 202, following Montour v. Purdy, 11 Minn. 278. **Miss.**—Shannon v. Summers, 86 Miss. 619, 38 So. 345. **Mo.**—Robbins v. Boulware, 190 Mo. 33, 88 S. W. 674, 109 Am. St. Rep. 746. **N. C.**—Coffin v. Cook, 106 N. C. 376, 11 S. E. 371; Edwards v. Moore, 99 N. C. 1, 5 S. E. 13. **Ohio.**—Calkins v. Johnston, 20 Ohio St. 539. **S. D.**—Blackman v. Mulhall, 19 S. D. 534, 104 N. W. 250; Phillips v. Phillips, 13 S. D. 231, 83 N. W. 94. **Tex.**—Gillenwaters v. Scott, 62 Tex. 670, where application stated no reason for sale, other than that land should be sold, and therefore failed to give any statutory ground.

Order to One of Two Administrators. Where there are two administrators, an order to one to sell cannot be attacked collaterally, after sale and confirmation. Corley v. Anderson, 5 Tex. Civ. App. 213, 23 S. W. 839.

55. **Ala.**—Clancy v. Stephens, 92 Ala. 577, 9 So. 522 (where courts says, "The granting of the order of sale by the Probate Court in this case was a judicial determination that T. was the personal representative, for without

Presumptions.—The order of sale in a proceeding to sell real estate can be impeached collaterally only when want of jurisdiction affirmatively appears on the face of the record,⁵⁶ since it will be presumed on collateral attack that the court granting the order had before it all the facts necessary to justify its action.⁵⁷

The existence of an order of sale cannot be presumed when the order

such determination the order could not have been made.'"); *Landford v. Dunklin*, 71 Ala. 594. **Mich.**—*Woods v. Monroe*, 17 Mich. 238. **Tex.**—*Dancy v. Stricklinge*, 15 Tex. 557, 65 Am. Dec. 179; *Poor v. Boyce*, 12 Tex. 440.

Contra, *Frederick v. Pacquette*, 19 Wis. 569, where court refused to treat order of sale as a judicial determination of the official capacity of petitioning administrator. See also, *Paul v. Willis*, 69 Tex. 261, 7 S. W. 357; *Withers v. Patterson*, 27 Tex. 491, 86 Am. Dec. 643, allowing collateral attack when grant of letters was void.

Failure of the executor to give bond does not make the court's order, in proceedings to sell realty, subject to collateral attack. *Moody v. Butler*, 63 Tex. 210.

Defects in Order.—A clerical error in description of property (*Corley v. Goll*, 8 Tex. Civ. App. 184, 27 S. W. 819); the fact that the court directed a public or private sale (*Fleming v. Bale*, 23 Kan. 88); or any other mere irregularity in order (*Peyroux v. Peyroux*, 24 La. Ann. 175), will not make order subject to collateral attack.

56. **Cal.**—*Dane v. Layne*, 10 Cal. App. 366, 101 Pac. 1067. **Ill.**—*Bradley v. Drone*, 187 Ill. 175, 58 N. E. 304, 79 St. Rep. 214. **Ind.**—*Sims v. Gay*, 109 Ind. 501, 9 N. E. 120. **Ky.**—*Dennis v. Alves*, 132 Ky. 345, 113 S. W. 483. **Mo.**—*Bray v. Adams*, 114 Mo. 486, 21 S. W. 853. **Ore.**—*Smith v. Whiting*, 55 Ore. 393, 106 Pac. 791. **S. D.**—*Blackman v. Mulhall*, 19 S. D. 534, 104 N. W. 250. **Wash.**—*Magee v. Big Bend Land Co.*, 51 Wash. 406, 99 Pac. 16.

57. **Cal.**—*Burris v. Kennedy*, 38 Pac. 971. **Ill.**—*Schnell v. City of Chicago*, 38 Ill. 382, 87 Am. Dec. 304, presuming regularity of administrator's appointment. **Ia.**—*Lees v. Wetmore*, 58 Iowa 170, 12 N. W. 238; *Long v. Burnett*, 13 Iowa 28, 81 Am. Dec. 420. **La.**—*Grevenberg v. Bradford*, 44 La. Ann. 400, 10 So. 786. **Mo.**—*Bray v. Adams*, 114

Mo. 486, 21 S. W. 853; *Rowden v. Brown*, 91 Mo. 429, 4 S. W. 129 (where court says: "The same liberal intentions attend the acts and doings of probate courts in regard to all matters within their jurisdiction, and as to which that jurisdiction has attached, as attend the acts and doings of courts of general jurisdiction.") **N. Y.**—*Mott v. Ft. Edwards Waterworks Co.*, 79 App. Div. 179, 79 N. Y. Supp. 1100. **N. C.**—*Yarborough v. Moore*, 151 N. C. 116, 65 S. E. 763, presuming service on minors to have been regular when record silent as to their ages. **Ohio.**—*Sheldon v. Newton*, 3 Ohio St. 494, sale in common pleas court. **Tex.**—*Templeton v. Ferguson*, 89 Tex. 47, 33 S. W. 329; *Mills v. Herndon*, 77 Tex. 89, 13 S. W. 854; *Tom v. Sayers*, 64 Tex. 339. **Wash.**—*McKenna v. Cosgrove*, 41 Wash. 332, 83 Pac. 240.

Compare.—*Howell v. Hughes*, 168 Ala. 460, 53 So. 105, where court says that since probate court is one of limited jurisdiction, the exercise of jurisdiction affords no presumption of its existence.

Presumption of Notice.—The production from the files in the case of a printer's certificate, showing defective and insufficient notice, is not sufficient to overcome the presumption of proper notice arising from a recital in court's decree that due notice was given. *Sloan v. Graham*, 85 Ill. 26; *Moore v. Neil*, 39 Ill. 256. But if return contradicts the finding of court that defendants were personally served, the presumption arising from the finding will be overcome and a want of jurisdiction shown even in a collateral proceeding. *Barnett v. Wolf*, 70 Ill. 76.

Construction Favoring Validity. When a collateral attack is made on administrator's sale, the order of sale should be given a construction which will support its validity, if such a construction is possible from the record. *Millwee v. Phelps*, 53 Tex. Civ. App. 195, 115 S. W. 891.

does not appear by any record or recital and when no confirmation of sale is shown.⁵⁸

e. *Appeal*.—(I.) *In General*.—An appeal may be taken from an order directing,⁵⁹ or refusing to direct,⁶⁰ a sale of decedent's real estate as prayed for by petitioner.

(II.) *Who May Appeal*.—The appeal may be taken by the heirs⁶¹ or other persons aggrieved by the court's order,⁶² and the personal representative has an appealable interest in an order dismissing his petition for authority to sell.⁶³

7. *Oath*.—Where statute requires the administrator to take an oath before proceeding with the sale, a substantial compliance is all that is essential.⁶⁴

58. *Cruse v. O'Gwin*, 48 Tex. Civ. App. 48, 106 S. W. 757.

59. Cal.—*In re Devincenzi's Estate*, 119 Cal. 498, 51 Pac. 845; *Estate of Corwin*, 61 Cal. 160. Colo.—*New York Life Ins. Co. v. Brown*, 32 Colo. 365, 76 Pac. 799; *Vance's Heirs v. Rockwell*, 3 Colo. 240. Fla.—*Price v. Winter*, 15 Fla. 66. Ill.—*Fitzgerald v. Glancy*, 49 Ill. 465. Ind.—*Bollenbacher v. Whisand*, 148 Ind. 377, 47 N. E. 706; *Simpson v. Pearson*, 31 Ind. 1, 99 Am. Dec. 577. Ia.—*Sigmond v. Bebbler*, 104 Iowa 431, 73 N. W. 1027. Ky.—*Roy v. Allen's Admr.*, 118 S. W. 981; *Row v. Back*, 115 S. W. 806; *Oliver v. Park*, 101 Ky. 1, 39 S. W. 423. N. J.—*Carroll v. Baxter*, 65 N. J. L. 478, 47 Atl. 507, dismissing a writ of certiorari. S. C.—*Epperson v. Jackson*, 83 S. C. 157, 65 S. E. 217.

Contra, Ala.—*Devany's Heirs v. Devany's Admr.*, 25 Ala. 722. Ohio.—*Steinbarger's Admr. v. Steinbarger*, 19 Ohio 106. Pa.—*Appeal of Snodgrass*, 96 Pa. 420; *Robinson v. Glancy*, 69 Pa. 89, taking position that order of sale is not a definite decree and that appeal only lies to the decree confirming sale upon return of order.

Mandamus.—A mandamus lies to compel the granting of a suspensive appeal from a decree directing the sale of succession property exceeding two thousand dollars in value. *State v. Lazarus*, 37 La. Ann. 830.

60. Cal.—*Estate of Leonis*, 138 Cal. 194, 71 Pac. 171; *Estate of Corwin*, 61 Cal. 160. Ind.—*Beaty v. Voris*, 138 Ind. 265, 37 N. E. 785. Minn.—*Dee v. Wilson*, 91 Minn. 115, 97 N. W. 647. Ore.—*Smith's Estate*, 43 Ore. 595, 75 Pac. 133, 73 Pac. 336.

A petition in error will lie to review order where the proceeding is not, un-

der the statutory provisions, reviewable on appeal. *Poessnecker v. Entenmann*, 64 Neb. 409, 89 N. W. 1033.

61. *Estate of Leonis*, 138 Cal. 194, 71 Pac. 171.

Heirs who are not parties to the proceeding in which order was obtained cannot prosecute an appeal or writ of error. *Arnett v. McCain*, 47 Ark. 411, 1 S. W. 873, *disapproving Gregg v. Gregg*, 33 Ark. 89, where heir was permitted to appeal under similar circumstances.

See also *Guy v. Pierson*, 21 Ind. 18.

62. *New York Life Ins. Co. v. Brown*, 32 Colo. 365, 76 Pac. 799; *Mowry v. Robinson*, 12 R. I. 152 (permitting appeal by purchaser from heir).

Fraudulent Grantee.—Grantee of intestate, holding land under a conveyance which is claimed by administrator to be fraudulent, may appeal from an order granting administrator license to sell such land. *Allen v. Smith*, 80 Me. 486, 15 Atl. 62.

Creditors.—A general creditor of decedent's estate cannot appeal from an order relative to the disposition of decedent's real estate. Mass.—*Henry v. Estey*, 13 Gray 336. N. J.—*Parker v. Reynolds*, 32 N. J. Eq. 290. Pa.—*Everman's Appeal*, 67 Pa. 335.

Contra, *Redman v. Adams*, 88 Mo. App. 534, by virtue of Mo. Rev. St., 1899, §278.

Claimant Under Paramount Title.—One who claims no interest under decedent but claims land ordered sold by title paramount, can not appeal. *Swackhamer v. Kline's Admr.*, 25 N. J. Eq. 503.

63. *Smith's Estate*, 43 Ore. 595, 75 Pac. 133, 73 Pac. 336.

64. *Hugo v. Miller*, 50 Minn. 105, 52 N. W. 381.

8. Bond.—In many jurisdictions the personal representative is required to give a special bond before proceeding to sell real estate.⁶⁵

Effect of Failure To File.—Some courts treat a sale as void when the bond is not filed as required,⁶⁶ while other courts hold that a failure to give bond does not invalidate the sale,⁶⁷ especially where there has been no misappropriation of the proceeds of sale.⁶⁸

Approval of Bond.—The bond should be approved in writing by the court;⁶⁹ but the fact that the court before sale approved a satisfactory bond in a less amount than had been required in the order of sale was not such an error as would invalidate sale.⁷⁰

9. Return of Order of Sale.—Since the sale under the court's decree is not complete until confirmed by the court,⁷¹ a return of the order of sale must be made to the court.⁷² Although the return should

An oath taken before sale, as required, is sufficient although not recorded until a later trial involving land (*Fowle v. Coe*, 63 Me. 245); and oral proof is admissible to show that oath which purported to have been taken after sale was in fact taken before (*Norman v. Olney*, 64 Mich. 553, 31 N. W. 555).

On effect of failure to take oath, see *Campbell v. Knights*, 26 Me. 224, 45 Am. Dec. 107.

65. Cases holding it error not to require bond. **Fla.**—*Bushnell v. Krum*, 32 Fla. 62, 13 So. 591. **Ky.**—*Tatum v. Gibbs*, 19 Ky. L. Rep. 695, 41 S. W. 565. **Me.**—*Snow v. Russell*, 93 Me. 362, 45 Atl. 305, 74 Am. St. Rep. 350, although will requested that "no official bond be required to be filed." **Miss.**—*Washington v. McCaughan*, 34 Miss. 304. **Neb.**—*McClay v. Foxworthy*, 18 Neb. 295, 25 N. W. 86.

For Kentucky cases deciding when bond necessary, see *Foley v. Graham's Guardian*, 33 Ky. L. Rep. 627, 110 S. W. 838, and *Thompson v. Thompson's Admr.*, 32 Ky. L. Rep. 319, 105 S. W. 1185.

In **Illinois**, where will directs that executors shall not be required to give bond, the court need not require a special bond upon sale except where it appears that fraud may be practiced. *Wood v. Stewart*, 120 Ill. App. 34.

66. **U. S.**—*Bright v. Boyd*, 1 Story 478, 4 Fed. Cas. No. 1,875. **Me.**—*Snow v. Russell*, 93 Me. 362, 45 Atl. 305, 74 Am. St. Rep. 350. **Minn.**—*Babcock v. Cobb*, 11 Minn. 347. **Miss.**—*Sharpley v. Plant*, 79 Miss. 175, 28 So. 799, 89 Am. St. Rep. 588 (although will authorized executor to administer the estate

without bond); *Heth v. Wilson*, 55 Miss. 587 (holding sale void without special bond, although made by a county administrator who had given a general bond under which he was authorized to administer estates); *Buckner v. Wood*, 45 Miss. 57; *Rucker v. Dyer*, 44 Miss. 591.

67. **Ala.**—*Wyman v. Campbell*, 6 Port. 219, 31 Am. Dec. 677. **Mass.**—*Perkins v. Fairfield*, 11 Mass. 227. **Mich.**—*Drake v. Kinsell*, 38 Mich. 232. **Pa.**—*Dixey's Exrs. v. Laning*, 49 Pa. 143.

68. *Clark v. Hillis*, 134 Ind. 421, 34 N. E. 13; *Foster v. Birch*, 14 Ind. 445; *Frothingham v. Petty*, 197 Ill. 418, 64 N. E. 270.

Defects in Bond Not Fatal.—The sale will not be affected because "there was no scroll or seal to the signatures of the obligors in the sale bond." *Buntin v. Root*, 66 Minn. 454, 69 N. W. 330; or because bond was not regularly approved. *Melcher v. Schluter*, 5 Neb. (Unof.) 445, 98 N. W. 1082.

69. *Austin v. Austin*, 50 Me. 74, 79 Am. Dec. 597.

70. *In re Winona Bridge R. Co.*, 51 Minn. 97, 52 N. W. 1079.

71. See *infra*, VI, A, 10.

72. **Mich.**—*Peirson v. Fisk*, 99 Mich. 43, 57 N. W. 1080, where court says: "He (administrator) must report to the court, which alone has power to determine what further proceedings shall be had." **N. J.**—*Den v. Lambert*, 13 N. J. L. 182. **Tex.**—*Dowling v. Duke*, 20 Tex. 181.

When order of confirmation recites the return of the order of sale and an inspection of same, an objection that there was no report can not be main-

clearly indicate the land sold, the same particularity of description is not required in the report of sale as in a deed.⁷³ The report should show what was received for the property sold⁷⁴ and should make known the name of the true purchaser.⁷⁵

Mere irregularities in the return will not affect the validity of the sale.⁷⁶

10. Confirmation.—a. *Necessity.*—A sale of a decedent's realty under order of court is a judicial sale and a confirmation of report by the court is therefore essential before title can be conveyed to the purchaser.⁷⁷

tained. *Day Land & Cattle Co. v. New York & T. Land Co.* (Tex. Civ. App.), 25 S. W. 1089.

That report of sale was made by one of two administrators is not sufficient to invalidate sale when report was properly confirmed by the court. *Doe v. Harvey*, 5 Blackf. (Ind.) 487.

73. *Calvert v. Alexander*, 10 Ky. L. Rep. 119, 8 S. W. 696; *Gilbert v. Cooksey*, 69 Mo. 42.

74. *Reinhardt v. Seaman*, 208 Ill. 448, 69 N. E. 847; *Martin v. Densford*, 3 Blackf. (Ind.) 295.

75. *Den v. Lambert*, 13 N. J. L. 182.

Parol.—The name of the real purchaser may be shown by parol when return does not indicate the name of the true purchaser, since the order of confirmation only approves the sale, without reference to the purchaser. *Dodd v. Templeman*, 76 Tex. 57, 13 S. W. 187.

76. *Higgins v. Reed*, 48 Kan. 272, 29 Pac. 389.

Verification.—Verification of the return is not always required (*Hargus v. Bowen*, 46 Miss. 72); and where practice is to require verification, failure to verify does not affect the validity of the sale (*Sheldon v. Wright*, 7 Barb. [N. Y.] 39).

Time of Return.—Statutory provisions relative to the time for making return are usually treated as merely directory. *Custer v. Holler*, 160 Ind. 505, 67 N. E. 228. See also, *Price v. Springfield Real Estate Assn.*, 101 Mo. 107, 14 S. W. 57, 20 Am. St. Rep. 595. But a report of sale by a personal representative after final settlement and his discharge is void. *Melton v. Fitch*, 125 Mo. 281, 28 S. W. 612.

77. U. S.—*Smith v. Arnold*, 5 Mason 414, 22 Fed. Cas. No. 13,044. **Ala.**

Wallace v. Hall's Heirs, 19 Ala. 367; *Bonner v. Greenlee's Heirs*, 6 Ala. 411. **Ark.**—*Apel v. Kelsey*, 47 Ark. 413, 2 S. W. 102, "confirmation will not be presumed but must be shown." **Fla.** *Knox v. Spratt*, 19 Fla. 817. **Idaho.** *State v. Cunningham*, 6 Idaho 113, 53 Pac. 451. **Ind.**—*Williams v. Perrin*, 73 Ind. 57. **Miss.**—*Maynard v. Cocke*, 18 So. 374. **Mo.**—*Desloge v. Tucker*, 196 Mo. 587, 94 S. W. 283. **N. C.** *Joyner v. Futrell*, 136 N. C. 301, 48 S. E. 649. **Pa.**—*Brennan's Estate*, 220 Pa. 232, 69 Atl. 678; *Greenough v. Small*, 137 Pa. 132, 20 Atl. 553; *Demmy's Appeal*, 43 Pa. 155; *Brittain's Estate*, 28 Pa. Super. Ct. 144. **Tenn.** *Hyder v. O'Brien*, 48 S. W. 262. **Tex.** *Cruse v. O'Gwin*, 48 Tex. Civ. App. 48, 106 S. W. 757; *Goldstein v. Susholtz*, 46 Tex. Civ. App. 582, 105 S. W. 219; *Neill v. Cody*, 26 Tex. 286.

Under Illinois statute, confirmation has been held unnecessary to vest title in purchaser. *Moffitt v. Moffitt*, 69 Ill. 641.

That sale was *bona fide*, that a full and fair price was paid by the purchaser and that the proceeds were applied in the payment of intestate's debts, does not supply the want of confirmation. *Rea v. McEachron*, 13 Wend. (N. Y.) 465, 28 Am. Dec. 471.

Entry Nunc Pro Tunc.—The court may enter a *nunc pro tunc* order confirming administrator's sale, but should do so only upon evidence which shows clearly and convincingly that confirmation was in fact made. *Jacks v. Adamson*, 56 Ohio St. 397, 47 N. E. 48, 60 Am. St. Rep. 749.

Heirs' Agreement Not To Sell.—The court is not deprived of jurisdiction to confirm a sale by reason of the fact that, after sale was ordered, the heirs entered into a contract to pay the

b. *Notice*.—Unless required by statute, it is unnecessary to serve notice upon the heirs or other persons interested of the application by the personal representative for confirmation,⁷⁸ and where party is entitled to notice, the sale should not be set aside in equity where he was not prejudiced by want of notice.⁷⁹

c. *Hearing and Objections*.—At the hearing, the heirs⁸⁰ or other persons interested in the estate⁸¹ may object to the confirmation.

Sufficient grounds for refusing confirmation may exist when those objecting prove that the price obtained was inadequate,⁸² that the sale was fraudulent,⁸³ that the title of decedent to the land is doubt-

debts of the estate without a sale of realty, when agreement was not brought to the attention of court or purchaser until after sale approved. *Lake v. Hathaway*, 75 Kan. 391, 89 Pac. 666.

Death of Administrator.—When administrator, who is sole plaintiff, dies before confirmation, if there be not a revivor, a subsequent confirmation is irregular and void. *Wheatley's Lessee v. Harvey*, 1 Swan. (Tenn.) 484.

Equitable Relief Dependent Upon Confirmation.—A bill in equity asking for title will not lie against administrator and purchaser on behalf of one who alleges that he was the highest bidder at the sale and tendered purchase price, since he should have sought relief in the case made by petition to sell and, until confirmation, he obtained no right to the land. *Mason v. Osgood*, 64 N. C. 467. See also *Campbell v. Hough* (N. J.), 68 Atl. 759, refusing to grant specific performance to administrator when sale unconfirmed.

Presumption.—After a lapse of fifty years, a confirmation will be presumed, when necessary, in support of a title acquired at administrator's sale. *Santana Live-Stock & Land Co. v. Pendleton*, 81 Fed. 784, 26 C. C. A. 608. Compare, *Apel v. Kelsey*, 47 Ark. 413, 2 S. W. 102.

Time of Confirmation.—When an administrator has sold land and his final settlement has been approved and remains in force, a confirmation of a report of sale made some years later cannot authorize the conveyance of title. *Garner v. Tucker*, 61 Mo. 427.

78. *Ala.*—*Moore v. Cottingham*, 113 Ala. 148, 20 So. 994, 59 Am. St. Rep. 100; *Ligon v. Ligon*, 84 Ala. 555, 4 So.

405. *Miss.*—*Johnson v. Cooper*, 56 Miss. 608. *Neb.*—*Brusha v. Phipps*, 86 Neb. 822, 126 N. W. 856.

Consult, also, *Palmerton v. Hoop*, 131 Ind. 23, 30 N. E. 874, where sale held valid although heir who had been given notice of filing of original petition died before sale and no further notice was given to his heirs.

Administrator must be given notice when application for confirmation is made by purchaser. *Dugger v. Tayloe*, 60 Ala. 504.

In Alabama, heirs must be given notice of application for confirmation when the administrator is himself the purchaser. *Smith v. Lusk*, 119 Ala. 394, 24 So. 256; *Washington v. Bogart*, 119 Ala. 377, 24 So. 245; *Bogart v. Bell*, 112 Ala. 412, 20 So. 511.

79. *Patterson v. Eakin*, 87 Va. 49, 12 S. E. 144.

80. *Mo.*—*Fenix v. Fenix's Admr.*, 80 Mo. 27. *Pa.*—*Weaver's Appeal*, 19 Pa. 416. *Utah.*—*In re Horace Gibbs*, 4 Utah 97, 6 Pac. 525.

81. *Estate of Santiago Arguello*, 50 Cal. 308. *McGregor v. Jensen*, 18 Idaho 320, 109 Pac. 729. *Estate of Christensen*, 15 Idaho 692, 99 Pac. 829. See, however, *Marcom v. Wyatt*, 117 N. C. 129, 23 S. E. 169, refusing to allow objections made by persons not parties to proceedings for sale who had not moved to be allowed to become parties.

82. *Idaho.*—*McGregor v. Jensen*, 18 Idaho 320, 109 Pac. 729. *Ky.*—*Mitchell v. Odewalt's Exr.*, 33 Ky. L. Rep. 1007, 112 S. W. 612. *S. C.*—*State v. Burnside*, 33 S. C. 276, 11 S. E. 787. *Tex.*—*Hardin v. Smith*, 49 Tex. 420; *Hirshfield v. Davis*, 43 Tex. 155. *Va.*—*Terry v. Cole's Exr*, 80 Va. 695.

83. *Pearson v. Morehead*, 6 Smed. & M. (Miss.) 609, 45 Am. Dec. 319.

ful,⁸⁴ or that sureties on special bond required from administrator are insolvent.⁸⁵

Discretion of Court.—Whether or not there shall be a confirmation of sale usually rests in the sound discretion of the court,⁸⁶ although statutes sometimes limit the court to the consideration of certain issues in passing on the question of confirmation.⁸⁷

d. Sufficiency of Order.—A formal entry of order of approval need not appear, if the approval can be gathered from the whole record,⁸⁸ and it is not necessary to incorporate in the order any description of the real estate sold.⁸⁹

Change of Order.—After confirmation of sale to one purchaser, the court may change order and confirm the sale in the name of a different purchaser, with the consent of him to whom the sale was first confirmed.⁹⁰

Erroneous Recital Not Fatal.—“The fact that the order of confirmation refers to a date subsequent to its own date as the day on which land was ordered sold does not make void the order of confirmation.”⁹¹

e. Appeal.—An appeal will lie from an order confirming⁹² or

84. *Hower's Appeal*, 55 Pa. 337. But in *Marcom v. Wyatt*, 117 N. C. 129, 23 S. E. 169, the court refused to permit opposition on ground of want of title when persons objecting had made no appearance in the proceedings for sale, although properly served with notice.

85. *Estate of Santiago Arguello*, 50 Cal. 308.

86. *Ala.*—*Roy v. O'Neill*, 52 So. 946; *Eatman v. Eatman*, 83 Ala. 478, 3 So. 850. *Kan.*—*Taylor v. Hosick*, 13 Kan. 518. *Pa.*—*De Haven's Appeal*, 106 Pa. 612, the court saying, “It is also undoubted that the court retains entire control over the sale until, and even after, confirmation, and may or may not confirm it, according to its sense of justice in the particular case.” *Tex.*—*Davis v. Stewart*, 4 Tex. 223. *Va.*—*Terry v. Cole's Exr.*, 80 Va. 695.

Mandamus will not lie to compel the probate court to have executed a deed conveying land to the highest bidder, the remedy being by appeal. *State v. Burnside*, 33 S. C. 276, 11 S. E. 787.

Permission of competitive bidding for the property, at the hearing upon the return, has been held to be a proper exercise of the court's discretion. *Estate of Griffith*, 127 Cal. 543, 59 Pac. 988.

87. See *Meadows v. Meadows*, 81 Ala. 451, 1 So. 29, quoting Alabama

statute limiting court to consideration of fairness of sale, adequacy of price and sufficiency of sureties.

88. *Carey v. West*, 139 Mo. 146, 40 S. W. 661; *Camden v. Plain*, 91 Mo. 117, 4 S. W. 86; *Henry v. McKerlie*, 78 Mo. 416; *Grayson v. Weddle*, 63 Mo. 523; *Jones v. Manly*, 58 Mo. 559 (but order of approval should be entered of record to make proceedings entirely regular); *Berryman v. Biddle*, 48 Tex. Civ. App. 624, 107 S. W. 922; *Moody v. Butler*, 63 Tex. 210 (where no entry of confirmation on minutes of court but approval indorsed on the return of sale); *Pendleton v. Shaw*, 18 Tex. Civ. App. 439, 44 S. W. 1002 (finding a sufficient confirmation in the approval of the accounts of an administrator showing sale of land). See, also, *Lloyd v. Waller*, 74 Fed. 601, 20 C. C. A. 548; *Cruse v. O'Gwin*, 48 Tex. Civ. App. 48, 106 S. W. 757, where court simply approved settlement which included disposition of proceeds of sale.

89. *Buntin v. Root*, 66 Minn. 454, 69 N. W. 330.

90. *Davis v. Touchstone*, 45 Tex. 490.

91. *Barton v. Davidson* (Tex. Civ. App.), 45 S. W. 400.

92. *Ala.*—*Field v. Gamble*, 47 Ala. 443. *Cal.*—*Estate of Bell*, 125 Cal. 539, 58 Pac. 153; *In re Pearsons*, 98 Cal. 603, 33 Pac. 451. *Idaho.*—*McGregor v. Jensen*, 18 Idaho 320,

refusing to confirm the sale of the property ordered to be sold.⁹³

11. Vacating Sale.—The court generally has the power, even after confirmation of sale, to vacate its own decrees made in proceedings to sell decedent's real estate,⁹⁴ but the power will not be exercised if there has been a long delay on the part of those seeking relief.⁹⁵

The court usually will not vacate a sale after confirmation merely because of inadequacy of price.⁹⁶

12. Actions To Set Aside.—a. *Jurisdiction in Equity.*—A bill to set aside a sale of decedent's real estate may be filed in a court of equity;⁹⁷ but in order to obtain relief such bill must be filed with-

109 Pac. 729; *Reed v. Stewart*, 12 Idaho 699, 87 Pac. 1002. **Ky.**—*Carter v. Crow's Admr.*, 130 Ky. 41, 112 S. W. 1093 (an appeal by purchaser); *Underwood's Admr. v. Cartwright*, 20 Ky. L. Rep. 809, 47 S. W. 580. **Mo.**—*Desloge v. Tucker*, 196 Mo. 587, 94 S. W. 283; *Tutt v. Boyer*, 51 Mo. 425; *Estate of Hesche v. Schnecko*, 73 Mo. App. 612. **Pa.**—*Snodgrass' Appeal*, 96 Pa. 420, refusing to allow appeal from order of sale because whole proceedings may be reviewed on an appeal from final confirmation. **Tex.**—*Goldstein v. Sustoltz*, 46 Tex. Civ. App. 582, 105 S. W. 219; *James v. Nease* (Tex. Civ. App.), 69 S. W. 110.

93. Cal.—*Estate of Leonis*, 138 Cal. 194, 71 Pac. 171. **Idaho.**—*Estate of Christensen*, 15 Idaho 692, 99 Pac. 829. **S. C.**—*State v. Burnside*, 33 S. C. 276, 11 S. E. 787. **Tex.**—*Hirshfield v. Davis*, 43 Tex. 155.

Notice of Appeal.—Purchaser of realty is entitled to notice of appeal from an order confirming the sale. *Estate of Bell*, 125 Cal. 539, 58 Pac. 153.

94. Miss.—*Planters' Bank v. Neely*, 7 How. 80. **N. C.**—*Lanier v. Heilig*, 149 N. C. 384, 63 S. E. 69 (holding that motion to set aside the final decree is the only remedy for irregularities in the progress of cause); *Strickland v. Strickland*, 129 N. C. 84, 39 S. E. 735; *Loviniar v. Pearce*, 70 N. C. 167. **Pa.**—*Brennan's Estate*, 220 Pa. 232, 69 Atl. 678; *Brittain's Estate*, 28 Pa. Super. 144.

Contra, *State v. Probate Court of Sibley County*, 33 Minn. 94, 22 N. W. 10; *State v. Probate Court of Ramsey County*, 19 Minn. 117. See, also, *Grant v. Lloyd*, 12 Smed. & M. (Miss.) 191; *Thompson v. Cox*, 53 N. C. 311.

95. Harrison v. Hargrove, 109 N. C. 346, 13 S. E. 939.

Extent of Power.—The orphans' court upon vacating a sale made by an executor has no power to pass upon and adjust the rights and equities of the purchaser growing out of the order of vacation; such jurisdiction belongs exclusively to a court of equity. *Eichelberger v. Hawthorne*, 33 Md. 588.

96. Roy v. O'Neill, 168 Ala. 354, 52 So. 946; *Costigan v. Truesdell*, 26 Ky. L. Rep. 971, 83 S. W. 98.

If price obtained is grossly inadequate, sale may be vacated. *Rosenham v. Pottinger*, 22 Ky. L. Rep. 1290, 60 S. W. 370; *Rohlf v. Estate of Snyder*, 73 Neb. 524, 103 N. W. 49.

Insufficient Ground.—The fact that, by reason of pending litigation, persons were restrained from bidding for the land, does not constitute ground for setting aside sale; this could only be considered in a separate action to attack the proceeding and sale. *Carraway v. Lassiter*, 139 N. C. 145, 51 S. E. 968.

97. Ala.—*Tillman v. Thomas*, 87 Ala. 321, 6 So. 151, 13 Am. St. Rep. 42; *Mosely v. Tuthill*, 45 Ala. 621; *Pearson v. Darrington*, 32 Ala. 227. **Ga.**—*Worthy v. Johnson*, 8 Ga. 236, 52 Am. Dec. 399. **Miss.**—*Smith v. Chew*, 35 Miss. 153. **N. J.**—*Runyon v. Newark India Rubber Co.*, 24 N. J. L. 467. **N. C.**—*McLaurin v. McLaurin*, 106 N. C. 331, 10 S. E. 1056, refusing to entertain a motion to set aside for fraud a sale which had been confirmed. **Ohio.**—*Caldwell v. Caldwell*, 45 Ohio St. 512, 15 N. E. 297; *Barrington v. Alexander*, 6 Ohio St. 189. **Tex.**—*Saunders v. Howard*, 51 Tex. 23.

Where sale is absolutely void, a bill will not lie to set aside sale, since heirs may proceed at law to gain possession and creditors may ask for a resale. *Bank of Missouri v. White*, 23

out unreasonable delay, or it will be dismissed because of laches.⁹⁵

Statutory provisions in some states limit the time within which an action to set aside may be brought.⁹⁹

b. *Parties*.—The heirs and devisees,¹ the purchaser,² the personal representative,³ and others who have an interest in the property sold,⁴

Mo. 342, 66 Am. Dec. 671; Mawhorter v. Armstrong, 16 Ohio 188.

In Arkansas, certiorari is the proper remedy when it is sought to set aside an erroneous order of sale where right of appeal from the order of confirmation has been lost through error of the probate court. *Burgett v. Apperson*, 52 Ark. 213, 12 S. W. 559.

98. U. S.—*Williamson v. Beardsley*, 137 Fed. 467, 69 C. C. A. 615 (a Utah case where delay five years); *Eames v. Manly*, 117 Fed. 387, 54 C. C. A. 561. Ark.—*Stuckey v. Lockard*, 87 Ark. 232, 112 S. W. 747; *Griffin v. Caldwell*, 72 Ark. 451, 81 S. W. 611. Cal.—*Dennis v. Bint*, 122 Cal. 39, 54 Pac. 378, 68 Am. St. Rep. 17. Ga.—*Griffin v. Stephens*, 119 Ga. 138, 46 S. E. 66. Ill.—*Stobaugh v. Irons*, 243 Ill. 55, 90 N. E. 272; *Brinkerhoff v. Brinkerhoff*, 226 Ill. 550, 80 N. E. 1056. Ky.—*Oliver v. Park*, 101 Ky. 1, 39 S. W. 423. La. *Blum v. Haas*, 125 La. 18, 51 So. 53; *Sicard v. Gumbel*, 112 La. 483, 36 So. 502. Mass.—*Lindsey v. Fabens*, 189 Mass. 329, 75 N. E. 623. Mo.—*Murphy v. De France*, 105 Mo. 53, 15 S. W. 949, 16 S. W. 861. N. C.—*Morris v. House*, 125 N. C. 550, 34 S. E. 712. Ohio.—*Brickman v. Shale*, 30 Ohio C. C. 372.

99. Cases Under Statutes.—Ind. *Hampton v. Murphy*, 45 Ind. App. 513, 86 N. E. 436, 88 N. E. 876, barring action in five years. La.—*Landry v. Laplos*, 113 La. 697, 37 So. 606. Minn. *In re Hanson*, 105 Minn. 30, 117 N. W. 235, barring suit in five years.

Under Mississippi Code, 1871, §2173, heirs who own fee in land assigned to widow as dower, must bring action to set aside sale within one year after death of widow, although not entitled to sue at law to recover land until death of widow. *Jordan v. Bobbitt*, 91 Miss. 1, 45 So. 311.

In Michigan, under §9128, 3 Comp. Laws, 1897, a bill to set aside a sale can be maintained only by those heirs of the estate who have not acquiesced in such sale for more than five years

after arriving at their majority. *Kammerer v. Morlock*, 125 Mich. 320, 84 N. W. 319.

Application of Statutes When Sale Void.—Some courts have construed statutes limiting the time within which heirs may sue for recovery of land sold as applicable to void sales (*O'Keefe v. Behrens*, 73 Kan. 469, 85 Pac. 555, 8 L. R. A. (N. S.) 354), while in other jurisdictions such statutes apply only to irregular and not to void sales (*Sharpley v. Plant*, 79 Miss. 175, 28 So. 799, 89 Am. St. Rep. 588; *Holmes v. Mason*, 80 Neb. 448, 114 N. W. 606; *Brandon v. Jensen*, 74 Neb. 569, 104 N. W. 1054).

1. *Tillman v. Thomas*, 87 Ala. 321, 6 So. 151, 13 Am. St. Rep. 42; *Worthy v. Johnson*, 8 Ga. 236, 52 Am. Dec. 399.

All the heirs are necessary parties to a bill to set aside sale and the fact that some refuse to join as complainants will not excuse the omission of them as parties, although it is sufficient reason for making them defendants (*Daniel v. Stough*, 73 Ala. 379); and it is not enough that those who bring the suit profess to file their bill "for themselves and the other heirs at law," when the heirs are known and not numerous (*Hoe v. Wilson*, 9 Wall (U. S.) 501, 19 L. ed. 762).

2. *McCombs v. Dunbar*, 3 La. 517.

3. *Herrmann v. Fontelieu*, 29 La. Ann. 502.

4. Heirs of *Burney v. Ludeling*, 41 La. Ann. 627, 6 So. 248; *Sterlins' Exr. v. Gros*, 5 La. 100; *Saunders v. Howard*, 51 Tex. 23.

Creditors.—The creditor on whose application the sale was made is an indispensable party to a suit in equity to set aside sale. *Hoe v. Wilson*, 9 Wall. (U. S.) 501, 19 L. ed. 762. And a creditor may maintain a suit in equity to set aside a sale for fraud, although a party to the original proceedings, if ignorant of fraud until after confirmation. *Johnson v. Waters*,

are necessary parties to a suit to set aside a sale of decedent's real estate.

c. *Sufficiency of Grounds*.—The sale of decedent's realty may be set aside in equity when there was actual fraud in the proceedings and the purchaser had notice thereof;⁵ and, in nearly all jurisdictions, the fact that the personal representative purchased at his own sale directly⁶ or indirectly⁷ is sufficient ground for setting aside the sale, although there may have been no actual fraud.

111 U. S. 640, 4 Sup. Ct. 619, 28 L. ed. 547.

A purchaser from executors under the exercise of a discretionary power of sale given by decedent's will may have a subsequent decree of sale in creditor's proceedings set aside. *Personeni v. Goodale*, 199 N. Y. 323, 92 N. E. 754.

Subsequent judgment creditors of an administrator who has purchased lands at his own sale, or his assignee for the benefit of creditors, have no standing to resist the interposition of court. Appeal of Hannum, 1 Chester Co. Ct. (Pa.) 362; *Estate of Worth*, 1 Chester Co. Ct. (Pa.) 297.

5. U. S.—*Johnson v. Waters*, 111 U. S. 640, 4 Sup. Ct. 619, 28 L. ed. 547, setting aside for fraud a sale confirmed by Louisiana court. Ala.—*Tillman v. Thomas*, 87 Ala. 321, 6 So. 151, 13 Am. St. Rep. 42. Ark.—*Adams v. Thomas*, 44 Ark. 267. Ind.—*Jones v. French*, 92 Ind. 138. Ia.—*VanHorn v. Ford*, 16 Iowa 578. Kan.—*McAdow v. Boten*, 67 Kan. 136, 72 Pac. 529. Miss.—*Grant v. Lloyd*, 12 Smed. & M. 191. Mo.—*Murphy v. De France*, 105 Mo. 53, 15 S. W. 949, 16 S. W. 861; *Hull v. Voorhis*, 45 Mo. 555. N. J. *Lawson v. Aston*, 57 N. J. Eq. 107, 40 Atl. 584. Ohio.—*Baker v. Lamkin*, 11 Ohio C. C. 103. Tex.—*McCampbell v. Durst*, 73 Tex. 410, 11 S. W. 380. Wis. *Hoffman v. Wheelock*, 62 Wis. 434, 22 N. W. 713.

Where Purchaser Innocent.—A sale will not be set aside because the administrator was guilty of fraud and misrepresentation, if purchaser had no notice thereof. Ark.—*Adams v. Thomas*, 44 Ark. 267. Ia.—*Read v. Howe*, 39 Iowa 553. Mich.—*Otis v. Kennedy*, 107 Mich. 312, 65 N. W. 219. Wis.—*Melms v. Pabst Brewing Co.*, 93 Wis. 153, 66 N. W. 518.

6. Ala.—*Daniel v. Stough*, 73 Ala. 379; *Pearson v. Darrington*, 32 Ala.

227. Ark.—*Stuckey v. Lockard*, 87 Ark. 232, 112 S. W. 747. Ga.—*Griffin v. Stephens*, 119 Ga. 138, 46 S. E. 66; *Moore v. Carey*, 116 Ga. 28, 42 S. E. 258; *Pirkle v. Cooper*, 113 Ga. 828, 39 S. E. 289; *Ward v. Davis*, 107 Ga. 780, 33 S. E. 691. Ky.—*Baker v. Lane*, 118 S. W. 963. Mo.—*Hull v. Voorhis*, 45 Mo. 555. N. C.—*Shute v. Austin*, 120 N. C. 440, 27 S. E. 90. Ohio.—*Caldwell v. Caldwell*, 45 Ohio St. 512, 15 N. E. 297; *Barrington v. Alexander*, 6 Ohio St. 189.

In Pennsylvania, the matter of allowing an administrator to purchase at his own sale is one which addresses itself to the sound discretion of the court. *McPherran's Estate*, 212 Pa. 425, 61 Atl. 954.

Ratification.—When an administrator purchases at his own sale, persons interested in the estate need not bring action to set sale aside, but may elect to ratify sale and hold administrator accountable for the purchase price. *Stuckey v. Lockard*, 87 Ark. 232, 112 S. W. 747; *James v. Little*, 135 Ga. 672, 70 S. E. 251.

7. Cal.—*Guerrero v. Ballerino*, 43 Cal. 118. Ill.—*Prinkerhoff v. Brinkerhoff*, 226 Ill. 550, 80 N. E. 1056; *Miller v. Rich*, 204 Ill. 444, 68 N. E. 488. La. *Widow & Heirs of Willis v. Berry*, 104 La. 114, 28 So. 888. Mass.—*Manning v. Mulrey*, 192 Mass. 547, 78 N. E. 551; *Ives v. Ashley*, 97 Mass. 198. Mich. *Houlihan v. Fogarty*, 162 Mich. 492, 127 N. W. 793. Mo.—*Pearson v. Murray*, 230 Mo. 162, 130 S. W. 21. Neb. *Veeder v. McKinley-Lanning Loan & Trust Co.*, 61 Neb. 892, 86 N. W. 982. N. C.—*McNeill v. Fuller*, 121 N. C. 209, 28 S. E. 299. Wis.—*Gibson v. Gibson*, 102 Wis. 501, 78 N. W. 917, construing Sec. 3914, Statutes of 1898, which makes such a sale "void" to mean that such a sale is "voidable."

A purchase by husband at a sale had by his wife as administratrix is void-

A court will not set aside a sale on account of mere defects or irregularities in the proceedings to sell.⁸

d. *Pleadings*. — If the suit is to set aside for fraud, the bill should set forth the facts justifying the charge of fraud,⁹ and should allege that the purchaser participated in the fraud or bought with knowledge thereof.¹⁰ The complaint should contain a sufficient description of the real estate sold by the court's order.¹¹

Joinder. — A cause of action against administrator and others growing out of a fraudulent sale of decedent's land cannot be joined with a cause of action against administrator for waste.¹²

able at the election of the heirs and they may institute proceedings within a reasonable time to have sale set aside. *Lowery v. Idleson*, 117 Ga. 778, 45 S. E. 51.

Loan by Executor. — The fact that an executor loaned part of purchase price to his brother to enable him to purchase at executor's sale was not a sufficient ground for setting aside sale, when heirs knew of advance and made no seasonable objection. *Brinkerhoff v. Brinkerhoff*, 226 Ill. 550, 80 N. E. 1056.

Widow and heirs can not have a sale set aside in equity when land was sold for its full value to one who purchased for administrator and when the sale was ratified by creditors, the total assets of estate being insufficient to pay debts. *Highsmith v. Whitehurst*, 120 N. C. 123, 26 S. E. 917.

8. *Ala.* — *Watts v. Frazer*, 80 Ala. 186; *Clark v. Bernstein*, 49 Ala. 596. *Ark.* — *Bennett v. Owen*, 13 Ark. 177. *Fla.* — *Deans v. Wilcoxson*, 25 Fla. 980, 7 So. 163; *Price v. Winter*, 15 Fla. 66. *Ill.* — *Moore v. Neil*, 39 Ill. 256, 89 Am. Dec. 303. *Ia.* — *Spurgin v. Bowers*, 82 Iowa 187, 47 N. W. 1029. *La.* — *Succession of Gurney*, 14 La. Ann. 622. *Minn.* — *Smith v. Barr*, 83 Minn. 354, 86 N. W. 342. *N. C.* — *Harris v. Brown*, 123 N. C. 419, 31 S. E. 877; *Fowler v. Poor*, 93 N. C. 466.

Estoppel. — Adult heirs who, with knowledge of the facts, accept and retain money derived from the sale of real estate by administrator, cannot maintain an action to set aside sale on the ground that land sold was a homestead and not liable to be sold for debts against estate. *Mote v. Kleen*, 83 Neb. 585, 119 N. W. 1125. See also *McGary's Heirs v. McGary*, 32 Ky. L. Rep. 314, 105 S. W. 891.

9. *U. S.* — *Williamson v. Beardsley*, 137 Fed. 467, 69 C. C. A. 615. *Miss.* — *Leonard v. Cameron*, 39 Miss. 419. *Neb.* — *Lander v. Abrahamson*, 34 Neb. 553, 52 N. W. 571. *N. C.* — *Murray v. Southerland*, 125 N. C. 175, 34 S. E. 270, holding allegation of a conspiracy to defraud by the "administrator and others" too indefinite.

For complaints sufficient to require trial on issue of fraud, see *Van Horn v. Ford*, 16 Iowa 578; *Morton v. Blades Lumber Co.*, 144 N. C. 31, 56 S. E. 551.

If action is to recover property on the theory that the sale is absolutely null, it is necessary, in order to disclose a cause of action, that the grounds of nullity be set forth. *Smith v. Kraus & Managhan Lumber Co.*, 125 La. 703, 51 So. 693.

10. *N. J.* — *Duffy v. Mellick*, 42 N. J. Eq. 117, 7 Atl. 341. *N. C.* — *Murray v. Southerland*, 125 N. C. 175, 34 S. E. 270. *Pa.* — *Cascaden v. Cascaden*, 140 Pa. 140, 21 Atl. 259.

Where statute limits the time within which infant may set aside sale for fraud to one year after he reaches majority, a bill is subject to demurrer which does not by a proper averment show that complainant is within the limitation fixed by the law. *Back v. Combs*, 96 Ky. 522, 29 S. W. 352.

Where a bill in equity, which prayed in part that a sale under order of the probate court be set aside for fraud, was amended and this part of prayer omitted, the court will treat the amendment as an affirmation of sale. *Smith v. Worthington*, 53 Fed. 977, 4 C. C. A. 130.

11. *Fisher v. Bush*, 133 Ind. 315, 32 N. E. 924.

12. *Hoffman v. Wheelock*, 62 Wis. 434, 22 N. W. 713.

13. Collateral Attack.—A sale of decedent's land made in pursuance of an order of court, cannot be attacked collaterally because of errors or irregularities in the proceedings to sell,¹³ but the fact that the court which ordered the deed did not have jurisdiction of the parties or of the subject-matter may always be shown in a collateral proceeding, since its order was a nullity.¹⁴

Presumptions.—The order approving administrator's sale is a final decree and entitled, on collateral attack, to the same favorable presumptions as are accorded other judgments.¹⁵

14. Actions Against Purchasers.—a. *Right To Sue in General.* The personal representative who was a party to the proceeding for sale or his successor may maintain an action against the purchaser for the sale price or for the loss which resulted to the estate upon a resale because of failure of bidder to keep his bid good.¹⁶ A decree

13. Ala.—Haynes v. Simpson, 143 Ala. 554, 39 So. 352 (heir not made a party, which is mere irregularity in Alabama); Moore v. Cottingham, 113 Ala. 148, 20 So. 994, 59 Am. St. Rep. 100. **Ark.**—Washington v. Govan, 73 Ark. 612, 84 S. W. 792. **Ill.**—Frothingham v. Petty, 197 Ill. 418, 64 N. E. 270. **Ind.**—Denton v. Arnold, 151 Ind. 188, 51 N. E. 240; Hawkins v. Ragan, 20 Ind. 193. **Kan.**—Lake v. Hathaway, 75 Kan. 391, 89 Pac. 666. **La.**—Hibernia Bank & Trust Co. v. Whitney, 122 La. 890, 48 So. 314. **Mich.**—Brown v. Hannah, 152 Mich. 33, 115 N. W. 980. **Mo.**—Smith v. Black, 231 Mo. 681, 132 S. W. 1129; Blickensderfer v. Hanna, 231 Mo. 93, 132 S. W. 678; Noland v. Barrett, 122 Mo. 181, 26 S. W. 692, 43 Am. St. Rep. 572. **N. C.**—Rackley v. Roberts, 147 N. C. 201, 60 S. E. 975. **Tex.**—Holland v. Nance, 102 Tex. 177, 114 S. W. 346; Berryman v. McDonald, 49 Tex. Civ. App. 81, 107 S. W. 944.

The sale of several lots in one parcel under an order directing their sale separately is a mere irregularity and will not subject sale to a collateral attack. Brown v. Hannah, 152 Mich. 33, 115 N. W. 980.

14. Ala.—Reddick v. Long, 124 Ala. 260, 27 So. 402. **Ia.**—Mullin v. White, 134 Iowa 681, 112 N. W. 164. **Me.**—Snow v. Russell, 93 Me. 362, 45 Atl. 305, 74 Am. St. Rep. 350. **Minn.**—Cater v. Steeves, 95 Minn. 225, 103 N. W. 885. **Mo.**—Stark v. Kirchgraber, 186 Mo. 633, 85 S. W. 868, 105 Am. St. Rep. 629, allowing collateral attack when application made for sale made by a person who had no interest in

estate. **N. C.**—Card v. Finch, 142 N. C. 140, 54 S. E. 1009.

Land Sold That of Living Person. Children who, believing their ancestor to be dead, admitted his death and submitted to a decree for the sale of his land, may impeach such decree in a collateral proceeding by showing that their ancestor was alive when sale ordered, since this would deprive court of jurisdiction. Springer v. Shavender, 116 N. C. 12, 21 S. E. 397.

15. Mo.—Young v. Downey, 145 Mo. 250, 46 S. W. 1086, 68 Am. St. Rep. 568; Rogers v. Johnson, 125 Mo. 202, 28 S. W. 635. **N. Y.**—Wood v. McChesney, 40 Barb. 417. **Tenn.**—Pope v. Atwell, 16 Lea 99. **Tex.**—Salas v. Mundy (Tex. Civ. App.), 125 S. W. 633.

16. Ala.—Thomas v. Caldwell, 136 Ala. 518, 34 So. 949 (holding first purchaser who refused to comply with his bid for difference in price at second sale, although before second sale residence on land had been destroyed by fire); Cruickshank v. Luttrell, 67 Ala. 318; Harbin v. Levi, 6 Ala. 399. **Ga.**—Sproull v. Seay, 74 Ga. 676. **La.**—Smith v. Kinney, 30 La. Ann. 332. **Mass.**—Cobb v. Wood, 8 Cush. 228. **Mich.**—Peirson v. Fisk, 99 Mich. 43, 57 N. W. 1080. **Pa.**—Singerly v. Swain's Admr., 33 Pa. 102; Banes v. Gordon, 9 Pa. 426.

Terms and Time of Resale.—If the first bidder is to be held for the loss occasioned by his failure to carry out his agreement, the re-sale must be ordered upon the same or equally beneficial terms as the first sale (Howison

for specific performance of the bidder's contract may also be obtained by the personal representative upon proper showing in a court of equitable jurisdiction.¹⁷

A confirmation of the sale must be made by the court before suit can be instituted against the bidder.¹⁸

b. *Defenses and Set-Offs.*—The purchaser at an administrator's sale may allege and prove the invalidity of the order of sale, when sued for failure to keep his bid good,¹⁹ or he may defend on the ground that he was misled as to the identity of the land sold by statements reasonably calculated to mislead, made by the seller.²⁰ But mere irregularities in the proceedings are not available as a defense to the purchaser, since he is protected by the decree for sale and confirmation.²¹

v. Oakley, 118 Ala. 215, 23 So. 810); and re-sale must be made within a reasonable time (Short's Admr. v. Ramsey, 18 Tex. 397).

The personal representative may sue in his own name or in his representative capacity. Cobb v. Wood, 8 Cush. (Mass.) 228.

Time for Action.—An administrator bringing suit against a purchaser, who has refused to complete sale, for the loss sustained on a resale, is not bound to wait until the expiration of the credit allowed by the terms of the first purchase. Mount v. Brown, 33 Miss. 566, 69 Am. Dec. 362.

Assumpsit for Loss Improper.—A declaration in *assumpsit* against the first purchaser for the difference in prices as liquidated damages is demurrable, unless sale was made on condition that property might be re-sold and vendee held for such difference. McGuinness v. Whaler, 16 R. I. 558, 18 Atl. 158, 27 Am. St. Rep. 763.

17. Mercer v. Sager, 129 Ga. 123, 58 S. E. 1037; Dawson v. Miller, 20 Tex. 171 (statutory remedy for recovery of deficiency is merely cumulative and not intended to take away the remedy by suit in equity for specific performance).

Jurisdiction To Order.—In Nebraska, the court in which the proceeding for sale is pending may compel the bidder to complete his purchase. Maul v. Hellman, 39 Neb. 322, 58 N. W. 112. In Louisiana, also, the probate court may compel purchaser to comply with terms of sale. Landry v. Connely, 4 Rob. (La.) 127.

18. Ark.—Bell v. Green, 38 Ark. 78.

Ill.—Greenwalt v. McClure, 7 Ill. App. 152. Ky.—Blakeley's Admr v. Hughes, 130 S. W. 1067. Tex.—Bradbury v. Reed, 23 Tex. 258.

Contra, Culli v. House, 133 Ala. 304, 32 So. 254.

19. Ill.—Tilton v. Pearson, 67 Ill. App. 372, where description in order of sale insufficient. La.—Succession of Michel, 20 La. Ann. 233. Miss.—Campbell v. Brown, 6 How. 230. Okla. Zufall v. Peyton, 26 Okla. 808, 110 Pac. 773.

20. Clay v. Kagelmacher, 98 Ga. 149, 26 S. E. 493.

A plea setting up the misrepresentation of the administrator who made the sale, as to the amount of the land sold, is no defense to an action for the purchase price, the maxim of caveat emptor applying in such a case. Culli v. House, 133 Ala. 304, 32 So. 254.

21. Succession of Byrne, 38 La. Ann. 518.

Where irregularity in decree ordering the sale is such as to render it liable to reversal on suspensive appeal, the purchaser will not be compelled to comply with the terms of sale. Succession of Weber, 16 La. Ann. 420.

Insufficient Defenses.—That purchase was made for joint benefit of defendant and one of the administrators, is no defense in an action for the amount of defendant's bid at administrator's sale (McAnulty v. Hodges, 33 Miss. 579); and delay in making re-sale does not discharge bidder's liability when delay is caused by his request or with his consent (Sproull v. Seay, 74 Ga. 676).

Set-off.—In a suit by the personal representative to recover the purchase price of land sold under order of court, the purchaser cannot set-off a claim which accrued to him in the lifetime of decedent.²²

B. SALE OF PERSONAL PROPERTY.—At common law, the authority of the personal representative to sell every species of personal property belonging to decedent's estate was co-extensive with that which decedent possessed in his lifetime,²³ but in many jurisdictions, the statutes do not permit a sale by the personal representative unless the will of the testator or an order of court authorizes sale.²⁴

The proceedings to obtain authority from the court to sell personal property belonging to estate are in many respects similar to those when real estate is to be sold under order of court.²⁵

VII. PROCEEDINGS WHEN ESTATE INSOLVENT.—**A. WHERE ESTATE ADMINISTERED.**—The settlement of an insolvent estate usually proceeds in the probate court²⁶ although in a few jurisdictions the settlement may be had in a court of equity when a question of special equitable cognizance is involved.²⁷

B. REPORT OF INSOLVENCY.—When it appears that the assets of the estate will be insufficient to pay the indebtedness, the administra-

22. **Ga.**—*Mills v. Lumpkin*, 1 Ga. 511, 44 Am. Dec. 677. **Ky.**—*Hancock v. Hancock's Admr.*, 24 Ky. L. Rep. 664, 69 S. W. 757. **Miss.**—*Bales v. Hyman*, 57 Miss. 330; *Mellen v. Boardman*, 13 Smed. & M. 100. **Pa.**—*Singerly v. Swain's Admr.*, 33 Pa. 102, 75 Am. Dec. 581. **Tex.**—*Hall v. Hall*, 11 Tex. 526, recognizing general rule but saying that there may be exceptions when purchaser is sole creditor or whether other equitable reasons control.

Where administrator agrees at the time sale is made that the amount secured by a lien on land sold may be set-off, he is bound to allow the amount of the lien in settling with purchaser. *McDaniel v. Hooks*, 30 Ga. 981. See also *Smith's Estate*, 179 Pa. 208, 36 Atl. 223.

23. **Ala.**—*Baldwin v. Hatchett*, 56 Ala. 461. **Conn.**—*Buckingham's Appeal*, 60 Conn. 143, 22 Atl. 509; *Johnson v. Connecticut Bank*, 21 Conn. 148, 156. **Ind.**—*Rogers v. Zook*, 86 Ind. 237; *Weyer v. Second Nat. Bank of Franklin*, 57 Ind. 198. **Me.**—*Carter v. Manufacturer's Nat. Bank*, 71 Me. 448, 36 Am. Rep. 338. **Mo.**—*Overfield v. Bullitt*, 1 Mo. 749. **N. J.**—*Hayes v. Hayes*, 45 N. J. Eq. 461, 17 Atl. 634, even where will makes specific bequest of personality. **N. C.**—*Tyrrell v. Morris*, 21 N. C. 559. **Ohio.**—*Jelke v.*

Goldsmith, 52 Ohio St. 499. **Wis.**—*Munteith v. Rahm*, 14 Wis. 210.

See also, *Woerner Am. Laws Adm.*, §§175, 331.

24. Consult local statutes.

Cases Under Such Statutes.—**U. S.**—*Tate v. Norton*, 94 U. S. 746, 24 L. ed. 222, decided under Arkansas statute. **Ala.**—*Ikleheimer v. Chapman's Admr*, 32 Ala. 676 (holding Alabama statute to be an implied abrogation of the common law right to sell); *Wyatt's Admr. v. Rambo*, 29 Ala. 510. **Ill.**—*Wilkinson v. Ward*, 42 Ill. App. 541.

Sale by Consent.—Where authority of court is essential, a sale is good if made with the consent of all parties interested. *Joslin v. Caughlin*, 32 Miss. 104.

Realty.—The interest of the estate in an executory contract for the sale of lands can be sold by the administrator only as real estate. *Hovorka v. Havlik*, 68 Neb. 14, 93 N. W. 990, 110 Am. St. Rep. 387.

25. See *supra*, VI, A.

26. *Shackelford v. Bankhead*, 72 Ala. 476; *Clark v. Eubank*, 65 Ala. 245; *Greenwood v. McGilvray*, 120 Mass. 516.

27. **Ala.**—*Corr v. Shackelford*, 68 Ala. 241. **Ga.**—*Jeter v. Barnard & Co.*, 42 Ga. 43. **S. C.**—*Thomson v. Palmer*, 2 Rich. Eq. 32.

tor or executor may file with the court his report indicating the insolvency of estate.²⁸

Time for Filing. — Unless the statute expressly limits time, the personal representative may file the report of insolvency at any reasonable time after he has been appointed and has ascertained the condition of the estate.²⁹

C. ORDER DECLARING INSOLVENCY. — 1. In General. — If the court finds that there are insufficient assets to pay indebtedness of estate, it should make a decree declaring estate insolvent.³⁰ This decree is not a final adjudication on claims and merely ascertains status of estate as between executor or administrator and creditors,³¹ but to this extent the decree is conclusive and not open to collateral attack.³²

28. Ala.—*Life Asso. v. Neville*, 72 Ala. 517; *Hayes v. Collier*, 47 Ala. 726; *Byrne v. McDow*, 23 Ala. 404; *Clarke v. West*, 5 Ala. 117; *Wood v. McCann*, 3 Ala. 61. Fla.—*Holliday v. McKinne*, 22 Fla. 153. Mass.—*Hunt v. Whitney*, 4 Mass. 620.

Administrator *de bonis non* may file his report for the purpose of having estate declared insolvent, when former administrator failed to do so. *Quackenbush v. Campbell*, Walk. Ch. (Mich.) 525; *Yandell v. Pugh*, 53 Miss. 295.

Signature and Verification.—If there are two or more executors or administrators, all should join in report of insolvency (*Hutchinson v. Newbold*, 45 N. J. Eq. 698, 17 Atl. 691); but a verification by the oath of one will be sufficient, if report is adopted by others (*Steele v. Weaver's Exrs*, 20 Ala. 540); and failure to verify is a mere irregularity which does not affect the jurisdiction of the court to declare estate insolvent (*Friedman v. Shamblyn*, 117 Ala. 454, 23 So. 821).

Administrator's prosecution of his application to have estate declared insolvent cannot be enjoined on ground that some of the debts which have been proved are barred. *McMahon v. Weart* (N. J.), 35 Atl. 444.

29. Ala.—*Hullett v. Hood*, 109 Ala. 345, 19 So. 419. Mich.—*Quackenbush v. Campbell*, Walk. Ch. 525. Miss.—*Neibert's Admrs. v. Withers*, 1 Smed. & M. 599, administrator need not first reduce realty and personalty to money. Tenn.—*Daniel v. Lowe*, 7 Heisk 361, two years after learning of insolvency is an unreasonable delay.

In Rhode Island, proceedings for the appointment of commissioners must be commenced within thirty days after

the period prescribed for presenting claims, and if commenced later, an appointment of commissioners is ineffective. *Strong v. Luther*, 20 R. I. 317, 38 Atl. 1054.

Equity cannot aid an administrator or executor who has failed to declare the estate insolvent within the time prescribed by statute. *Williams v. Starkweather*, 22 R. I. 501, 48 Atl. 669.

Notice.—Actual notice of proceedings to declare estate insolvent is not necessary (*Hine v. Hussey*, 45 Ala. 496); but publication is often required to bring estate within scope of insolvency statutes (*Bashaw v. Temple*, 115 Tenn. 596, 91 S. W. 202).

30. *Thames v. Herbert*, 61 Ala. 340; *Holliday v. McKinne*, 22 Fla. 153.

Decree Not Retroactive.—A decree declaring estate insolvent does not have a retroactive effect upon the acts done by the administrator prior to decree. *Ayers v. Leighton*, 73 N. H. 487, 63 Atl. 43.

31. *Randle v. Carter*, 62 Ala. 95; *Willis v. Rand's Admrs.*, 41 Ala. 198; *State Bank v. Ellis*, 30 Ala. 478; *McGuire v. Shelby*, 20 Ala. 456; *Greenwood v. McGilvray*, 120 Mass. 516.

Persons Entitled to Object.—The personal representative cannot object to the regularity of decree, when made upon his own report (*McLaughlin v. Creditors of Nelms*, 9 Ala. 925); but next of kin entitled to estate if debts are barred may oppose application to have estate declared insolvent. *McMahon v. Weart* (N. J.), 35 Atl. 444.

32. *Friedman v. Shamblyn*, 117 Ala. 454, 23 So. 821 (refusing to allow collateral attack because of irregularity in verification of report of insolvency); *Dolan v. Dolan*, 89 Ala. 256, 7 So. 425;

2. Appeal.—An appeal may be taken from the court's decree declaring the estate insolvent.³³

D. APPOINTMENT OF COMMISSIONERS.—**1. In General.**—According to the practice established by statute in a number of jurisdictions, the court appoints commissioners to ascertain the debts of estate.³⁴ The court should not appoint as commissioner a creditor³⁵ or other person interested in the insolvent estate.³⁶

2. Appeal From Order of Appointment.—An appeal may be taken from an order appointing commissioners on an insolvent estate.³⁷

E. NOTICE OF MEETING OF COMMISSIONERS.—Statutes generally require notice to creditors and to executor or administrator of the time and place of the meeting of commissioners so that there may be an opportunity to present claims or offer objections thereto.³⁸

F. PRESENTATION OF CLAIMS.—**1. Necessity in General.**—When commissioners are appointed, creditors are generally required to present their claims to them within a time prescribed by statute or fixed by the court.³⁹ The court may extend the time fixed by it for the

Hine v. Hussey, 45 Ala. 496; *Moody v. Davis*, 67 N. H. 399, 38 Atl. 494.

When court rejects first representation in insolvency filed by administratrix, it cannot refuse to consider a second representation simply because of its former decision. *Pettee v. Wilmarth*, 5 Allen (Mass.) 144; *Buckman v. Phelps*, 6 Mass. 448.

33. *Hine v. Hussey*, 45 Ala. 496; *Banks v. McDougald's Admr.*, 29 Ala. 75; *Bristow v. McClelland*, 122 Ind. 64, 22 N. E. 299.

34. Conn.—*Bailey v. Bussing*, 37 Conn. 349. **Me.**—*Hall v. Merrill*, 67 Me. 112. **R. I.**—*McGowen v. Peabody*, 20 R. I. 582, 40 Atl. 758.

In Maine, commissioners need not be appointed for an insolvent estate when funds are insufficient to extend beyond the payment of the expenses of the funeral, costs of administration and the allowance to widow and children. *Ludwig v. Blackinton*, 24 Me. 25.

35. *Fairbank's Appeal*, 2 Root (Conn.) 386; *Lyon v. Lyon*, 2 Root (Conn.) 203; *Barker v. Wales*, 1 Root (Conn.) 265; *Preston v. Cutter*, 64 N. H. 461, 13 Atl. 874, even when creditor's claim appears to be fully secured.

36. *English v. Smith*, 13 Conn. 221 (applying in this connection the provisions of statutes regarding disqualification of judges because of interest or relationship); *Sturges v. Peek*, 12 Conn. 139 (creditor a brother of commissioner); *Stoddard v. Moulthrop*, 9 Conn. 502.

Waiver of Objections.—One who proves his claim before commissioner without making objection waives his right to object to the appointment of commissioner. *Harris v. Parker*, 66 N. H. 324, 23 Atl. 81.

37. *Pierce v. Allen*, 12 R. I. 510. *Contra*, *Putney v. Fletcher*, 140 Mass. 596, 5 N. E. 640, where the court in refusing to allow appeal said: "No person can be aggrieved by such action. It is merely a mode of ascertaining the debts due from the estate."

38. See *Davis' Appeal* from Probate, 39 Conn. 395, construing Connecticut statute requiring notice to "known creditors."

Formal notice may be waived by creditors and by executor or administrator. *Hall v. Merrill*, 67 Me. 112.

39. Me.—*Dillingham v. Weston*, 21 Me. 263. **Mass.**—*Fay v. Haskell*, 207 Mass. 207, 93 N. E. 641; *Paine v. Nichols*, 15 Mass. 264. **N. H.**—*Stevens v. King*, 74 N. H. 144, 65 Atl. 944. **R. I.**—*Moies v. Sprague*, 9 R. I. 541. **Vt.**—*Freeman v. Holt*, 51 Vt. 538; *Burgess v. Gates*, 20 Vt. 326 (chancery can give no relief, if creditor omits to present, in absence of fraud or mistake).

An administrator who has resigned and has a claim against estate which is insolvent should not prove his claim before commissioners, but should present his claim to court upon settlement of his accounts. *Newell v. West*, 149 Mass. 520, 21 N. E. 954; *Green v.*

exhibition of claims against estate when a sufficiently good cause is shown.⁴⁰

2. Sufficiency of Claimant's Statement.—In the presentation of claims to commissioners, no formal pleadings are necessary,⁴¹ and the statement is sufficient when it enables commissioners to understand the claim and fairly discloses an existing liability against the estate.⁴² If the claim is upon a written instrument, the instrument or a copy thereof is a sufficient statement.⁴³

Verification.—The claim should be supported by an affidavit showing that it is a just and subsisting demand against estate.⁴⁴

G. OBJECTIONS TO CLAIMS.—Objections to the allowance of claims may be made by the personal representative,⁴⁵ creditors,⁴⁶ or others interested in the insolvent estate.⁴⁷

Russell, 132 Mass. 536. *Compare*, Wheeldon v. Nichols, 65 Atl. 445, and Riley v. McInlear's Estate, 61 Vt. 254, 17 Atl. 729, 19 Atl. 996.

Re-filing of Claim Withdrawn. Where claim is properly presented but is withdrawn because of misrepresentation of the administrator as to the condition of the estate, a re-filing should be allowed before distribution of assets. *Stamps v. Bell*, 2 Baxt. (Tenn.) 170.

40. Conn.—Deming's Appeal from Probate, 34 Conn. 201 (court may extend, at its discretion, to any time withing eighteen months); *Lockwood v. Reynolds*, 16 Conn. 303. **Me.**—Griffin v. Parcher, 48 Me. 406. **Mass.** Walker v. Lyman's Admr., 6 Pick. 458, although report of commissioners made and accepted. **N. H.**—Peabody's Petition, 40 N. H. 342 (no extension beyond two years for any cause); *Buford v. Johnson*, 34 N. H. 489.

Appeal When Extension Refused. An appeal will lie from an order refusing to grant the petition of a creditor for an extension of the time within which to file claims. *Griffin v. Parcher*, 48 Me. 406; *Walker v. Lyman's Admr.*, 6 Pick. (Mass.) 458.

41. Mills v. Wildman, 18 Conn. 124.

42. Thornton v. Moore, 61 Ala. 347; *Hogan's Exr. v. Calvert*, 21 Ala. 194; *Appeal of Am. Board of Comrs. for Foreign Missions*, 27 Conn. 344.

43. Rutherford's Admr. v. Branch Bank of Mobile, 14 Ala. 92; *Rowdon v. Young*, 12 Ala. 234; *Mills v. Wildman*, 18 Conn. 124.

44. Thornton v. Moore, 61 Ala. 347; *Campbell's Admr. v. Campbell's Creditors*, 11 Ala. 730 (although claim evi-

denced by copy of judgment); *Morgan v. McCausland*, 96 Me. 449, 52 Atl. 931 (oath should be by claimant or some person cognizant of claim).

In Alabama, a defective affidavit may be amended or an affidavit may be supplied at or before the day for the final settlement. *Thornton v. Moore*, 61 Ala. 347; *Gaffney v. Williamson's Admr.*, 21 Ala. 112; *Rutherford's Admr. v. Br. Bank of Mobile*, 14 Ala. 92; *Gilbert v. Brashear*, 12 Ala. 191; *Brown & Co. v. Easley*, 10 Ala. 564.

Time of Verification.—An affidavit to claim made after qualification of personal representative is not defective because made before estate declared insolvent. *Norvill v. Williams' Admr.*, 35 Ala. 551; *P. & M. Bank v. Smith*, 14 Ala. 416.

45. Gaffney v. Williamson's Admr., 21 Ala. 112; *Trezevant v. McQueen*, 13 Smed. & M. (Miss.) 311, "As the representative of the intestate, and as trustee for creditors generally, in regard to each specific claim he (administrator) stood in the attitude of a defendant."

46. Claghorn's Estate, 181 Pa. 600, 37 Atl. 918, 59 Am. St. Rep. 680; *Smith v. Sprout* (Tenn.), 58 S. W. 376.

47. Christopher v. Stewart, 133 Ala. 348, 32 So. 11 (quoting §313, Code 1896, allowing objection by "the administrator, or any creditor, heir, legatee, devisee or distributee"); *Eubank v. Clark*, 78 Ala. 73; *Bailey v. Bussing*, 37 Conn. 349.

Form of Objections.—In Ala., Code 1896, §313, objections to the allowance of any claim against estate must be "in writing." See *Christopher v.*

Statutes sometimes limit the time within which objections to claims may be filed.⁴⁸

II. HEARING AND ALLOWANCE OF CLAIMS.—On the hearing the amount and validity of claims against the estate are determined,⁴⁹ and if no objections are made, properly verified claims are usually allowed as a matter of course.⁵⁰ If commissioners allow a claim, they should ascertain the exact amount due to claimant.⁵¹

The allowance of a claim against an insolvent estate does not operate as a judgment.⁵²

I. REPORT OF COMMISSIONERS.—1. Sufficiency.—The commissioners should file with the court a report showing the claims allowed by them,⁵³ and on motion of any person interested, the court which made the appointment may compel the filing of such report.⁵⁴

A report is sufficient which simply sets forth the amounts which have been allowed as due the respective claimants.⁵⁵ All the commissioners appointed should join in and sign the report.⁵⁶

Stewart, 133 Ala. 348, 32 So. 11, quoting statute.

48. In Alabama, objections may be filed at any time within twelve months after the declaration of insolvency (Christopher v. Stewart, 133 Ala. 348, 32 So. 11); and the time cannot be enlarged by an agreement between the probate court and the administrator of the estate (Hardy v. Meachem's Admr., 33 Ala. 457).

49. Bailey v. Bussing, 37 Conn. 349, where it was said: "The tribunal, although performing duties judicial in their character, is in no sense a court of general jurisdiction, and its jurisdiction is limited to debts against estate and matters incidentally connected therewith. Parties appear before them in an informal manner and all persons interested in the estate may be heard in respect to any claim that is presented."

50. Chandler v. Wynne, 85 Ala. 301, 4 So. 653 (under Alabama Code of 1886, Sec. 2244, allowance must be made by court, if no objections made); Cunningham v. Lindsay, 77 Ala. 510; Clark v. Knox, 70 Ala. 607; Thames v. Herbert, 61 Ala. 340.

51. Lowry v. Stevens, 6 Vt. 113, holding allowance void which simply certified that claim was just.

52. Bowers v. Hammond, 139 Mass. 360, 31 N. E. 729; Sharp v. Citizens Bank of Stanton, 70 Neb. 758, 98 N. W. 50.

53. Conn.—Bailey v. Bussing, 37 Conn. 349. Me.—Nelson v. Woodbury,

1 Me. 251. Miss.—Herring v. Wellons, 5 Smed. & M. 354; Saunders v. Planters Bank, 2 Smed. & M. 287. Vt. Hodges v. Thatcher, 23 Vt. 455, decision of commissioners does not become a part of record until made a record in probate court.

Time for Filing.—Failure to file report within the time prescribed does not render report of commissioners void (Providence Steam Carpet Beating Co. v. Hazard, 20 R. I. 131, 37 Atl. 635); and court may extend the time allowed to the commissioners for presenting their report (Saunders v. Planters Bank, 2 Smed. & M. (Miss.) 287), and if return is made within less than the time prescribed by statute, the court is not thereby prevented from approving report (Sowles v. Quinn, 61 Vt. 354, 17 Atl. 493).

54. Blanchard v. Allen, 116 Mass. 447.

55. Littlefield v. Clark, 3 R. I. 265.

In Maine, preferred claims need not be embraced in the report of commissioners. Flitner v. Hanley, 19 Me. 261.

56. Hodges v. Thatcher, 23 Vt. 455. See, however, Whitcomb v. Hutchinson, 48 Vt. 310, where one commissioner died after first session and before report made and where, the report signed by one commissioner having been approved, the court refusing to sustain an objection by administrator to payment of one claim allowed, he having failed to appeal from order approving report.

Oath.—It is not essential that it ap-

2. Court's Action on Report.—The court may accept or reject the entire report of commissioners,⁵⁷ but may not allow or disallow any particular claim against an insolvent estate contrary to the findings of commissioners.⁵⁸ The court should reject the report when commissioners were disqualified to act.⁵⁹

Re-opening Commission.—Upon application of a creditor, the court may re-open the commission after report has been filed,⁶⁰ and it is not

pear of record that the report of the commissioners of insolvency was made under oath. *Herring v. Wellons*, 5 Smed. & M. (Miss.) 354.

57. *Bailey v. Whitman*, 49 Conn. 79; *Sturges v. Peck*, 12 Conn. 139. "Although no express power is given to courts of probate to accept or reject the returns either of commissioners or distributors, yet such a power is both necessary and incidental to the salutary exercise of probate jurisdiction." *Peck v. Sturges*, 11 Conn. 420. "Court to whom the report is to be made must of necessity determine whether the report presented is the judgment of commissioners." *Hodges v. Thatcher*, 23 Vt. 455.

Rejection After Acceptance.—"After acceptance the court may, of its own motion, reject a report and send it back to commissioners for the correction of errors found therein, without notice to the parties interested. *Adarone v. Marlow's Estate*, 33 Vt. 558.

Nature and Time of Objections to Report.—An objection to a report of commissioners will not be considered unless specifically pointed out by exceptions to report (*Crutcher's Heirs v. Cavanaugh's Admr.*, 12 Ky. L. Rep. 292); and exceptions should be taken at the term to which report is made (*Hemphill v. Fortner*, 11 Smed. & M. (Miss.) 344; *Smith v. Berry*, 1 Smed. & M. (Miss.) 321; *Chewning v. Peck*, 6 How. (Miss.) 524).

The fact that the court omitted to make an order of distribution upon allowing the report of commissioners is no objection to the correctness of report. *Hemphill v. Fortner*, 11 Smed. & M. (Miss.) 344.

In Massachusetts, the judge does not pass upon the return of commissioners and if no appeal is taken, the return of the commissioners is conclusive and the estate must be distributed accordingly. *Greenwood v. McGilvray*, 120 Mass. 516.

Failure To Record Acceptance.—Although formal acceptance and not mere reception of report is essential, an acceptance may be complete and operative although court fails to make a record or entry of it at the time. *Bailey v. Whitman*, 49 Conn. 79.

58. Conn.—*Shelton v. Hadlock*, 62 Conn. 143, 25 Atl. 483; *Bennett's Appeal*, 33 Conn. 214; *Peck v. Sturges*, 11 Conn. 420; *Hotchkiss v. Beach*, 10 Conn. 232. Mass.—*Parsons v. Mills*, 2 Mass. 80; *Gold v. McMechan*, 1 Mass. 23. Mich.—*Clark v. Davis*, 32 Mich. 154. R. I.—*Barnes v. Mowry*, 11 R. I. 420; *Yeaw v. Searle*, 2 R. I. 168. Vt. *Hodges v. Thatcher*, 23 Vt. 455.

Method of Correcting Report.—If commissioners erroneously allow claim, the only relief to the party as aggrieved is by review or an application to open the commission. *Findlay v. Hosmer*, 2 Conn. 350.

A court of equity cannot make an order adding to the report of commissioners a claim not provable before them. *Moies v. Sprague*, 9 R. I. 541.

59. *Sturges v. Peck*, 12 Conn. 139; *Stoddard v. Moulthrop*, 9 Conn. 502; *Fairbank's Appeal*, 2 Root (Conn.) 386; *Lyon v. Lyon*, 2 Root (Conn.) 203.

60. Mass.—*Towle v. Bannister*, 16 Pick. 255 (before distribution to correct mistake in report); *Walker v. Lyman's Admr.*, 6 Pick. 458. Mich.—*Heavenrich v. Nichols' Estate*, 113 Mich. 508, 71 N. W. 852; *Hart v. Shiawassee Circuit Judge*, 56 Mich. 592, 23 N. W. 326. N. H.—*Parker v. Gregg*, 23 N. H. 416, without notice to personal representative.

In Mississippi, the court cannot, for any cause, re-open report at any term subsequent to the one in which report was approved by the court. *Dahlgren v. Duncan*, 7 Smed. & M. 280; *Herring v. Wellons*, 5 Smed. & M. 354; *Smith v. Berry*, 1 Smed. & M. 321; *Chewning v. Peck*, 6 How. 524.

necessary that the commissioners be reappointed or their powers renewed.⁶¹

J. REVIEW.—1. Appeal From Decision of Commissioners.—An appeal may be taken from the allowance⁶² or disallowance⁶³ by commissioners of claims against an insolvent estate.

2. Appeal From Decision of Court.—An appeal from the order of the court accepting a commissioner's report cannot be taken because commissioners erred in allowing or rejecting a claim presented,⁶⁴ but an appeal will lie from the court's acceptance, if appellant's objection goes to the validity of the entire report of commissioners.⁶⁵

3. Who Entitled to Appeal.—Creditors,⁶⁶ administrators or ex-

An appeal will lie from an order refusing to revive a commission on claims and mandamus may issue to require the court to allow the aggrieved party to prosecute such appeal. *Hart v. Shiwassee Circuit Judge*, 56 Mich. 592, 23 N. W. 326.

61. *Davis' Appeal from Probate*, 39 Conn. 395.

Impeachment for Fraud.—The allowance of claim by commissioners may be impeached for fraud by one who was not a party to the proceedings in insolvency and had no right to appeal. *Matthews v. Hutchins*, 68 N. H. 412, 40 Atl. 1063.

62. *Conn.*—*Gillett's Appeal*, 82 Conn. 500, 74 Atl. 762; *Bennett's Appeal from Probate*, 33 Conn. 214; *Saunders v. Denison*, 20 Conn. 521. *Mass.* *Ostrom v. Curtis*, 1 Cush. 461; *Sabine v. Strong*, 6 Met. 270. *N. H.*—*Chapman v. Haley*, 43 N. H. 300. *R. I.* *Barnes v. Mowry*, 11 R. I. 420. *Vt.* *Hobart v. Herrick*, 28 Vt. 627.

In Rhode Island, under Pub. St. Ch. 186, §§13, 14, a separate appeal must be taken to each allowance and a single appeal from an order of commissioners allowing three claims is void and cannot be amended. *Harris v. Angell*, 16 R. I. 347, 16 Atl. 142, 17 Atl. 909.

63. *Conn.*—*Bennett's Appeal*, 79 Conn. 578, 65 Atl. 946; *Huntington's Appeal*, 73 Conn. 582, 48 Atl. 766. *Me.* *Morgan v. McCausland*, 96 Me. 449, 52 Atl. 931; *Nealley v. Segar*, 57 Me. 563. *Mass.*—*Waters v. Randall*, 8 Metc. 132. *N. H.*—*Foster v. Clark*, 61 N. H. 29. *Ohio.*—*Cromwell v. Herron*, 11 Ohio C. C. 448.

A creditor may prosecute an appeal from disallowance of his claim by commissioners although administrator has settled his administration accounts and an order discharging him has been en-

tered. *Clough v. Clark*, 63 N. H. 403, 1 Atl. 201.

Under Minnesota statute, an appeal from the adjudication of commissioners allowing certain items of a claim and disallowing others can not be restricted to the portion of the decision which disallows items. *Capehart v. Logan*, 20 Minn. 442.

In Maine, creditor can not appeal because commissioners decide that his claim is not a preferred one. *State v. Hichborn*, 67 Me. 504.

64. *Bennett's Appeal from Probate*, 33 Conn. 214 (appeal should be directly from doings of commissioners); *Barnes v. Mowry*, 11 R. I. 420 (refusing to allow amendment of an appeal from court's order so that appeal might be treated as an appeal from commissioners); *Yeaw v. Searle*, 2 R. I. 168.

65. *Bailey v. Whitman*, 49 Conn. 79; *Sturges v. Peek*, 12 Conn. 139; *Peek v. Sturges*, 11 Conn. 420; *Stoddard v. Moulthrop*, 9 Conn. 502; *Fairbank's Appeal*, 2 Root (Conn.) 386; *Lyon v. Lyon*, 2 Root (Conn.) 203; *Edwards v. Botsford*, 1 Root (Conn.) 244.

In Vermont, it has been held that if the probate court refuses to receive what purports to be a report of commissioners, an appeal will not lie, since refusal is not final. *Hodges v. Thatcher*, 23 Vt. 455.

For practice in Tennessee when claim disallowed, see *Barksdale v. Ward*, 46 S. W. 771, and *England v. Pearson*, 13 Lea 443.

In Alabama, the court passes upon claims and Code §458, sub. 6, provides for an appeal "upon any issue as to the allowance of any claim against insolvent estates." See *Christopher v. Stewart*, 133 Ala. 348, 32 So. 11, quoting statute.

66. *Conn.*—*Saunders v. Denison*, 20

ecutors,⁶⁷ or other persons aggrieved⁶⁸ may appeal from decisions allowing or rejecting claims against insolvent estates,⁶⁹ since equity can grant no relief to one who fails to appeal within time prescribed.⁷⁰

4. Notice of Appeal.—Notice of appeal at the probate office is sometimes required,⁷¹ and notice to persons adversely interested is necessary to perfect appeal in some jurisdictions.⁷²

5. Proceedings in Appellate Court.—The practice in some jurisdictions does not require that any pleadings be filed in the appellate court,⁷³ while in others, when the appeal is perfected, the creditor

Conn. 521; *Peck v. Sturges*, 11 Conn. 420. **Mass.**—*Sabine v. Strong*, 6 Mete. 270. **N. H.**—*Poss v. Lord*, 59 N. H. 529; *Chapman v. Haley*, 43 N. H. 300. **Vt.**—*Hobart v. Herrick*, 28 Vt. 627.

Creditor's appeal cannot be dismissed because he refused to testify before commissioners in support of his claim, although requested to do so. *Foster v. Clark*, 61 N. H. 29.

Stay Until Creditor's Claim Established.—Proceedings on a creditor's appeal from an order allowing claim of another creditor should be stayed when administrator has taken an appeal from the allowance of the claim of appealing creditor. *Farr v. Williams*, 47 N. H. 560.

67. Conn.—*Gillett's Appeal*, 82 Conn. 500, 74 Atl. 762; *Woodbury's Appeal from Probate*, 70 Conn. 455, 39 Atl. 791 (but personal representative not aggrieved when claim disallowed). **Me.**—*Burrows v. Bourne*, 67 Me. 225. **Mass.**—*Waters v. Randall*, 8 Mete. 132.

68. Bailey v. Whitman, 49 Conn. 79; *Sawyer v. Copp*, 6 N. H. 42.

When court allows claim of executor or administrator against an insolvent estate, any person aggrieved may appeal. *Sawyer v. Copp*, 6 N. H. 42.

69. Me.—*Robbins Cordage Co. v. Brewer*, 48 Me. 481, time mentioned in statute runs from day court accepts report and not from day commissioners sign. **Mass.**—*Merriam v. Leonard*, 6 Cush. 151. **N. H.**—*Jones v. Martin*, 67 N. H. 334, 39 Atl. 971; *Parsons v. Parsons*, 67 N. H. 296, 29 Atl. 451; *Hilton v. Wiggin*, 46 N. H. 120; *Sumner v. Fisk*, 45 N. H. 588. **N. J.** *Young v. Young*, 32 N. J. Eq. 275. **Ohio.** *Cromwell v. Herron*, 11 Ohio C. C. 448.

Time prescribed by statute for an

appeal from the decision of commissioners is not extended by the pendency of an appeal from the order of the probate court directing that report be received. *Barnes v. Mowry*, 11 R. I. 420.

70. Swain v. Knapp, 71 N. H. 620, 51 Atl. 905; *Parsons v. Parsons*, 67 N. H. 419, 29 Atl. 999.

In Rhode Island, under Pub. St., 221, §8, the supreme court may grant a trial to one who has failed to appeal from the decision of commissioners on an insolvent estate. *Harris v. Earle*, 39 Atl. 192; *Baker v. Hoxie*, 38 Atl. 1000.

71. Robbins Cordage Co. v. Brewer, 48 Me. 481; *Pattee v. Lowe*, 36 Me. 138; *Pattee v. Lowe*, 35 Me. 121 (notice in writing necessary); *Jacobs v. Jacobs*, 110 Mass. 229.

72. Shaw v. Newell, 9 R. I. 111 (notice to administrator only is not sufficient); *Sheldon v. Court of Probate of Johnston*, 5 R. I. 436.

Where Court Authorized To Order Notice.—Failure of the probate court to make order for notice to the parties interested, as authorized by statute, does not deprive the appellate court of jurisdiction (*Donovan's Appeal from Probate*, 40 Conn. 154); and notice need not be served on other creditors, if judge makes no direction requiring such notice (*Home Savings Bank v. Wayne Circuit Judge*, 113 Mich. 385, 71 N. W. 638).

73. Tolle's Appeal, 54 Conn. 521, 9 Atl. 402; *Westra v. Estate of Westra*, 101 Mich. 526, 60 N. W. 55, trial conducted as if before commissioners and administrator allowed to prove set-off without having given notice thereof); *Hatheway's Appeal*, 52 Mich. 112, 17 N. W. 718; *Patrick v. Howard*, 47 Mich. 40, 10 N. W. 71.

is required to file his declaration as in an ordinary action at law.⁷⁴

K. DECREE FOR DISTRIBUTION.—1. In General.—Upon settlement of the accounts of the executor or administrator, if the debts exceed the assets, the court should make a decree for the distribution of the estate among creditors according to the amounts found due in the proceedings in insolvency.⁷⁵ The court may decree the payment of a certain percentage of the whole claim or may ascertain the share of the creditor and direct its payment.⁷⁶

In some jurisdictions, the order of distribution is a final judgment

74. **Me.**—*Morgan v. McCausland*, 96 Me. 449, 52 Atl. 931. **Mass.**—*Jacobs v. Jacobs*, 110 Mass. 229. **N. H.**—*Souhegan National Bank v. Wallace*, 60 N. H. 354 ("claim is heard and tried as though no prior proceedings had been had"); *Parker v. Gregg*, 23 N. H. 416.

Joinder.—Claimant may join counts in assumpsit and book account in the declaration filed in appellate court. *Abbott v. Keith*, 11 Vt. 525.

Amendment.—When pleadings are not required, claimant may, on appeal, amend his statement of claim, providing he does not change his ground of action (*Huntington's Appeal*, 73 Conn. 582, 48 Atl. 766; *Donahue's Appeal* from Commissioners, 62 Conn. 370, 26 Atl. 399); and where the filing of a declaration is required on appeal, the appellate court may allow an amendment to declaration (*Parker v. Gregg*, 23 N. H. 416).

Examination of Creditor.—The appellate court may require the creditor to submit to an examination under oath. *Dyer v. Stanwood*, 7 N. H. 261.

75. **Ala.**—*Eubank v. Clark*, 78 Ala. 73. **Me.**—*Hall v. Merrill*, 67 Me. 112. **Mass.**—*Bowers v. Hammond*, 139 Mass. 360, 31 N. E. 729; *Stanwood v. Owen*, 5 Allen 439; *Jewett v. Phillips*, 5 Allen 150; *Davis v. Estey*, 8 Pick. 475; *Daves v. Head*, 3 Pick. 128. **N. H.** Judge of Probate *v. Couch*, 59 N. H. 39, order for payment necessary before suit on bond for not accounting. **R. I.**—Probate Court of West Greenwich *v. Carr*, 20 R. I. 592, 40 Atl. 844. **Vt.**—Probate Court *v. Kent*, 49 Vt. 380; Probate Court *v. Kimball*, 42 Vt. 320; Bank of Orange County *v. Kidder*, 20 Vt. 519.

Duty To Ask for Order.—The executor or administrator should seasonably move the court for an order of distribution or he may be held liable

for his neglect. Probate Court *v. Carr*, 20 R. I. 592, 40 Atl. 844.

Extent of Court's Authority.—When commissioners are appointed, the court has no authority over the claims. "All that the court can do is to order dividends made from time to time among those whose claims are allowed." *Clark v. Davis*, 32 Mich. 154.

When Estate Proves Solvent.—In *Greenwood v. McGilvray*, 120 Mass. 516, the court said: "If it appears that debts allowed do not exceed assets, the estate must be settled as if no representation had been made." But in *Hall v. Merrill*, 67 Me. 112, the court held that after the decree of insolvency and the acceptance of the report of commissioners, the estate should be settled as an insolvent estate, although assets are in excess of liabilities.

Amendment of Decree of Distribution.—On petition to the surrogate court, an order may be made amending decree for distribution by reducing the percentage which is to be paid to creditors, and one given notice of such petition can not collaterally attack amended decree. *Woodruff v. H. B. Claflin Co.*, 133 App. Div. 874, 118 N. Y. Supp. 48.

Notice of Change in Decree.—The orphan's court has no authority to alter the decree settling the claims against insolvent estate without notice to creditors or their voluntary appearance. *Eakin v. Brick's Admr.*, 16 N. J. L. 93.

76. *State v. Bowen*, 45 Miss. 347. In New Hampshire, when court directs administrator to pay a sum certain to creditor, the administrator is chargeable as a trustee for creditor. *Adams v. Dakin*, 2 N. H. 374.

The fact that the judge is himself a creditor does not invalidate the de-

binding upon executor or administrator and execution may be issued thereon.⁷⁷

2. Appeal.—An appeal may be taken from an order distributing among creditors the funds of an insolvent estate in the hands of the personal representative.⁷⁸

L. ACTIONS ON CLAIMS BY CREDITORS.—An action on a claim against the estate cannot be brought by a creditor after a report of insolvency has been filed with the court,⁷⁹ unless the demand is one which is not affected by the insolvency of the estate because entitled to preference,⁸⁰ or unless the claim has been rejected by the court or commissioners.⁸¹

VIII. PROCEEDINGS TO REQUIRE ACCOUNTING.—**A. IN PROBATE COURT.**—**1. Who May Institute.**—Any person interested

in the estate may sue for distribution. Judge of Probate *v. Tillotson*, 6 N. H. 292.

77. Ala.—*Lehman v. Robertson*, 84 Ala. 489, 4 So. 728. **Miss.**—*Allen v. Smith*, 72 Miss. 689, 18 So. 579; *State v. Bowen*, 45 Miss. 347; *Powell v. Cooper*, 42 Miss. 221 (execution should not issue until demand by creditor or time for demand). **Neb.**—*Lydiek v. Chaney*, 64 Neb. 288, 89 N. W. 801.

See, also, *Bank of Orange County v. Kidder*, 20 Vt. 519.

Collateral Attack.—When court has jurisdiction, the decree of distribution of the assets of an insolvent estate can not be collaterally attacked. *Probate Court v. Van Duzer*, 13 Vt. 135.

78. Ala.—*Lehman v. Robertson*, 84 Ala. 489, 4 So. 728. **Mass.**—*Stanwood v. Owen*, 5 Allen 439. **Mo.**—*Estate of McCune*, 76 Mo. 200.

Administrator may appeal although not personally aggrieved when distribution ordered works injustice to creditors of estate. *Estate of McCune*, 76 Mo. 201.

79. Ind.—*Remy v. Butler*, 7 Blackf. 5. **Me.**—*Pattee v. Lowe*, 36 Me. 138; *Daggett v. Chase*, 29 Me. 356. **Mass.**—*Cushing v. Field*, 9 Mete. 180; *Johnson v. Ames*, 6 Pick. 330; *Paine v. Nichols*, 15 Mass. 264. **Miss.**—*Nutt v. Brandon*, 85 Miss. 702, 38 So. 104, since code of 1880. **N. J.**—*Smith v. Crater*, 43 N. J. Eq. 636, 12 Atl. 530 (only where claim is excepted to and administrator or executor gives the claimant notice to sue); *Reeves v. Townsend*, 22 N. J. L. 396.

One creditor of estate may enjoin execution of a judgment at law obtained by another creditor after suggestion of insolvency filed in the pro-

bate court. *Searlett v. Hicks*, 13 Fla. 314. See also *Farmers & M. Nat. Bank v. Bell*, 31 Tex. Civ. App. 124, 71 S. W. 570.

Pleading by Personal Representative. The administrator or executor, when sued by claimant, should plead specially that estate has been represented insolvent. *Cameron v. Clarke, Smith & Co.*, 11 Ala. 259; *Humphreys v. Morrow*, 9 Port. (Ala.) 283.

80. Pattee v. Lowe, 36 Me. 138.

When estate proved solvent although represented insolvent, a claim presented to executor and rejected within twelve months after it became due might be sued upon in an action at law against executor. *Bacon v. Thorp*, 27 Conn. 251.

81. Mass.—*Eaton v. Whitaker*, 6 Pick. 465. **N. J.**—*Smith v. Crater*, 43 N. J. Eq. 636. **R. I.**—*James v. James*, 14 R. I. 564 (claimant need give no notice of intention to bring suit); *Burlingame v. Brown*, 5 R. I. 410.

Claimant cannot prosecute an action pending at his intestate's death when his claim was presented to commissioners and their report disallowing a large part of it was approved by the court. *Bates v. Ward*, 49 Me. 87.

When Suit Premature.—A suit by creditor is premature, although brought after commissioners have in fact rejected claim, when report has not yet been returned to the court and accepted. *Goff v. Kellogg*, 18 Pick. (Mass.) 256.

Claimant who sues on a rejected claim should allege that he laid his claim before commissioners and that it was rejected by them. *Eaton v. Whitaker*, 6 Pick. (Mass.) 465.

in the settlement of a decedent's estate may institute proceedings to compel the executor or administrator to account for the assets received by him⁸² and according to the weight of authority, creditors of the estate,⁸³ legatees or devisees,⁸⁴ heirs or distributees,⁸⁵ and co-executors

82. Mo.—*Goodman v. Griffith*, 155 Mo. App. 574, 134 S. W. 1051. **N. Y.** *In re Hasselbrook's Estate*, 128 App. Div. 874, 113 N. Y. Supp. 97; *In re Tisdale*, 110 App. Div. 857, 97 N. Y. Supp. 494; *In re Watts*, 68 App. Div. 357, 74 N. Y. Supp. 75; *Estate of Duffy*, 3 How. Pr. (N. S.) 240. **Pa.** *Wagner's Estate*, 227 Pa. 460, 76 Atl. 215. **Tex.**—*McLain v. Pate* (Tex. Civ. App.), 124 S. W. 718. **Vt.**—*Davis v. Eastman*, 68 Vt. 225, 35 Atl. 73.

In New York, a mere appearance of an interest is ordinarily sufficient to sustain petition, even though interest is questioned. *In re Williams' Estate*, 57 Misc. 537, 109 N. Y. Supp. 974; *Reilley v. Duffy*, 4 Dem. Sur. (N. Y.) 366.

83. U. S.—*Lewis v. Parrish*, 115 Fed. 285, 53 C. C. A. 77. **La.**—*Voinche v. Brouillette*, 50 La. Ann. 370, 23 So. 318 (judgment creditor of heir); *State v. Judge Second District Court*, 20 La. Ann. 580. **N. Y.**—*Matter of Gill*, 183 N. Y. 347, 76 N. E. 274. **Pa.**—*In re Love's Estate*, 11 W. N. C. 324; *In re Wistar's Estate*, 12 Phila. 48.

One having a claim against the personal representative which may be paid out of the funds of the estate is not entitled to require an accounting as a creditor of the estate. *In re Flint's Estate*, 15 Misc. 598, 38 N. Y. Supp. 188 (where claim was for funeral expenses); *Lewis' Estate*, 6 Pa. Co. Ct. 457 (claimant employed by executors to balance accounts of estate).

A creditor whose claim is barred by the special statute of limitations in favor of executors or administrators can not present a petition as creditor. *Allen v. Trustees of Ashley School Fund*, 102 Mass. 262.

General creditors of an insolvent firm of which decedent was a member cannot maintain an action to compel the personal representative to account. *Frothingham v. Hodenpyl*, 61 Hun 627, 16 N. Y. Supp. 341.

In New York, after letters of an executor or an administrator have been revoked, a creditor can not by

petition compel an accounting, since by Code Civ. Proc., §2605, such proceedings must be instituted by a former co-representative or by a successor. *Breslin v. Smyth*, 3 Dem. Sur. (N. Y.) 251.

84. U. S.—*Silsby v. Young*, 3 Cranch 249, 2 L. ed. 429. **N. J.**—*McCarthy v. Cutter*, 75 Atl. 897; *Hastenbeck's Case*, 73 N. J. Eq. 337, 75 Atl. 823. **N. Y.**—*Woodruff v. Woodruff*, 17 Abb. Pr. 165; *Carroll v. Carroll*, 11 Barb. 293. **N. C.**—*Brotten v. Bateman*, 17 N. C. 115, 22 Am. Dec. 732. **Pa.**—*Palethorp's Estate*, 14 Pa. Co. Ct. 288, 3 Pa. Dist. 144; *Alter's Estate*, 3 W. N. C. 356.

Assignee of a portion of legatee's interest may compel the executor or administrator to account. *Citizens Cent. Nat. Bank v. Toplitz*, 113 App. Div. 73, 98 N. Y. Supp. 826.

Legatee whose legacy is payable at death of executor may maintain proceedings to compel accounting. *In re Jones' Estate*, 30 Misc. 354, 63 N. Y. Supp. 726.

Court may require accounting upon petition of a residuary legatee who has released his interest (*Harris v. Ely*, 25 N. Y. 138); especially where the interest of petitioner appears to have been extinguished by a release which he attacks as void (*Reilley v. Duffy*, 4 Dem. Sur. [N. Y.] 366).

Where Interest a Remainder.—One whose interest is only by way of a remainder may petition for an accounting. *Earle v. Earle*, 73 App. Div. 300, 76 N. Y. Supp. 851; *In re Lawrence's Estate*, 15 Civ. Proc. 54, 1 N. Y. Supp. 213; *Campbell v. Purdy*, 5 Redf. Sur. (N. Y.) 434; *Estate of Bushong*, 14 Phila. (Pa.) 322; *Albertson's Estate*, 1 W. N. C. (Pa.) 188. And the right of remainderman to require an accounting is not affected by the fact that life tenant is given authority to use principal for her support. *Matter of Hunt*, 84 App. Div. 159, 82 N. Y. Supp. 538, affirmed, 179 N. Y. 570, 72 N. E. 1143; *In re Hunt's Estate*, 38 Misc. 30, 76 N. Y. Supp. 968.

85. La.—*Succession of Wiemann*,

or co-administrators,⁸⁶ are held to be persons interested.

Although, under statutes requiring the filing of accounts by executors and administrators, the court may compel accounting of its own motion,⁸⁷ the court should not entertain a petition filed by one who has no interest in the settlement of the estate.⁸⁸

2. Who May Be Required To Account.—Statutes uniformly require that an executor or administrator shall file a statement of his accounts in the probate court or in the court exercising probate jurisdiction,⁸⁹ and a former administrator or executor who has resigned or has been removed may be required to account.⁹⁰

106 La. 387, 30 So. 893; Succession of Touzanne, 36 La. Ann. 420. **Me.** Rogers v. Marston, 80 Me. 404, 15 Atl. 22. **N. H.**—Flanders v. Lane, 54 N. H. 390. **N. Y.**—Matter of Killan, 172 N. Y. 547, 65 N. E. 561; *In re Meyer's Estate*, 98 App. Div. 7, 90 N. Y. Supp. 185; *In re Williams' Estate*, 57 Misc. 537, 109 N. Y. Supp. 974. **E. I.**—Burch v. Champlin, 52 Atl. 988, although heirs had executed to administrator a release of all claims and demands.

The purchaser of the interest of an heir or distributee may compel an accounting (Wright v. Lowe's Exrs., 6 N. C. 354; Branch v. Hanrick, 70 Tex. 731, 8 S. W. 539); and the residuary legatee of a deceased distributee is a proper petitioner for an accounting (*In re Prout's Estate*, 52 Hun 109, 4 N. Y. Supp. 841).

Widow of decedent may petition for accounting. Melizet's Appeal, 17 Pa. 449, 55 Am. Dec. 573.

86. **N. Y.**—Joseph v. Herzig, 198 N. Y. 456, 92 N. E. 103; Wood v. Brown, 34 N. Y. 337; *In re Ramsey's Will*, 63 Hun 635, 18 N. Y. Supp. 402. **N. C.**—Moffitt v. Moffitt's Admrs., 36 N. C. 124. **S. C.**—Wright v. Exrs. of Wright, 2 Desaus. 242.

Surviving executor may require executors of a deceased executor to account. *In re Hodgman's Estate*, 56 Hun 648, 10 N. Y. Supp. 491.

Sureties on an executor's bond have been held to have no right to petition for an order requiring an accounting. Dunnell v. Municipal Court of Providence, 9 R. I. 189. But see Matter of Provost, 87 App. Div. 86, 89 N. Y. Supp. 29.

87. **Ala.**—Vincent v. Daniel, 59 Ala. 602. **N. Y.**—Harris v. Ely, 25 N. Y. 138; *In re Kennedy's Estate*, 143 App. Div. 839, 128 N. Y. Supp. 626; Matter

of Uglow, 51 How. Pr. 342; Woodruff v. Woodruff, 17 Abb. Pr. 165. **Wis.** Appeal of Campbell, 12 Wis. 369.

88. Vincent v. Daniel, 59 Ala. 602; Appeal of Beeber (Pa.), 8 Atl. 191.

Persons Not Interested.—The following have been held to have no right to petition for an accounting: Administrator de bonis non when his petition shows that there was no personal estate (Wither's Admr. v. Wither's Heirs, 30 Ky. L. Rep. 1099, 100 S. W. 253); administrators of beneficiary of trust when there are acting trustees (Attwill v. Dole, 74 N. H. 300, 67 Atl. 403); widow of beneficiary (Bushe v. Wright, 118 App. Div. 320, 103 N. Y. Supp. 410, affirmed, 195 N. Y. 509, 88 N. E. 1116); assignee of judgment obtained against personal representative individually (Matter of Sayles, 57 Misc. 524, 109 N. Y. Supp. 972); and sisters of decedent who claim through their deceased father (Estate of Brooke, 14 Phila. (Pa.) 325). See also Keller's Estate, 224 Pa. 523, 73 Atl. 926.

In New York, under Code Civ. Proc., §2725, the daughter of a testator cannot require an intermediate account when given no legacy or pecuniary interest by the will. *In re Steiner's Estate*, 134 App. Div. 162, 118 N. Y. Supp. 833.

In Iowa the court may, in its discretion, entertain proceedings instituted by a mere volunteer. Wheeler v. Long, 128 Iowa 643, 105 N. W. 161.

89. Consult local statutes.

An executor who is also residuary legatee may be required to make proof of his accounts. Ridgley v. People, 163 Ill. 112, 45 N. E. 116.

90. **Cal.**—*In re Radovich*, 74 Cal. 536, 16 Pac. 321. **Ga.**—Giles v. Brown,

When a personal representative dies without having presented his accounts, his executor or administrator generally may be required to present such accounts for him.⁹¹

3. Time for Requiring.—At any time after the expiration of the period within which an accounting is required by statute, proceedings to compel accounting may be instituted, since general statutes of limitation do not bar the right to require such an accounting.⁹²

4. Parties Other Than Administrators or Executors.—In addition

60 Ga. 658; *Hardwick v. Thomas*, 10 Ga. 266. **Kan.**—*Hudson v. Barratt*, 62 Kan. 137, 61 Pac. 737. **La.**—*Chaffee v. Farmer*, 36 La. Ann. 813. **N. J.** *Hartson v. Elden*, 58 N. J. Eq. 478, 44 Atl. 156; *Aldridge v. McClelland*, 34 N. J. Eq. 237. **N. Y.**—*Dunford v. Weaver*, 21 Hun 349.

An executrix who qualified but whose letters were recalled before she became possessed of any property of the estate can not be compelled to account by her successor. *Hanley v. Holton*, 120 Mo. App. 393, 96 S. W. 691.

91. Ga.—*Giles v. Brown*, 60 Ga. 658; *Knight v. Lasseter*, 16 Ga. 151. **La.** *Succession of Landers*, 126 La. 371, 52 So. 545. **Mich.**—*Perrin v. Lepper*, 72 Mich. 454, 40 N. W. 859. **N. Y.** *In re Walton*, 112 App. Div. 176, 98 N. Y. Supp. 42; *In re Irvin's Estate*, 68 App. Div. 158, 74 N. Y. Supp. 443; *Budd v. Hardenbergh*, 36 Misc. 90, 72 N. Y. Supp. 537; *Matter of Fithian*, 44 Hun 457, 5 Dem. Sur. 305; *Herbert v. Stevenson*, 3 Dem. Sur. 236. **N. C.**—*Jones v. Wooten*, 137 N. C. 421, 49 S. E. 915. **Pa.**—*Wagner's Estate*, 227 Pa. 460, 76 Atl. 215; *Bowman's Appeal*, 62 Pa. 166.

When No Assets Received.—The personal representative of a deceased executor or administrator will not be compelled, in the absence of statute, to account as the representative of the first decedent, when none of the assets of first decedent came to his hands. **N. Y.**—*Dakin v. Demming*, 6 Paige 95. **Ore.**—*Cross v. Basket*, 17 Ore. 84, 21 Pac. 47. **Wis.**—*Reed v. Wilson*, 73 Wis. 497, 41 N. W. 716.

92. U. S.—*Pulliam v. Pulliam*, 10 Fed. 23. **Ala.**—*Greenlees v. Greenlees*, 62 Ala. 330. **Ark.**—*Brinkley v. Willis*, 22 Ark. 1. **Ill.**—*Boyd v. Swallows*, 59 Ill. App. 635. **La.**—*Heirs of McGehee v. McGehee*, 41 La. Ann. 657, 6 So. 253; *Coutade v. Chamberlain*, 4 La. Ann. 368. **N. C.**—*Grant v. Hughes*, 94

N. C. 231. **Pa.**—*Estate of Nixon*, 14 Phila. 297 (where twenty-five years had elapsed); *Estate of Landis*, 13 Phila. 305. **S. C.**—*Renwick v. Smith*, 11 S. C. 294. **Tenn.**—*Carr v. Lowe's Exrs.*, 7 Heisk. 84. **Tex.**—*Main v. Brown*, 72 Tex. 505, 10 S. W. 571, 13 Am. St. Rep. 823. **Vt.**—*Davis v. Eastman*, 68 Vt. 225, 35 Atl. 73.

In New York, the special proceedings for an accounting should be instituted within six years after right to an accounting accrues. *In re Bradley*, 25 Misc. 261, 54 N. Y. Supp. 555; *Matter of Hale*, 6 App. Div. 411, 39 N. Y. Supp. 577; *In re Nicholls*, 8 N. Y. Supp. 7; *Drake v. Wilkie*, 30 Hun 537; *Cole v. Terpenning*, 25 Hun 482; *Clock v. Chadeagne*, 10 Hun 97. *Compare Matter of Ashheim*, 185 N. Y. 609, 78 N. E. 1099, *affirming* 111 App. Div. 176, 97 N. Y. Supp. 607; *Matter of Williams*, 57 Misc. 537, 109 N. Y. Supp. 974. And a proceeding to compel the representative of a deceased executor or administrator to file an account may also be barred by the statute of limitations. *Bushe v. Wright*, 195 N. Y. 509, 88 N. E. 1116, *affirming* 118 App. Div. 320, 103 N. Y. Supp. 410; *Matter of Rogers*, 153 N. Y. 316, 47 N. E. 589.

Laches.—If too long a time is allowed to elapse after the right to an accounting accrues, petitioner may be defeated in a court of equitable jurisdiction by laches, although his right may not be affected by any statute. **Ala.**—*Salmon v. Wynn*, 153 Ala. 538, 45 So. 133; *Ragland's Exrs. v. Morton*, 41 Ala. 344, 91 Am. Dec. 516. **Ark.**—*Martin v. Campbell*, 35 Ark. 137. **N. J.**—*Hill v. Hill*, 70 N. J. Eq. 107, 62 Atl. 385; *Bechtold v. Read*, 49 N. J. Eq. 111, 22 Atl. 1085; *Osborne v. O'Reilly*, 43 N. J. Eq. 647, 12 Atl. 377. **N. Y.**—*Matter of Van Epps*, 64 How. Pr. 464. **Pa.**—*Henry's Estate*, 198 Pa. 382, 48 Atl. 274. **Va.**—*Tate v. Jones*, 98 Va. 544, 36 S. E. 984;

to those from whom an accounting is sought,⁹³ petitioner may make defendant any person whose rights must necessarily be determined in the proceedings.⁹⁴ A surety on the bond of an executor or administrator is not a proper party defendant in proceedings for compulsory accounting in the probate court.⁹⁵

5. Pleadings. — a. *Petition.* — The strict rules of pleading are not enforced as a rule in proceedings to require an accounting in the probate court,⁹⁶ but the interest of the petitioner should be set forth,⁹⁷ as should also the cause of complaint and the relief desired.⁹⁸

The petition need not state matters in avoidance of the statute of limitations.⁹⁹

Signature and Verification. — Petition for accounting should be signed and verified.¹

Leake's Exr. v. Leake, 75 Va. 792. Or because, from lapse of time, a presumption has arisen of the discharge or extinguishment of the trust. Philips v. State, 5 Ohio St. 122.

93. See *supra*, VIII, A, 2.

94. Hollis v. Caughman, 22 Ala. 478; Clock v. Chadeagne, 10 Hun (N. Y.) 97.

Creditors, legatees and next of kin need not be made party to proceedings except in case of final accounting. Wood v. Brown, 34 N. Y. 337.

Upon petition for accounting filed by legatee, the personal representative cannot, as a matter of right, have sole remaining legatee made a party to the proceeding. Harrell v. Warren, 105 Ga. 476, 30 S. E. 426.

Co-heirs need not be made parties defendant in a petition by heir to compel an accounting. Hickman v. Flenniken, 12 La. Ann. 268.

A surviving executor need not be made a party to a petition, filed by the sole beneficiary under a will naming two executors, to compel an accounting by the executor of one of the two executors. *In re* Trask's Estate, 27 Civ. Proc. 7, 49 N. Y. Supp. 825.

95. McMahon v. Smith, 24 App. Div. 25, 49 N. Y. Supp. 93.

96. Crowder v. Shackelford, 35 Miss. 321.

When a special proceeding for an account has been properly commenced, by a creditor, a second creditor coming in need not file a complaint unless his claim is denied. Isler v. Murphy, 76 N. C. 52.

97. Ala.—*Vincent v. Daniel*, 59 Ala. 602. Mich.—*Estate of Robinson*, 6 Mich. 137. N. Y.—*In re Kipp's Es-*

tate, 17 Misc. 491, 41 N. Y. Supp. 259; *Wever v. Marvin*, 14 Barb. 376. Pa.—*Davis' Estate*, 6 W. N. C. 15; *Okeson's Appeal*, 2 Grant's Cas. 303.

Creditor should aver that his claim is legally authenticated against the estate. *Freeman v. Rhodes*, 3 Smed. & M. (Miss.) 329.

A petition to require accounting presented by the president of an association need not allege that president is duly authorized to sign and present petition. *McKenzie v. Webber Hospital Assn.*, 106 Me. 385, 76 Atl. 704.

98. Mich.—*Estate of Robinson*, 6 Mich. 137. N. C.—*Isler v. Murphy*, 76 N. C. 52. Pa.—*Okeson's Appeal*, 2 Grant's Cas. 303.

The petition should ask that executor or administrator be required to account and a petition for an account and distribution is irregular. *Estate of Mazurie*, 11 Phila. (Pa.) 143.

Petition to compel the filing of a further account should aver that administrator or executor has been in receipt of money or other assets of estate since the confirmation of his prior account. *Estate of Davis*, 12 Phila. (Pa.) 128.

A petition to compel a final accounting by an executor or administrator must aver that the estate is ready for final settlement. *In re Morrison's Estate*, 48 Ore. 612, 87 Pac. 1043.

99. *In re Underhill's Estate*, 1 Con. Sur. 541, 9 N. Y. Supp. 455.

1. *Estate of Robinson*, 6 Mich. 137 (although court may receive a petition which has not been verified); *Estate of Darrach*, 4 Pa. L. J. 245, 2 Clark 454; *Okeson's Appeal*, 2 Grant's Cas. (Pa.) 303.

b. *Answer*.—The administrator or executor may file an answer denying that the petitioner is a party interested in the estate,² or alleging a prior final accounting.³

6. *Notice*.—Notice of the filing of the petition must be given to defendants as in other actions;⁴ but the failure to give notice of filing is merely an irregularity in the mode of citation which may be cured by voluntary appearance and settlement.⁵

Signature by Guardian.—A petition to compel accounting brought on behalf of an infant by his guardian, although signed by guardian individually, is sufficient, when body of petition shows the capacity in which petition is signed. *Matter of Hurlburt*, 43 Hun (N. Y.) 311.

2. *Estate of Lightner*, 144 Pa. 273, 22 Atl. 808; *Estate of Williams*, 1 Lack. Leg. N. (Pa.) 340.

An affidavit to the effect that petitioner has no interest because of a release given to affiant as executor, is not a sufficient answer to petition. *Seiter v. Straub*, 3 Dem. Sur. (N. Y.) 264.

In New York, an allegation of payment to petitioner which amounts to a denial of interest is not fatal to the petition, since a mere appearance of interest is sufficient to sustain petitioner's right to ask for accounting. *In re Williams' Estate*, 57 Misc. 537, 109 N. Y. Supp. 974.

Replication is essential, when answer responsive to averments of petition is filed, or answer may be taken as true. *Mead's Estate*, 4 Pa. Dist. 750.

3. *Estate of Hood*, 90 N. Y. 512.

Sufficient Allegations.—An answer by executrix sets forth a sufficient defense when it is alleged that she never exercised control over estate or received any assets thereof, that the same was exclusively managed by a co-executor, and that a final accounting was had in the surrogate's court. *Matter of Rust*, 23 Abb. N. C. (N. Y.) 78.

Insufficient Allegation of Settlement. An answer which avers that administrator "duly distributed according to law, and by order of the probate court, all the assets which came to his hands as administrator of said estate," is no defense, since it does not allege that a final settlement was made. *Harrison's Admr. v. Harrison's Distributees*, 39 Ala. 489.

Answer of executor is demurrable which simply alleges "that suits are pending against him as executor;" but fails to set out suits or refer to records or any schedule which describes claims on which suits are founded. *Chighizola v. Le Baron*, 21 Ala. 406.

4. *Cal.*—*Ashurst v. Fountain*, 67 Cal. 18, 6 Pac. 849. *N. J.*—*Duncan v. Barnes*, 20 N. J. L. 75. *N. C.*—*Isler v. Murphy*, 76 N. C. 52; *Staley v. Sellers*, 65 N. C. 467.

In Louisiana, the service on the administrator or executor of the order of the court to file his account is sufficient, and he is not entitled to the time given for answering an ordinary suit. *State ex rel. Farmer v. Judge Parish Court*, 31 La. Ann. 116.

Citation to Others Interested.—If administrator is properly cited, the court has jurisdiction to make an order which shall conclude him, although no citation is issued to distributees affected by decree. *McMahon v. Smith*, 24 App. Div. 25, 49 N. Y. Supp. 93.

In North Carolina, notice by publication to creditors is required by sections 1451 and 1452 of the Code, and administrator or executor may take advantage of failure to make publication upon appeal from court's order. *Hester v. Lawrence*, 102 N. C. 319, 8 S. E. 915.

Form of Citation.—Citation should follow the prayer of petition and should direct the party cited to show cause "why he should not render and settle his account," or why he should not file his account for "judicial settlement." *Schlegel v. Winckel*, 2 Dem. Sur. (N. Y.) 232.

5. *Ala.*—*Petty v. Wafford*, 11 Ala. 143; *Hearne's Admr. v. Harbison*, 9 Ala. 731; *Sankey v. Heirs of Sankey*, 6 Ala. 607. *La.*—*Reynolds' Tutor v. Reynolds, Admr.*, 12 La. 617. *N. Y.* *Matter of Hurlburt*, 43 Hun 311.

7. Hearing and Decree.—The parties to the proceedings are entitled to a hearing in the nature of a trial,⁶ and an account should not be ordered when it appears that the petitioner has no interest in the estate.⁷

If cause is shown why the prayer of the petition should be granted, an order requiring the executor or administrator to file his account should be entered.⁸

Enforcement of Order.—The executor or administrator may be compelled by attachment to obey the order requiring him to file his accounts and make settlement.⁹

6. Matter of O'Brien, 45 Hun (N. Y.) 284.

The liability of executor for the acts of negligence of his co-executor will not be determined upon the hearing for a citation to require an accounting. *O'Neil's Estate, 12 W. N. C. (Pa.) 463.*

Consolidation.—When it appears to the personal representative against whom proceedings have been instituted that there may be two trials relative to the same issues, he may file his petition in voluntary proceedings for accounting, and a consolidation of the two proceedings and a single hearing may be allowed. *In re Rainforth's Estate, 37 Misc. 660, 76 N. Y. Supp. 314; In re Mulry's Estate, 31 Misc. 78, 64 N. Y. Supp. 576.*

7. In re Whitehead, 38 App. Div. 319, 56 N. Y. Supp. 989, although surrogate is given power to require executor to account at any time, in his discretion.

Dismissal.—Surrogate may dismiss proceedings of a creditor for an accounting, after citation has been issued, when it appears that validity of petitioner's claims has not been conceded or established. *Matter of Stevenson, 77 Hun 203, 28 N. Y. Supp. 362.*

8. In re Arkenburgh's Estate, 11 App. Div. 193, 42 N. Y. Supp. 965; Perkins v. Shadbolt, 44 Wis. 574.

Legatee who institutes proceedings for an accounting against the representative of a deceased executor is not entitled to an order that trust property be delivered to him. *Spencer v. Popham, 5 Redf. Sur. (N. Y.) 425.*

Accounting may be ordered from one who was appointed administrator and received and dissipated assets of estate, although appointment irregular

or a nullity (*Dobler v. Strobel, 9 N. D. 104, 81 N. W. 37, 81 Am. St. Rep. 530*); or from an executor who took no part with his co-executors in the management of the estate (*In re Campbell's Estate, 21 Misc. 133, 47 N. Y. Supp. 29*).

A personal judgment should not be rendered upon a citation by legatees to compel executor to settle estate. *Merritt v. Merritt, 66 Ga. 324.* But in Louisiana, the court is authorized to issue execution against an administrator personally who makes a vague and insufficient answer to a rule to compel statement of condition of succession. *Stevens v. Stevens, 13 La. Ann. 416.*

A second final report may be ordered by the court when administrator has never been discharged. *Fletcher v. Nicholson, 45 Ind. App. 375, 90 N. E. 910.*

Decree of surrogate abating proceedings for compulsory accounting against an administrator should not be made because of the death of the administrator, and if made without notice, is void. *In re Armstrong, 72 App. Div. 286, 76 N. Y. Supp. 37.*

"If executor or administrator refuses to file an account, it is proper for those interested to ascertain, so far as they can, the amount of property which came into his hands, and to state an account for him." *Stevens v. Ottawa Probate Judge, 156 Mich. 526, 121 N. W. 477.*

9. Cook v. Cook, 69 Ala. 294; Vincent v. Daniel, 59 Ala. 602 (where court says, "If he [administrator] fails to obey the citation, he stands in contempt, and the court may proceed against him by attachment, or may proceed to state an account for

8. Appeal.—An appeal will lie from an order denying the prayer of the petition for an accounting,¹⁰ but an order requiring the personal representative to present his account is not a final order from which an appeal can be taken.¹¹

B. IN EQUITY.—1. Jurisdiction.—In a number of states, courts of equity have concurrent jurisdiction with courts of probate in the matter of compelling an accounting by executors and administrators,¹² while in others courts of equity cannot exercise jurisdiction except where some special ground is alleged which makes interference necessary to furnish an adequate remedy to persons interested.¹³

him"); *Phillips v. State*, 5 Ohio St. 122.

Imprisonment for Contempt.—The court may imprison for contempt an administrator or executor who refuses to obey an order that he file his accounts, and an appeal does not lie from an order for imprisonment. *State ex rel. Farmer v. Judge Parish Court*, 31 La. Ann. 116.

10. Mich.—*Fingleton v. Kent Circuit Judge*, 116 Mich. 211, 74 N. W. 473. **Mo.**—*Seymour v. Seymour*, 67 Mo. 303. **Ore.**—*Bellinger v. Ingalls*, 21 Ore. 191, 27 Pac. 1038. **Vt.**—*Davis v. Eastman*, 68 Vt. 225, 35 Atl. 73.

If decree of surrogate is void, no appeal can be taken, but motion to vacate it may be made, even though decree is open to collateral attack. *In re Armstrong*, 72 App. Div. 286, 76 N. Y. Supp. 37.

11. La.—*Succession of Carriere*, 34 La. Ann. 1056. **N. Y.**—*Matter of Calaghan*, 139 N. Y. 51, 34 N. E. 756; *Matter of Halsey*, 93 N. Y. 48. **Pa.** *Palethorp's Estate*, 160 Pa. 316, 28 Atl. 689. **Vt.**—*French v. Winson*, 24 Vt. 402.

Contra.—*Fiester v. Shepard*, 26 Hun (N. Y.) 183; *Tillinghast v. Brown University*, 24 R. I. 179, 52 Atl. 891. Consult also, *Perkins v. Shadbolt*, 44 Wis. 574.

12. Ala.—*Hurt v. Hurt*, 157 Ala. 126, 47 So. 260; *Peters v. Rhodes*, 157 Ala. 25, 47 So. 183; *St. John v. St. John*, 150 Ala. 237, 43 So. 580; *Glenn's Admr. v. Billingslea*, 64 Ala. 345; *James v. Faulk*, 54 Ala. 184. **Cal.** *Deck v. Gerke*, 12 Cal. 433. But see *King v. Chase*, 159 Cal. 420, 115 Pac. 207. **Fla.**—*Sanderson's Admrs. v. Sanderson*, 17 Fla. 820, that annual accounts have been filed in probate court does not deprive court of equity of jurisdiction to order accounting. **Ga.**

Ewing v. Moses, 50 Ga. 264. **Md.** *State v. Dilley*, 64 Md. 314, 1 Atl. 612. **Miss.**—*Clopton v. Haughton*, 57 Miss. 787; *Buie v. Pollock*, 55 Miss. 309. **N. J.**—*Frey v. Demarest*, 16 N. J. Eq. 236; *Clarke v. Johnston*, 10 N. J. Eq. 287. *Compare* *Filley v. Van Dyke*, 72 Atl. 943; *Vineland Historical, etc. Soc. v. Landis*, 66 Atl. 946.

In New York, the surrogate court and the supreme court have concurrent jurisdiction to compel executors or administrators to account, but supreme court will entertain petition only where surrogate has not full jurisdiction to decide all questions involved. *Bushe v. Wright*, 118 App. Div. 320, 103 N. Y. Supp. 410, *affirmed*, 195 N. Y. 509, 88 N. E. 1116; *In re Smith*, 120 App. Div. 199, 105 N. Y. Supp. 233; *Volhard v. Volhard*, 119 App. Div. 266, 104 N. Y. Supp. 578; *In re Fogarty's Estate*, 117 App. Div. 583, 102 N. Y. Supp. 776.

Jurisdiction of Federal Courts.—A creditor cannot maintain a bill for accounting in the federal courts merely on the ground of the trust relation, when there is no averment of fraud or maladministration. *Thiel Detective Service Co. v. McClure*, 130 Fed. 55; *Walker v. Brown*, 58 Fed. 23.

13. Ark.—*Eagle v. Terrell*, 130 S. W. 550; *Coppedge v. Weaver*, 90 Ark. 444, 119 S. W. 678; *Hankins v. Layne*, 48 Ark. 544, 3 S. W. 821; *McLeod v. Griffiths*, 45 Ark. 505. **Conn.**—*Beach v. Norton*, 9 Conn. 182. **Ill.**—*Elting v. First Nat. Bank*, 68 Ill. App. 204, *affirmed*, 173 Ill. 368, 50 N. E. 1095. **Ia.**—*Cowins v. Tool*, 36 Iowa 82. **Me.** *Graffam v. Ray*, 91 Me. 234, 39 Atl. 569. **Mass.**—*Fletcher v. Fletcher*, 191 Mass. 211, 77 N. E. 758; *Greene v. Brown*, 180 Mass. 308, 62 N. E. 374; *Ammidown v. Kinsey*, 144 Mass. 587, 12 N. E. 365. **Mo.**—*Powers v. Blakey's*

2. Parties.—In general, the parties who may institute proceedings to compel the filing of an account in the probate court may present a bill to require an accounting in equity.¹⁴ The executor or administrator is a necessary party to a suit for an accounting.¹⁵ And if there are two or more administrators or executors who qualify, all should be made defendants.¹⁶ In some jurisdictions, the sureties of the administrator may be joined in a suit for an account and settlement,¹⁷ for if a balance should be found due from the administrator

Admr., 16 Mo. 437. **Neb.**—Boales *v.* Ferguson, 55 Neb. 565, 76 N. W. 18. **N. H.**—Hurlburt *v.* Wheeler, 40 N. H. 73. **N. C.**—Ballard *v.* Kilpatrick, 71 N. C. 281; Sprinkle *v.* Hutchinson, 66 N. C. 450. **Ohio.**—McDonald *v.* Aten, 1 Ohio St. 293. **Vt.**—Angus *v.* Robinson's Admr., 62 Vt. 60, 19 Atl. 993.

14. See *supra*, VIII, A, 1.

Creditors of estate may of course file a bill in chancery for the settlement of estate. **Ala.**—Rensford *v.* Joseph A. Magnus & Co., 150 Ala. 288, 43 So. 853. **Ky.**—Ashford *v.* Tipton, 21 Ky. L. Rep. 866, 53 S. W. 268. **W. Va.**—Shurtliff *v.* Right, 66 W. Va. 582, 66 S. E. 719.

The sole heir of a distributee can not maintain a suit for accounting against the representative of the first intestate, the administrator of the distributee being the proper person to bring such suit. Strickland *v.* Bridges, 21 S. C. 21.

The assignee of a legatee is a necessary party to a bill for accounting by a legatee who has assigned his interest but has retained the right to the excess, if more than a certain sum is realized. Hood *v.* Hood, 85 N. Y. 561.

Intervention by Assignee.—When a legatee dies after he has commenced proceedings to compel accounting and after he has assigned his legacy, the assignee may intervene and continue the proceedings. Matter of Fortune, 14 Abb. N. C. (N. Y.) 415.

15. **U. S.**—Conolly *v.* Wells, 33 Fed. 205. **Ky.**—Ashford *v.* Tipton, 21 Ky. L. Rep. 866, 53 S. W. 268. **N. C.**—Goode *v.* Goode, 6 N. C. 335. **Va.**—Robertson *v.* Gillenwaters, 85 Va. 116, 7 S. E. 371; Hansford *v.* Elliott, 9 Leigh 79; Moring *v.* Lucas, 4 Call 577.

The personal representative of a deceased administrator or executor is a proper party defendant in a suit for an accounting of the former administration. **Ala.**—Kennedy's Heirs & Exrs. *v.*

Kennedy's Heirs, 2 Ala. 571. **Ky.**—Rawlings' Guardian *v.* Rawlings, 112 S. W. 862. **Miss.**—Owens *v.* Owens, 84 Miss. 673, 37 So. 149. **N. Y.**—Silsbee *v.* Smith, 60 Barb. 372. **N. C.**—Brotten *v.* Bateman, 17 N. C. 115, 22 Am. Dec. 732.

If former executor or administrator dies and an administrator de bonis non is appointed, such administrator de bonis non is a necessary party to a suit for accounting against the former executor or administrator or his personal representative. **Ala.**—Gould *v.* Hayes, 19 Ala. 438. **N. C.**—Hardy *v.* Miles, 91 N. C. 131; Raby *v.* Ellison, 40 N. C. 265. **S. C.**—Strickland *v.* Bridges, 21 S. C. 21.

When legatee after instituting proceedings against executor for an accounting is made administratrix with the will annexed, she becomes a necessary party to the suit in her representative capacity. Hayward *v.* Place, 54 Hun 637, 7 N. Y. Supp. 523.

16. Conolly *v.* Wells, 33 Fed. 205 (although one of the executors a non-resident); Howth *v.* Owens, 29 Fed. 722; Bregaw *v.* Claw, 4 Johns. Ch. (N. Y.) 116.

When one of two administrators dies without having participated actively in the administration of estate, his administrator is not a necessary party to a bill for accounting. Shorter *v.* Hargroves, 11 Ga. 658; Will's Admr. *v.* Dunn's Admr., 5 Gratt. (Va.) 384.

17. **U. S.**—Payne *v.* Hook, 7 Wall. 425, 19 L. ed. 260; Donohue *v.* Roberts, 1 Fed. 449. **N. J.**—Dorsheimer *v.* Rorback, 23 N. J. Eq. 46, proper but not necessary parties when for distributive share. **S. C.**—Taylor *v.* Taylor, 2 Rich. Eq. 123. See also, State *v.* Canterbury, 124 Mo. App. 241, 101 S. W. 678, where proceedings under statute.

Contra.—Sureties are sometimes held not to be proper parties defendant on the ground that their liability arises

they would be liable. Creditors¹⁸ and heirs or devisees¹⁹ are usually not necessary parties defendant. Legatees are not necessary parties when the bill asks only for an accounting.²⁰ And where the bill is filed by a distributee, it is not essential that other distributees be made parties.²¹

3. Pleadings.—a. *Bill.*—The bill must contain averments showing the right of complaint to bring suit,²² and a bill to compel final settlement must aver or show that the estate is ready for settlement.²³

only after the default of their principal has been fixed. *Grady v. Hughes*, 80 Mich. 184, 44 N. W. 1050; *Smith v. Everett*, 50 Miss. 575.

Intervention by Sureties.—Sureties who have paid part of a judgment rendered against them in another state may intervene in a suit for the settlement of estate of deceased administrator. *Moore v. Smith*, 116 N. C. 667, 21 S. E. 506.

18. *Terry v. Bank of Cape Fear*, 20 Fed. 773; *Moreau v. Moreau*, 25 La. Ann. 214.

In Kentucky, the statute requires that creditors of decedent, so far as known to plaintiff, be made parties. *Ashford v. Tipton*, 21 Ky. L. Rep. 866, 53 S. W. 268. And all creditors are entitled to be heard. *Payne v. Johnson's Exrs.*, 95 Ky. 175, 24 S. W. 238.

Debtors to estate are not proper parties to suit in equity for settlement. *Citizens' Nat. Bank v. Boswell's Admrs.*, 93 Ky. 92, 19 S. W. 174.

19. *Diversey v. Johnson*, 93 Ill. 547 (heirs proper but not necessary parties); *Smith v. Rotan*, 44 Ill. 506.

In Kentucky, heirs and devisees are necessary parties to suit for settlement of estate. *Lintheum v. Vowels' Exr.*, 118 Ky. 338, 80 S. W. 1090; *Karn's Admr. v. Seaton*, 23 Ky. L. Rep. 101, 62 S. W. 737.

Court may make heirs and next of kin parties in a special proceedings in the nature of a creditors' bill. *Warden v. McKinnon*, 94 N. C. 378.

20. **U. S.**—*Terry v. Bank of Cape Fear*, 20 Fed. 773. **Md.**—*Gordon v. Small*, 53 Md. 550, executor is the representative of all those interested in the personal estate. **N. Y.**—*Brown v. Ricketts*, 3 Johns. Ch. 553.

If legatee is made a party defendant and dies while suit is pending, no objection can be made because personal representative of deceased leg-

atee is not made a party. *Johnson v. Henagan*, 11 S. C. 93.

21. *Payne v. Hook*, 7 Wall. (U. S.) 425, 19 L. ed. 260. See also, *Baines v. Barnes*, 64 Ala. 375.

One whose interest is only contingent is not a necessary party to a bill against executor for an accounting. *United States v. Gillespie*, 8 Fed. 140.

Joinder.—Distributee may maintain a suit against personal representative and one who is a debtor of estate and also a distributee, where it is charged that no attempt has been made by personal representative to collect debt (*Reager's Admr. v. Chappelle*, 104 Va. 14, 51 S. E. 170); although, in Virginia, it is not proper to unite debtors of estate as defendants (*Wilson's Admr. v. Wilson*, 93 Va. 546, 25 S. E. 596).

New Parties.—When necessary parties are not before the court, the defendant may require that such persons be made parties of record so that they may be concluded by the decree. *Southall v. Shields*, 81 N. C. 30.

22. **U. S.**—*Hubbard v. Urton*, 67 Fed. 419, holding sufficient on demurrer an allegation that complainants "comprise all the heirs and next of kin." **Fla.**—*West v. Reynolds*, 35 Fla. 317, 17 So. 740. **Ky.**—*Meyer v. Zotel's Admr.*, 96 Ky. 362, 29 S. W. 28, creditor must allege facts showing that he has a valid claim. **N. Y.** *Muir v. Trustees, etc.*, 3 Barb. Ch. 477. If claimant's right is derived solely through a will, he should aver that the will has been admitted to probate. *Wood v. Mathews*, 53 Ala. 1.

23. *Acklen v. Goodman*, 77 Ala. 521; *Harris v. Orr*, 42 W. Va. 745, 26 S. E. 455.

Bill against personal representative of deceased executor should aver that assets of first estate came into hands of defendant. *Maze v. Brown*, 2 Dem. Sur. (N. Y.) 217.

Complaint must show such a breach of duty on the part of the defendant as to entitle complainant to the relief asked.²⁴

Time Within Which Bill May Be Filed.—Since a personal representative is in the position of a trustee, the right to an accounting is not affected by general statutes of limitation, unless the trust is repudiated, and is therefore barred only by laches.²⁵

b. *Plea and Defenses.*—The personal representative may plead that he has fully administered the estate,²⁶ and may, in his answer, set forth a copy of his final account.²⁷ An answer averring that the petitioner has parted with all his interest in the estate sets forth a sufficient defense.²⁸

24. For bills containing sufficient averments; see, **Fla.**—Anderson v. Northrop, 30 Fla. 612, 12 So. 318. **Ky.**—Holland v. Lowe, 101 Ky. 98, 39 S. W. 834. **Miss.**—Swinney v. Cockrell, 86 Miss. 353, 38 So. 360. **N. C.**—Mann v. Baker, 142 N. C. 235, 55 S. E. 102.

Petition for further accounting against an executor who has accounted and has been discharged, should aver that further property has come to his hands as executor. Matter of Jenkins, 132 App. Div. 339, 117 N. Y. Supp. 74.

Where necessary allegations are prescribed by statute, as in Kentucky, the bill need only conform to statutory requirements. Holland v. Lowe, 101 Ky. 98, 39 S. W. 834. And it is not necessary that bill contain an allegation of fraud or mismanagement on the part of the personal representative. Faulkner v. Tucker, 26 Ky. L. Rep. 1130, 83 S. W. 579.

Amendment of Bill.—The court may permit amended bill to be filed setting up facts to establish a right not claimed in original bill. Cheever v. Ellis, 144 Mich. 477, 108 N. W. 390.

25. See cases cited in VIII, A, 3.

In Kentucky, under St. §3847, an action to settle the estate may be brought as soon as the personal representative qualifies. Brand's Exr. v. Brand, 109 Ky. 721, 60 S. W. 704.

26. **Ky.**—Bedell's Admr. v. Keethley, 5 T. B. Mon 598. **N. Y.**—Rayner v. Pearsall, 3 Johns. Ch. 578. **S. C.**—Thompson v. Buckner, Riley Eq. 33, 2 Hill Eq. 499.

When defendant pleads "*quod plene comptent*", he must aver that there has been an account stated between plaintiff and himself, and that as stated it is just and true; and when practicable,

it is proper that a copy of the account so settled should be annexed to the answer." Grant v. Bell, 87 N. C. 34.

It is a good plea in bar, in a proceeding by legatees against estate of a deceased executor, that a full accounting and settlement has been had between administrator of deceased executor and administrator *de bonis non* of first testator. Jones v. Wooten, 137 N. C. 421, 49 S. E. 915.

In an action against one who is administratrix and widow of decedent, an allegation by defendant that the personalty received by her is no more than allowed to her by law does not state a sufficient reason why accounting should not be required. Clement v. Riley, 29 S. C. 286, 6 S. E. 932.

27. Mitchell v. Mitchell, 3 Md. Ch. 71; Hanlon v. Wheeler (Tex. Civ. App.), 45 S. W. 821 (although reference to account on file is sufficient).

"It is an established rule in chancery practice that a party charging himself in a schedule to his answer, cannot discharge himself by another schedule to the same answer stating his disbursements." Dodson v. Dodson, 6 Heisk. (Tenn.) 110.

28. Price's Estate, 24 Pa. Co. Ct. 224.

Cross-Bill.—When a release to administrator is executed after answer to bill praying for settlement is filed, a cross-bill is the appropriate mode of bringing forward the release. Pearson v. Darrington, 32 Ala. 227. See generally the title "**Cross-Bills.**"

Defense of Surety.—A surety on bond of administrator, when sued in equity to compel a settlement of the administration, may plead all the de-

IX. ACCOUNTING.—A. FORM AND SUFFICIENCY OF ACCOUNT.

Although no special form need be adopted by the personal representative in making up his account,²⁹ the practice in nearly all jurisdictions is to require an itemized statement of receipts and disbursements.³⁰ The statement should account for all the property mentioned in the inventory of the estate.³¹ When the account is not sufficiently definite, the court may require that the personal representative make it more specific.³²

fenses available to his principal. *Baines v. Barnes*, 64 Ala. 375.

29. *Solomons v. Kursheedt*, 3 Dem. Sur. (N. Y.) 307.

30. **Conn.**—*Hutchinson's Appeal* from Probate, 34 Conn. 300; *Swan v. Wheeler*, 4 Day 137. **Ky.**—*Steele v. Norrison's Admr.*, 4 Dana 617. **La.** *Hickman v. Flenniken*, 12 La. Ann. 268. **Mich.**—*Loomis v. Armstrong*, 49 Mich. 521, 14 N. W. 505. **N. Y.** *Gardner v. Gardner*, 7 Paige 112.

Compare, *Wheaton v. Pope*, 91 Minn. 299, 97 N. W. 1046.

Contents.—"When an estate is fully administered, the executor or administrator is required to file his final account which must contain a detailed statement of the amount of money received and expended by him, from whom received, and to whom paid, and refer to the vouchers for such payments, and the amount of money and property, if any, remaining unexpended and unappropriated." *In re Osburn's Estate*, 36 Ore. 8, 58 Pac. 521.

In South Carolina, "according to the practice of the English courts, all parties accounting before the Master are required to bring in their accounts in the form of debtor and creditor, accompanied by an affidavit containing a verification of the accuracy of the schedules in which are contained the details of account." *Duncan v. Tobin*, 1 Cheves Eq. (S. C.) 143, 34 Am. Dec. 605.

In Pennsylvania, principal and income should be stated separately in account. *Rankin's Estate*, 9 W. N. C. (Pa.) 407.

When administrator continues the business of his intestate without authority, he need not state in his account the receipts and disbursements of the business, since he is not acting in his representative capacity. *In re Munzor's Estate*, 4 Misc. 374, 25 N. Y. Supp. 818.

An instrument showing only disbursements is not an executor's account and can not be accepted as such because executor is entitled to the estate of testator for life. *Maxwell v. McCreery*, 57 N. J. Eq. 287, 41 Atl. 498.

In New York, the personal representative need not include in his account the items of necessary expenses paid by him for the benefit of the estate, in order to obtain an allowance of such items by court. *In re Brandreth's Estate*, 64 App. Div. 566, 72 N. Y. Supp. 333.

31. **La.**—*Succession of Kendrick*, 7 Rob. 138. **Ky.**—*Steele v. Morrison's Admr.*, 4 Dana 617. **Pa.**—*Hermann's Estate*, 226 Pa. 543, 75 Atl. 731.

In intermediate account, an administrator need not charge himself with the appraised value of the entire estate. *In re Davis' Estate*, 31 Mont. 421, 78 Pac. 704.

Inventory and account should be taken together in ascertaining condition of estate. *Spicer's Appeal*, 80 Conn. 620, 69 Atl. 936.

32. *Hirschfeld v. Cross*, 67 Cal. 661, 8 Pac. 507.

Amendment.—The court may allow amendments and additions to account presented for settlement, in furtherance of justice, up to the time the account is finally passed upon by the court. *Loomis v. Armstrong*, 63 Mich. 355, 29 N. W. 867. See also, *Matter of Hodgman*, 11 App. Div. 344, 42 N. Y. Supp. 1004.

Account of Ancillary Administration. Executors appointed at domicile of testator must there render an account of the property administered by them which is situated in another state and if required to render an account in such other state, should obtain and file a certified copy of the account there rendered," with a certificate of the proper court that the same has been examined, allowed and confirmed and

Blending Accounts. — A personal representative should not blend in one account his transactions as executor and guardian,³³ as administrator and tutor,³⁴ or as administrator and trustee under appointment of court.³⁵ It is not good practice to blend administration and distribution accounts and the court may, of its own motion, refuse to confirm the account of a personal representative which contains items of distribution.³⁶

Verification. — The account of an administrator or executor should be verified.³⁷

B. OBJECTIONS TO ACCOUNT. — 1. In General. — Upon receipt of notice that executor or administrator has presented his accounts for settlement, which is generally required by statute,³⁸ any one who wishes to object to the account should file his exceptions thereto,³⁹ although the court may reject any improper items in the account when no objections are made.⁴⁰ Accountant may take advantage of the fact

that the original account and necessary vouchers are on file there." *In re Phelps*, 3 Ohio Dec. Reprint 13, 2 Wkly. Law Gaz. 120.

33. *Thomas' Estate*, 2 Kulp (Pa.) 160.

34. *Succession of Bertrand*, 127 La. 857, 54 So. 127; *Succession of Milmo*, 47 La. Ann. 126, 16 So. 772.

35. *Simon's Estate*, 9 Pa. Dist. 59. *Compare*, *Whitney v. Phoenix*, 4 Redf. Sur. (N. Y.) 180.

Two estates can not be blended and considered as one, although parties in interest to both are the same and all agree to the settlement as one estate. *Richardson's Admr. v. Richardson*, 24 Ala. 395.

36. *Thompson's Estate*, 229 Pa. 542, 79 Atl. 173; *Wentz's Estate*, 225 Pa. 566, 74 Atl. 424.

Separate accountings should not be made by administrators of one estate. *In re Smith's Estate*, 40 Misc. 331, 81 N. Y. Supp. 1035.

37. **La.**—*Succession of Rabasse*, 50 La. Ann. 746, 23 So. 910. **N. Y.**—*In re Brandreth's Estate*, 64 App. Div. 566, 72 N. Y. Supp. 333; *Gardner v. Gardner*, 7 Paige 112; *Kellett v. Rathbun*, 4 Paige 102. **N. C.**—*Rich v. Morisey*, 149 N. C. 47, 62 S. E. 762. **S. C.**—*Duncan v. Tobin*, 1 Cheves Eq. 143, 34 Am. Dec. 605.

Where there is more than one executor or administrator, the affidavit of one to the truth of the account is sufficient. *Kennedy v. Wachmuth*, 12 Serg. & R. (Pa.) 171, 14 Am. Dec. 676.

38. **Ill.**—*Reizer v. Mertz*, 223 Ill. 555, 79 N. E. 283, quoting Illinois statute requiring notice "in such manner as the court may direct." **Me.**—*McKenzie v. Weber Hospital Assn.*, 106 Me. 385, 76 Atl. 704. **Mont.**—*In re Davis' Estate*, 35 Mont. 273, 88 Pac. 957.

39. **Cal.**—*Estate of More*, 121 Cal. 635, 54 Pac. 148. **Ind.**—*Swift v. Harley*, 20 Ind. App. 614, 49 N. E. 1069. **La.**—*Succession of Bofenschen*, 29 La. Ann. 711. **N. J.**—*Poulson v. National Bank of Frenchtown*, 33 N. J. Eq. 250. "In these proceedings the account and the objections thereto form the pleadings; and the objector to the account is as much bound to set up in such objections any claim which he proposes to make against the administrator as the defendant in an action is bound to set up in his answer any claim which he proposes to urge against the plaintiff." *Matter of Hart*, 60 Hun 516, 15 N. Y. Supp. 239.

Party contesting account may do so by disputing items of disbursements, or by adding charges and showing larger assets. *Loomis v. Armstrong*, 49 Mich. 521, 14 N. W. 505.

Waiver.—One who fails to object to one item in an administrator's account, although objecting to others, does not waive his right to object to such item upon the filing of a supplemental account by the administrator. *Morissey v. Rogers*, 120 Ill. App. 37.

40. *Waller v. Ray*, 48 Ala. 468; *Estate of Willey*, 140 Cal. 238, 73 Pac. 998; *Estate of More*, 121 Cal. 635, 54

that objections are filed too late, since statutes of limitation frequently prescribe the time within which exceptions to the account of an executor or administrator may be filed.⁴¹

2. Who Entitled To File. — Persons Interested. — Any person interested in the settlement of the accounts of an administrator or executor has a right to file exceptions⁴² but the court will not entertain exceptions presented by one who has no interest in the estate.⁴³

Pac. 148; *Estate of Spanier*, 120 Cal. 698, 53 Pac. 357; *In re Sanderson*, 74 Cal. 199, 15 Pac. 753. *Compare*, *Estate of Stitzel*, 221 Pa. 227, 70 Atl. 749.

41. See, *Larkin v. Simms*, 2 Penne. (Del.) 543, 46 Atl. 750, quoting Del. Rev. Code, ch. 124; §7, limiting time to three years after settlement.

Time for Filing.—It is not too late to file exceptions to account although accountant has introduced his evidence and closed, when judgment has not been rendered. *Succession of Scott*, 41 La. Ann. 668, 6 So. 792.

Exceptions to Partial Account.—All accounts of an administrator are open to exception when final account is filed, although no exceptions have been taken to partial accounts previously filed. *Ala.*—*Steele v. Knox*, 10 Ala. 608. *Miss.*—*Dement v. Heth*, 45 Miss. 388. *Mo.*—*Picot v. Biddle's Admr.*, 35 Mo. 29, 86 Am. Dec. 134. *Pa.*—*Walker's Estate*, 3 Rawle 243. Especially when contestant was not cited to appear when partial account filed. *Estate of McCunn*, 15 N. Y. St. 712. But where parties file exceptions to a partial account and withdraw them before confirmation, they have no right to present the same exceptions when final account is filed. *Light's Appeal*, 22 Pa. 445.

Laches.—The court may refuse to allow objections to account to be filed on the ground of undue delay, although no statute may bar right. *Matter of Von Glahn*, 53 App. Div. 164, 65 N. Y. Supp. 865.

What Is Not Laches.—The time for exceptions is when account of personal representative is presented and the delay intervening between time of appointment and time of filing account does not constitute laches in those objecting. *Whittemore v. Coleman*, 144 Ill. App. 109, affirmed, 239 Ill. 450, 88 N. E. 228; *In re Lyth*, 32 Misc. 608, 67 N. Y. Supp. 579.

In Mississippi, when court states account in vacation, exceptions may be filed in term time, or if commissioner, on reference, states account, exception may be taken in court when it is presented for confirmation. *Smith v. Hurd*, 8 Smed. & M. (Miss.) 682.

Exceptions Nunc Pro Tunc.—The court may allow exceptions to be filed nunc pro tunc when application is made promptly within the term by non-resident parties who had no actual notice of proceedings to settle accounts. *Irwin's Estate*, 225 Pa. 372, 74 Atl. 212.

42. *Ala.*—*Byrd v. Jones*, 84 Ala. 336, 4 So. 375. *N. J.*—*Dunham v. Marsh*, 52 N. J. Eq. 831, 31 Atl. 619; *Poulson v. National Bank of Frenchtown*, 33 N. J. Eq. 618. *N. Y.*—*Matter of St. John*, 104 App. Div. 460, 93 N. Y. Supp. 836; *In re Walton's Estate*, 38 Misc. 723, 78 N. Y. Supp. 296. *Va.*—*Triplett's Exr. v. Jameson*, 2 Munf. 242.

Sureties on the bond of an administrator with will annexed who has been discharged have sufficient interest to entitle them to file objections to his account. *In re Sill's Estate*, 41 Misc. 270, 84 N. Y. Supp. 213.

A subsequent administrator may object to the allowance of an item in the final account of a previous administrator. *Estate of Spanier*, 120 Cal. 698, 53 Pac. 357.

Co-Executors.—When one of two executors presents his accounts, his associate may file objections thereto. *Mead v. Willoughby*, 4 Dem. Sur. (N. Y.) 364; *Matter of Rich*, 2 Redf. Sur. (N. Y.) 330.

43. *Ind.*—*Schrichte v. Stites' Estate*, 127 Ind. 472, 26 N. E. 77, 1009. *Miss.*—*Byrd v. Wells*, 40 Miss. 711. *Neb.*—*Tunnicliff v. Fox*, 68 Neb. 811, 94 N. W. 1032, where executor's interest contingent. *Pa.*—*Estate of Stitzel*, 221 Pa. 227, 70 Atl. 749; *Estate*

Creditors. — Creditors of the estate have sufficient interest to enable them to object to an account of the personal representative,⁴⁴ although the estate has not been declared insolvent.⁴⁵

Heirs and Legatees. — The accounts of an executor or administrator may be contested by the heirs⁴⁶ or by legatees.⁴⁷

3. Form. — Exceptions to the account of an executor or administrator need not be made in formal pleadings,⁴⁸ but the usual practice is

of Law, 140 Pa. 444, 21 Atl. 429; Herbein's Estate, 2 Chest. Co. 449.

The removal of an administrator and the appointment of a successor does not divest the creditor of his right to file exceptions to the account of the first administrator. *Poulson v. National Bank of Frenchtown*, 33 N. J. Eq. 250.

One whose claim against estate has been judicially denied will not be permitted to object to the allowance of other claims. *In re Williams' Estate*, 118 N. Y. Supp. 562.

Authority of Court When Exceptor Not Interested.—In *Estate of Pease*, 149 Cal. 167, 85 Pac. 149, the court said that there was no force in the point that the person objecting was not shown to be a "person interested," since the court might inquire into all the items of the account on its own motion. And in *Buchan v. Rintoul*, 70 N. Y. 1, *affirming* 10 Hun 183, the court said: "There can be no doubt that he (the surrogate) may call to his aid any person to point out errors and defects in the accounts." See, also, cases cited in *In re Stitzel*, 221 Pa. 227, 70 Atl. 749, 18 L. R. A. (N. S.) 284.

Attorney of an executor is not a party interested in the settlement of the accounts of the executor. *Estate of Kruger*, 143 Cal. 141, 76 Pac. 891; *Mead v. Willoughby*, 4 Dem. Sur. (N. Y.) 364.

44. Cal.—*Tompkins v. Weeks*, 26 Cal. 50. **La.**—*Succession of McCalop*, 10 La. Ann. 224. **Mo.**—*Taylor v. Bader*, 117 Mo. App. 72, 98 S. W. 80; *Wilson v. Ruthrauff*, 82 Mo. App. 435. **N. J.**—*Equitable Life Assur. Soc. v. Chesley*, 64 N. J. Eq. 348, 51 Atl. 725. **N. Y.**—*In re Miles' Estate*, 33 Misc. 147, 68 N. Y. Supp. 368.

Creditor who has failed to present his claim within the time prescribed by statute cannot object to charges

in account. *Schrichte v. Stites' Estate*, 127 Ind. 472, 26 N. E. 77, 1009.

One who claims the property mentioned in the account as belonging to himself is not entitled to contest account as a creditor. *Cathey v. Kerr*, 15 La. Ann. 228.

Creditor of a distributee has not sufficient interest to authorize him to file exceptions (*Owens v. Thurmond's Admr.*, 40 Ala. 289); nor has the creditor of an heir (*Succession of Junqua*, 123 La. 714, 49 So. 482).

Creditors of the executor of a deceased executor can not object to the account filed as to the estate of the latter's testator. *Estate of Law*, 140 Pa. 444, 21 Atl. 429.

45. *Byrd v. Jones*, 84 Ala. 336, 4 So. 375. *Compare*, *Succession of Gohs*, 37 La. Ann. 428.

46. Cal.—*In re Misamore*, 90 Cal. 169, 27 Pac. 68. **La.**—*Succession of Van Hoven*, 46 La. Ann. 911, 15 So. 391; *Succession of Sterry*, 38 La. Ann. 854; *Succession of Ames*, 33 La. Ann. 1317; *Succession of Barbour*, 17 La. Ann. 133. **Mo.**—*McClelland v. McClelland*, 42 Mo. App. 32. **Pa.**—*Dampf's Appeal*, 97 Pa. 371.

47. *Estate of Pease*, 149 Cal. 167, 85 Pac. 149; *Metzger v. Metzger*, 1 Brad. (N. Y.) 265.

48. *Taylor v. Bader*, 117 Mo. App. 72, 98 S. W. 80.

Statute must be followed when it prescribes the manner in which exception to account may be taken. *Blackwell v. Blackwell*, 29 N. J. Eq. 576.

Answer to Exceptions.—No answer to an exception to account is authorized, and no question can be raised to a demurrer to such answer when filed. *Dohle v. Stults*, 92 Ind. 540.

Demurrer Improper.—The final account of an executor or administrator is not in the nature of a complaint and is not the subject of demurrer. *Conger v. Babcock*, 87 Ind. 497.

to require that the exceptions be reduced to writing.⁴⁹ The exceptions should set forth specifically the items objected to and the grounds of objection.⁵⁰

4. Questions Which May Be Raised.—Exceptions to the account must be confined to issues legally arising from the account,⁵¹ and the court cannot consider exceptions which seek to raise collateral issues.⁵²

49. Ala.—*Cummings v. Bradley*, 57 Ala. 224, writing required by rule of court. **Cal.**—*Estate of Sylvar*, 1 Cal. App. 35, 81 Pac. 663; *Estate of More*, 121 Cal. 635, 54 Pac. 148. **La.**—*Succession of Von Hoven*, 46 La. Ann. 911, 15 So. 391, quoting Art. 1004, Code of Practice, providing for written objections.

Contra, *Steele v. Knox*, 10 Ala. 608.

Discretion of Court.—The court may, in its discretion, listen to objections to the account of a personal representative before written objections are filed. *Estate of Kennedy*, 120 Cal. 458, 52 Pac. 820.

50. Ala.—*Cummings v. Bradley*, 57 Ala. 224. **Cal.**—*Estate of More*, 121 Cal. 635, 54 Pac. 148; *Estate of Sylvar*, 1 Cal. App. 35, 81 Pac. 663. **Ga.** *Tate v. Gairdner*, 119 Ga. 133, 46 S. E. 73, citing *Bonner v. Evans*, 89 Ga. 656, 15 S. E. 906. **La.**—*Succession of Van Hoven*, 46 La. Ann. 911, 15 So. 391; *Succession of Bofenschen*, 29 La. Ann. 711. **N. Y.**—*Thompson v. Mott*, 2 Dem. Sur. 154 (no statute requires specific objections but only rule of court); *Metzger v. Metzger*, 1 Brad. Sur. 265 (must surcharge or falsify). **Pa.**—*Reese v. Reeside*, 6 Phila. 507.

General Objection Insufficient.—When administrator in his account claims credit for an account held by him against estate, part of which is barred by the statute of limitations, a general objection not limited to the part which is barred may be overruled. *Robertson v. Black*, 74 Ala. 322. See also, *Pearson v. Darrington*, 32 Ala. 227. Compare, *Peck v. Sherwood*, 56 N. Y. 615; *Matter of Hall*, 7 Abb. N. C. (N. Y.) 149.

In equity, one who objects to a stated account must allege an omission in the account or deny the correctness of some or all of the items rendered. *Tate v. Gairdner*, 119 Ga. 133, 46 S. E. 73.

When executrix of a will was entitled to file exceptions to account of

executor of another testator, the fact that she presented exceptions in the name of the "estate" instead of in her own name as executrix was immaterial. *Estate of Robinson v. Hodgkin*, 99 Wis. 327, 74 N. W. 791.

Exceptions to Supplemental Account. When a supplemental account for matters occurring after settlement of final account is filed, exceptions to it must be confined to what is contained in that account. *Irvine's Estate*, 209 Pa. 325, 58 Atl. 618.

Signature.—In Louisiana, the statute provides for the filing of objections by the heirs or other claimants or their counsel. *Succession of Van Hoven*, 46 La. Ann. 911, 15 So. 391.

Verification.—The surrogate has authority to compel one who files exceptions to an account to verify his statement of exceptions. *Thompson v. Mott*, 2 Dem. Sur. (N. Y.) 154.

51. Succession of Joseph Oteri, 108 La. 395, 32 So. 423; *Browning v. Richardson*, 186 Mo. 361, 85 S. W. 518.

52. Cases Where Issues Deemed Collateral.—**U. S.**—*West v. Smith*, 8 How. 402, 12 L. ed. 1130, right of legatee to certain realty. **Cal.**—*Estate of Vance*, 141 Cal. 624, 75 Pac. 323, whether decedent formerly held certain property as trustee. **Ind.**—*First Nat. Bank of Indianapolis v. Hanna*, 12 Ind. App. 240, 39 N. E. 1054, whether decree to sell realty erroneous. **Ia.**—*In re Brown's Estate*, 113 Iowa 351, 85 N. W. 617 (money belonging to third person converted by executor to his own use but reported in account); *McLeary v. Doran*, 79 Iowa 210, 44 N. W. 360 (whether adjudication on claim correct); *Estate of Berryhill*, 61 Iowa 345, 16 N. W. 198 (whether executor fraudulently procured property in lifetime of decedent); *Ashton v. Miles*, 49 Iowa 564 (whether administrator procured allowance of his claim against estate by fraud). **La.**—*McNeely v. McNeely*, 50 La. Ann. 823, 24 So. 338 (rights of executor and joint owner

A claim allowed by the personal representative may be contested on final settlement⁵³ and the question whether or not a claim be paid as preferred may be raised on exceptions.⁵⁴

C. TRIAL.—1. Right to Jury.—In the absence of statute, neither the personal representative who is accounting nor the person filing exceptions can insist that the issues arising on exceptions be submitted to a jury,⁵⁵ and where there is a trial by jury of the issues raised, their verdict is merely advisory.⁵⁶ Issues relative to items, the allowance of which is discretionary with court, cannot be submitted to jury.⁵⁷

relative to improvements); Succession of Blancand, 48 La. Ann. 578, 19 So. 683 (claim for specific property held by executor). **Mass.**—Newell v. West, 149 Mass. 520, 21 N. E. 954, whether allowance to widow by court properly made. **Nev.**—Estate of Millenovich, 5 Nev. 161, whether appraisers disinterested. **N. Y.**—Carroll v. Hughes, 5 Redf. Sur. 337, whether administrator's appointment valid.

Exception Not for Collection of Debt.—An exception must be to the correctness of the account in charge or discharge and must not have for its object simply the recovery of a sum of money due exceptors. Succession of Sanchez, 41 La. Ann. 504, 6 So. 791; Carey v. Monroe, 54 N. J. Eq. 632, 35 Atl. 456.

Res Adjudicata.—Exceptions to a settlement relating to matters with respect to which a court of competent jurisdiction has entered a judgment, will not be considered by the court. Ladd v. Stephens, 147 Mo. 319, 48 S. W. 915.

53. Estate of Hill, 62 Cal. 186.

In Louisiana, the question of the widow's right to the marital fourth may be raised on a contest of executor's account. Succession of Leppelman, 30 La. Ann. 468.

54. Goodbub v. Hornung, 127 Ind. 181, 26 N. E. 770; Cunningham v. Cunningham, 94 Ind. 557.

Waste.—In Missouri, court may investigate exception that administrator sold real estate at a less price than he was offered therefor, since such act was waste. Johnson v. Johnson, 72 Mo. App. 386.

55. Ala.—Kirksey v. Kirksey, 41 Ala. 626; Savage v. Dickson, 16 Ala. 257; Reynolds' Admr. v. Reynolds' Distributees, 11 Ala. 1023; Willis' Admr. v. Heirs of Willis, 9 Ala. 330.

Ark.—Crow v. Reed, 38 Ark. 482 (contest of guardian's account). **Cal.** *In re Sanderson*, 74 Cal. 199, 15 Pac. 753; *In re Moore*, 72 Cal. 335, 13 Pac. 880. **Ill.**—Boyd v. Swallows, 59 Ill. App. 635. **Ind.**—Taylor v. Wright, 93 Ind. 121. **La.**—Succession of Bozant, 5 La. Ann. 709. **Mo.**—Estate of Schooler v. Stark, 73 Mo. App. 301, *citing In re Estate of Meeker*, 45 Mo. App. 186. **Pa.**—Sharp's Appeal, 3 Grant's Cas. 260.

Statute of Maryland has been held to grant either party to controversy a right to require that issue be framed for submission to jury. *In re Estate of Atwood*, 2 App. Cas. (D. C.) 74.

In Michigan, the parties have a right to a trial by jury when there is an appeal to the circuit court. Wisner v. Mabley's Estate, 70 Mich. 271, 38 N. W. 262; Grovier v. Hall, 23 Mich. 7.

In Pennsylvania, the statute gives orphans court authority to direct an issue to the common pleas, but exercise of power is discretionary and verdict is not binding on court. Thompson's Appeal, 103 Pa. 603.

56. **Cal.**—*In re Moore*, 72 Cal. 335, 13 Pac. 880, holding immaterial an irregularity in the formation of the jury or any error in instructions. **Mich.**—*In re Pfeffer's Estate*, 117 Mich. 207, 75 N. W. 454. **Pa.**—Thompson's Appeal, 103 Pa. 603.

Verdict of Jury.—A general verdict should not be taken. Loomis v. Armstrong, 49 Mich. 521, 14 N. W. 505.

57. Wisner v. Mabley's Estate, 70 Mich. 271, 38 N. W. 262, *citing* Maynadier v. Armstrong, 98 Md. 175, 56 Atl. 357; Gott v. Culp, 45 Mich. 265, 7 N. W. 767.

Framing Issues.—Issues should be as specific as possible and framed on the matters in controversy. Loomis v. Armstrong, 49 Mich. 521, 14 N. W. 505.

2. Manner of Conducting.—On the hearing of exceptions to the account of an executor or administrator, the court should apply the rules of procedure in civil causes but should not require strict formality,⁵⁸ and the practice should conform as nearly as possible to that in equity.⁵⁹ The personal representative usually stands as plaintiff and the exceptor as defendant in the proceedings,⁶⁰ and the former is entitled to open and close both the evidence and the argument when the issues throw upon him the burden of proof.⁶¹ The court may investigate any question necessarily involved whether relating to personalty or realty.⁶²

3. Burden of Proof.—When On Accountant.—Where the executor or administrator claims a credit for money expended by him in payment of a debt, the burden of proving the existence of the debt and its payment rests upon him,⁶³ especially where payment was for

58. *Goodbub v. Estate of Hornung*, 127 Ind. 181, 26 N. E. 770; *Wysong v. Nealis*, 13 Ind. App. 165, 41 N. E. 388.

Proceedings are in the nature of a suit between the parties. *Gray v. Harris*, 43 Miss. 421.

59. *Mich.*—*Loomis v. Armstrong*, 49 Mich. 521, 14 N. W. 505. *Mo.*—*Estate of Danforth*, 66 Mo. App. 586; *In re Estate of Meeker*, 45 Mo. App. 186. *Pa.*—*Appeal of Rhoades*, 3 Rawle 420; *Appeal of Sterrett*, 2 Pen. & W. 419.

Equitable rules and not mere technicalities should be regarded in determining the liability of an administrator or executor. *Brown v. Forsche*, 43 Mich. 492, 5 N. W. 1011.

When an amended account is filed shortly before hearing, those objecting to account should be given an opportunity to file objections thereto. *Succession of Hasley*, 27 La. Ann. 586.

60. *Brownlee v. Hare*, 64 Ind. 311; *Yingling v. Hesson*, 16 Md. 112.

Proceeding involves an adjudication upon each item. *Hall v. Grovier*, 25 Mich. 428.

61. *Taylor v. Burk*, 91 Ind. 252; *Yingling v. Hesson*, 16 Md. 112.

62. *In re Bruchaeser's Estate*, 49 Misc. 194, 98 N. Y. Supp. 937.

Court may disregard an objection made with reference to the management of the real estate by administrator when account does not touch on that subject and when estate remains open. *In re Smith's Estate*, 133 Iowa 142, 109 N. W. 196.

Scope of Investigation.—The court should exclude evidence not relevant to the disputed items. *La.*—*Succession of Bofenschen*, 29 La. Ann. 711. *Neb.*

In re Estate of Whiton, 86 Neb. 367, 125 N. W. 606. *Ore.*—*In re Roach's Estate*, 50 Ore. 179, 92 Pac. 118.

Where no balance for distribution is shown, the court should simply ascertain correctness of account, and it is error for court to hear and determine claims of creditors, legatees and distributees. *Snyder's Estate*, 15 Pa. Co. Ct. 253.

Exceptors have the right to have their objections disposed of in a legal manner and are entitled to introduce evidence in proof of their averment that they are heirs interested in estate. *In re Ollschlager's Estate*, 50 Ore. 55, 89 Pac. 1049.

Adjournment and Stay.—When an issue is raised which must be determined in a direct action, the proceedings may be adjourned for a sufficient time to enable parties to establish their rights (*Succession of Troxler*, 46 La. Ann. 738, 15 So. 153; *In re Schmidt's Estate*, 58 N. Y. Supp. 595); but stay will not be granted because of pendency of action involving title to decedent's real estate (*Matter of Benedict*, 15 N. Y. St. 746).

63. *Ala.*—*Jenks v. Terrell*, 73 Ala. 238; *Harwood's Admr. v. Pearson*, 60 Ala. 410; *Pearson v. Darrington*, 32 Ala. 227. *Ind.*—*Wysong v. Nealis*, 13 Ind. App. 165, 41 N. E. 388. *La.*—*Succession of Conery*, 106 La. 50, 30 So. 294; *Succession of Dougart*, 30 La. Ann. 268. *Me.*—*In re Eacott*, 95 Me. 522, 50 Atl. 708. *Miss.*—*Haralson v. White*, 38 Miss. 178. *N. J.*—*In re Wiley's Estate*, 65 Atl. 212; *Brewster v. Demarest*, 48 N. J. Eq. 559, 23 Atl. 271; *Kirby v. Coles*, 15 N. J. L. 441.

a debt due accountant or for a debt created by him.⁶⁴ The personal representative is *prima facie* chargeable with inventoried debts due estate, and the burden is upon him to show that he has been unable to collect them.⁶⁵ And when property is once shown to have come into the possession of the personal representative, he has the burden of accounting therefor.⁶⁶

When on Contestant.—The contestant has the burden of proof when his exceptions are affirmative and are matters of charge against the accountant.⁶⁷

N. C.—Barnawell v. Smith, 58 N. C. 168. **Ore.**—*In re* Roach's Estate, 50 Ore. 179, 92 Pac. 118.

Compare, Matter of Cozine, 104 App. Div. 182, 93 N. Y. Supp. 557; *In re* Wagner, 40 Misc. 490, 82 N. Y. Supp. 797; Metzger v. Metzger, 1 Brad. Sur. (N. Y.) 265.

Exact amount paid must be shown by accountant or he is not entitled to credit on an item. Cox v. Doty, 20 Ky. L. Rep. 287, 45 S. W. 1044.

If claim is shown to have been duly allowed and ordered paid in the course of administration, administrator will be protected, if there is no fraud, although claim was not a proper one. Whittemore v. Coleman, 144 Ill. App. 109.

64. Matter of Cozine, 113 App. Div. 22, 98 N. Y. Supp. 1041; Matter of Peck, 79 App. Div. 296, 80 N. Y. Supp. 76, *affirmed* 177 N. Y. 538, 69 N. E. 1129; Matter of Harnett, 15 N. Y. St. 725.

Note or account which on its face appears to be the obligation of accountant will be presumed to be his debt and he has the burden of establishing that it is the debt of the estate. Breckinridge v. Breckinridge, 98 Va. 561, 31 S. E. 982.

65. **Ky.**—Steele v. Morrison's Admr., 4 Dana 617. **Miss.**—Tell City Furniture Co. v. Stites, 60 Miss. 849. **Mo.**—Booker v. Armstrong, 93 Mo. 49, 4 S. W. 727; Julian v. Abbott, 73 Mo. 580; Williams v. The Heirs of Petticrew, 62 Mo. 460; Hallway v. Eckler, 105 Mo. App. 585, 80 S. W. 46. **N. C.** Mann v. Baker, 142 N. C. 235, 55 S. E. 102. **Va.**—Crouch v. Davis' Exr., 23 Gratt. 62. **Vt.**—Walworth's Estate v. Bartholomew's Estate, 76 Vt. 1, 56 Atl. 101.

If administrator wishes a discharge from his official liability for an antecedent debt which he owed the estate,

the burden is upon him to establish his insolvency. Howell v. Anderson, 66 Neb. 575, 92 N. W. 760, 61 L. R. A. 313; Moseley v. Johnson, 144 N. C. 257, 56 S. E. 922.

66. **Ill.**—Wilbanks v. Crosno, 112 Ill. App. 503. **Miss.**—Boggan v. Walter, 12 Smed. & M. 666. **N. J.**—Bayley's Case, 67 N. J. Eq. 566, 59 Atl. 215. **N. Y.**—*In re* Koch, 33 Misc. 153, 68 N. Y. Supp. 375. **Ore.**—Conser's Estate, 40 Ore. 138, 66 Pac. 607. **S. C.** Turbeville v. Flowers, 27 S. C. 331, 3 S. E. 542. **W. Va.**—Estill v. McClintic's Admr., 11 W. Va. 399.

Error in Inventory.—The burden is upon accountant to show that property was erroneously included in inventory. Dickie v. Dickie, 80 Ala. 57.

67. **Cal.**—Estate of Vance, 141 Cal. 624, 75 Pac. 323. **La.**—Succession of Hough, 119 La. 435, 44 So. 190. **N. J.** Kirby v. Coles, 15 N. J. L. 441. **N. Y.** *In re* Taber's Estate, 30 Misc. 172, 63 N. Y. Supp. 728; Matter of Stevenson, 86 Hun 325, 33 N. Y. Supp. 493.

Where no inventory was filed and executors filed a verified statement that no property of decedent's estate came into their possession, burden was upon contestant to prove that executors were chargeable with assets. Matter of Palmer, 3 Dem. Sur. (N. Y.) 129.

Burden of establishing more assets than are acknowledged by inventory is on party objecting to account. Matter of Baker, 42 App. Div. 370, 59 N. Y. Supp. 121.

Effect of Production of Vouchers. Where accountant produces vouchers covering items contested, the burden is upon the contestant to show that the items represented by the vouchers were not just claims against estate. *In re* Sprague, 40 App. Div. 615, 57 N. Y. Supp. 1128, *affirmed*, 162 N. Y. 646, 57 N. E. 1125; Matter of Frazer, 92 N.

4. Reference.—*a. In General.*—The court exercising probate jurisdiction is usually given authority to refer matters arising upon the settlement of the accounts of a personal representative to an auditor, referee or commissioner.⁶⁸

b. Report and Exceptions.—The referee should make a report of his finding to the court⁶⁹ and the court may compel the filing of such report.⁷⁰

Exceptions.—An opportunity must be given to persons interested to present exceptions to the report of a referee,⁷¹ and such exceptions

Y. 239; Boughton v. Flint, 74 N. Y. 476; Matter of White, 6 Dem. Sur. (N. Y.) 375; Valentine v. Valentine, 3 Dem. Sur. (N. Y.) 597.

68. D. C.—Matter of Estate of Ames, 3 MacArthur 30. **Ind.**—Cunningham v. Cunningham, 94 Ind. 557, by consent of parties. **Ky.** Chamberlain's Admr. v. Chamberlain, 13 Ky. L. Rep. 192, 16 S. W. 455. **Mass.**—Brigham v. Morgan, 185 Mass. 27, 69 N. E. 418, under Mass. St. 1889, ch. 311. **Miss.**—Anderson v. Gregg, 44 Miss. 170. **N. Y.**—*In re Rainforth's Estate*, 37 Misc. 660, 76 N. Y. Supp. 314; Matter of Hoes, 54 App. Div. 281, 66 N. Y. Supp. 664, quoting N. Y. statute; Buchan v. Rintoul, 10 Hun 183; Matter of Douglass, 3 Redf. Sur. 538. **Ohio.**—James v. West, 67 Ohio St. 28, 65 N. E. 156, to commissioner under Rev. St. §6186. **Tex.**—Dwyer v. Kalteyer, 38 Tex. 554, 5 S. W. 75.

In Arkansas, the statute authorizes the appointment of an auditor only when exceptions to account have been filed. Quinlan v. Fitzpatrick, 25 Ark. 471.

When Reference Unnecessary.—When only question was as to whether certain items should be charged against administrator and when no question raised as to amount of items or what they were for, a reference was improper. *In re Estate of Wincox*, 186 Ill. 445, 57 N. E. 1073, affirming 85 Ill. App. 613.

Reference on Intermediate Accounts. The intermediate account will not be referred when administrator objects on ground that within a short time she will be compelled to file her final account. *In re Siesel's Estate*, 2 N. Y. Supp. 704. Consult also, *In re De Russey's Will*, 14 N. Y. Supp. 177.

Who May Be Appointed.—In Kentucky, while it is not strictly proper

for court to appoint a member of its own body as a commissioner of accounts, such an appointment may be made. Chalfant v. Sterns' Heirs, 4 Dana (Ky.) 602.

Order Nunc Pro Tunc.—When court intended to make a reference of issues but form of order was that referees should take evidence and report, the court may, after report of referee, change the order of reference *nunc pro tunc*. Matter of May, 53 Hun 127, 6 N. Y. Supp. 356.

Oath of Auditors.—An order referring account need not require an oath for the due performance of duties to be administered to auditors. Benoit v. Brill, 24 Miss. 83.

69. Briscoe's Distributees v. Brady, 6 T. B. Mon. (Ky.) 134; Matter of Woodward, 69 App. Div. 286, 74 N. Y. Supp. 755; Matter of Hoes, 54 App. Div. 281, 66 N. Y. Supp. 664, quoting §2546, N. Y. Code Civ. Proc., which requires report to surrogate.

In Mississippi, before report on account is filed, the court may examine and decree upon account directly. Satterwhite v. Littlefield, 13 Smed. & M. (Miss.) 302.

Evidence upon which findings rest need not be stated in report, unless required by court. Mathews v. Sheehan, 76 Conn. 654, 57 Atl. 694, 100 Am. St. Rep. 1017; Matter of Woodward, 69 App. Div. 286, 74 N. Y. Supp. 755.

70. Estate of Hansell, 11 Phila. (Pa.) 47.

71. Ky.—Briscoe's Distributees v. Brady, 6 T. B. Mon. 134, either party may accept. **Miss.**—Benoit v. Brill, 24 Miss. 83. **S. C.**—Tindal v. Tindal, 1 Rich. 111.

Exceptions Nunc Pro Tunc.—Prayer of petition for leave to file exceptions to auditor's report *nunc pro tunc* cannot be granted when court receiving report refused to allow exceptions *nunc*

should clearly specify the errors of which complaint is made.⁷² Exceptions to the report must be confined to the errors of the referee and cannot be taken where the error is that of the court.⁷³

c. *Court's Order on Report.*—The findings of the referee in his report are subject to approval or disapproval by the court which appointed him,⁷⁴ and the court may set aside the report and recommit it to the referee for a further hearing and report,⁷⁵ or the court

pro tunc, since petitioner's remedy was by appeal from such refusal. *Patton's Estate*, 19 Pa. Super. Ct. 545.

Waiver of Exceptions.—An administrator who, acting under an erroneous impression, has waived his exceptions to the report of commissioner, may be permitted to withdraw his waiver and renew his exceptions. *Hannah's Admr. v. Boyd*, 25 Gratt. (Va.) 692.

72. *Ga.*—*Gay v. Gay*, 114 Ga. 361, 40 S. E. 265. *N. J.*—*Hurlbut v. Hutton*, 44 N. J. Eq. 302, 15 Atl. 417. *N. Y.*—*Boughton v. Flint*, 74 N. Y. 476, holding insufficient the mere noting of exceptions in the minutes of testimony taken before the auditor.

Procedure When Evidence Not Reported.—When order of reference does not require the master commissioner to report the evidence, no exception can be taken to report because evidence is not reported, but party may make the evidence part of the record by a bill of exceptions signed by the master commissioner. *Cunningham v. Cunningham*, 94 Ind. 557.

73. Where error complained of relates to amendment and correction of a former report in accordance with opinion of court, the error is that of the court and can only be corrected on appeal. *Estate of Taylor*, 12 Phila (Pa.) 137.

Evidence on Exceptions.—No evidence will be received in support of exceptions to an auditor's report, except that which was laid before the auditor. *In re Harlan's Estate*, 1 Clark (Pa.) 451, 3 Pa. L. J. 116. Compare, *Benoit v. Brill*, 24 Miss. 83.

Duty of Court.—On exceptions taken to report of referee, the court should consider in detail the rulings made by the referee which are claimed to be erroneous. *Matter of Bedford*, 30 Hun (N. Y.) 551.

74. *In re Courtney's Estate*, 31 Mont. 625, 79 Pac. 317; *Matter of Woodward*, 69 App. Div. 286, 74 N. Y.

Supp. 755; *Matter of Mellen*, 56 Hun 553, 9 N. Y. Supp. 929.

Report Advisory Only.—The report of referee is advisory merely and the court may, if it so desires, hear further testimony and make findings of its own upon which to base its orders. *In re Courtney's Estate*, 31 Mont. 625, 79 Pac. 317; *James v. West*, 67 Ohio St. 28, 65 N. E. 156.

Contents of Order Confirming in New York.—"Notwithstanding the reference of the accounts under section 2546 of the Code, we are not prepared to say that a simple confirmation of the referee's report by the surrogate is a sufficient decision to answer the requirements of section 2545. Unless some authority can be found to the contrary, we think that the safer practice would be for the surrogate to make an independent decision, with findings of fact and law, accepting or rejecting the conclusions of the referee as shall seem just." *Matter of Keef*, 43 Hun (N. Y.) 98.

Effect of Ordering Recorded.—The order of the county court that the report of commissioners be recorded is a confirmation of allowances made to executors. *McCracken's Heirs v. McCracken's Exrs.*, 6 T. B. Mon. (Ky.) 342.

75. *Ky.*—*Steele v. Morrison's Admr.*, 4 Dana 617. *Miss.*—*Crowder v. Shackelford*, 35 Miss. 321. *N. Y.*—*Abercombie v. Holder*, 63 N. Y. 628, affirming 4 Hun 141; *Matter of Schroeder*, 113 App. Div. 204, 99 N. Y. Supp. 176, affirmed 186 N. Y. 537, 78 N. E. 1112; *Matter of Watson*, 101 App. Div. 550, 92 N. Y. Supp. 195; *Matter of Mellen*, 56 Hun 553, 9 N. Y. Supp. 929; *Matter of Bayer*, 54 Hun 189, 7 N. Y. Supp. 566. *N. C.*—*Peyton v. Smith*, 22 N. C. 325. *Pa.*—*Page's Estate*, 3 Pa. Dist. 212; *In re Harlan's Estate*, 1 Clark 451, 3 Pa. L. J. 116; *Estate of Bradley*, 32 Leg. Int. 257, 11 Phila. 87. *Va.*—*Thomas v. Dawson*, 9 Gratt. 531.

may itself modify the report before confirming it.⁷⁶ The court should not set aside the report except where there is obvious error or where findings are clearly against the weight of the evidence.⁷⁷

5. Decree Settling Accounts.—a. *Form and Sufficiency.*—Upon settlement of the accounts of an administrator or executor, the court should make a decree, in writing,⁷⁸ declaring the balance in the hands of the accountant belonging to the decedent's estate.⁷⁹ Unless the

After confirmation, the court may refer back report of auditor to review an item alleged to be erroneous. *Hughes' Estate*, 19 Pa. Super. Ct. 534.

When Reference Back Discretionary. When administrator has failed to use due diligence in proving a charge in his account before the referee, the court may, in its discretion, refuse to send back the report to allow proof. *In re O'Hara's Estate*, 50 Misc. 495, 100 N. Y. Supp. 635. *Consult*, also, *Estate of Scheetz*, 2 Woodw. Dec. (Pa.) 213, refusing to refer back when no newly discovered evidence.

Proceedings When Recommitted. When report is referred back to auditor so that he may amend his original report in conformity with the court's opinion, the auditor need not open account and receive new testimony. *Estate of Donnelly*, 3 Phila. (Pa.) 18.

76. Mont.—*In re Courtney's Estate*, 31 Mont. 625, 79 Pac. 317. **N. Y.**—*In re McGovern*, 118 N. Y. Supp. 378; *Matter of Schaefer*, 65 App. Div. 378, 73 N. Y. Supp. 57, affirmed 171 N. Y. 686, 64 N. E. 1125. **Ohio.**—*James v. West*, 67 Ohio St. 28, 65 N. E. 156.

When surrogate appoints referee to hear and determine all questions arising upon settlement of accounts, the court must confirm report of referee, if no exceptions are filed. *Matter of Lefingwell*, 30 Hun (N. Y.) 528.

77. Mass.—*Newell v. West*, 149 Mass. 520, 21 N. E. 954. **N. Y.**—*In re Bradley's Estate*, 1 Con. Sur. 106, 2 N. Y. Supp. 751. **Pa.**—*Thompson's Appeal*, 103 Pa. 603. See, also, *Young's Estate*, 204 Pa. 32, 53 Atl. 511.

Report should be given substantially the same force as the verdict of a jury. *In re Heath's Estate*, 58 Iowa 36, 11 N. W. 723; *Newell v. West*, 149 Mass. 520, 21 N. E. 954.

Writ of Mandamus to compel court to make and sign decree confirming report will not be issued, when court

has permitted administrator to file a supplemental account which has been referred back, although court has in fact confirmed report on original account. *People v. Lott*, 42 Hun (N. Y.) 408.

78. Perkins v. Perkins, 27 Ala. 479 (refusing to allow the rendition of a final decree at a subsequent term *nunc pro tunc*); *Matter of Sloane*, 135 App. Div. 703, 119 N. Y. Supp. 667 (Decision duly filed required by §2545, N. Y. Code Civ. Proc.).

Signature of Judge.—The decree should be signed by the judge. *Succession of Asbridge*, 1 La. Ann. 206.

Decree should be dated and should take effect from the time of its official announcement. *Lanier v. Richardson*, 72 Ala. 134. See also, *Steen v. Steen*, 25 Miss. 513.

Formal Allowance Held Unnecessary. In Mississippi, an order that "the final account be filed and recorded" has been held sufficient, although no formal order for allowance was entered. *Fort v. Battle*, 13 Smed. & M. (Miss.) 133. But see, *Steen v. Steen*, 25 Miss. 513, where entry on account signed by judge but not entered on minutes of court was held insufficient.

79. Ala.—*Hutton v. Williams*, 60 Ala. 107; *Watt's Admr. v. Watt's Distributees*, 37 Ala. 543 (holding insufficient a decree for payment of "whatever sums shall remain"); *Rhodes v. Turner*, 21 Ala. 210. **Mass.**—*Granger v. Bassett*, 98 Mass. 462. **N. J.**—*Sayre v. Sayre*, 16 N. J. Eq. 505.

Failure of accountant to file a list of heirs and distributees, as required by statute, does not prevent the court from rendering a decree ascertaining balance due. *Hutton v. Williams*, 60 Ala. 107.

A decree is void for uncertainty when rendered against administrator on his final account in favor of "the estate, or the legal representatives

estate is settled in equity, the court usually is not authorized to decree the distribution of the surplus when settling an administration account.⁸⁰ Special findings of fact and conclusions of law are not required.⁸¹

Correction of Decree.—Although the decree is conclusive, a clerical error appearing plainly in the account should be open for subsequent correction, and, on motion, the court may amend a decree making a void allowance so as to effectuate the intention of the court in making allowance.⁸²

b. How Enforced.—When the court has authority to direct the accountant to pay the balance in his hands to certain individuals entitled thereto, execution may be issued against accountant's in-

thereof." *Betts v. Blackwell's Heirs*, 2 Stew. & P. (Ala.) 373.

When Several Decrees Necessary. When accountant is administrator of an estate and guardian of intestate's minor heirs, his administration accounts and his accounts with each heir are distinct and court must render a separate decree upon each. *Foteaux v. Lepage*, 6 Iowa 123.

When Balance Due Accountant.—The probate court has no jurisdiction, on final settlement of the accounts of an executor or administrator whose disbursements exceed his receipts, to render a decree in his favor for the excess. *Reaves v. Garrett's Admr.*, 34 Ala. 558.

Order discharging administrator will not be regarded as a decree of final settlement when records of probate court show that debts of estate are unpaid and that realty of estate is undisposed of. *Crossan v. McCrary*, 37 Iowa 684.

Basis of Decree.—The court may make a decree based on figures other than those contained in the accounts as filed, since it is competent for the parties to agree to facts other than those originally stated by accountant. *In re Mount's Estate*, 27 Misc. 411, 59 N. Y. Supp. 176.

80. *Granger v. Bassett*, 98 Mass. 462 (payments in distribution made by executor are not allowable on settlement of final account); *Arnold v. Smith*, 14 R. I. 217.

On settlement of account the surrogate has no jurisdiction to decree that certain legacies are chargeable on residuary real estate. *In re Taber*, 132 App. Div. 495, 116 N. Y. Supp. 960.

Decree in Chancery.—If account is

settled in equity, the decree should ascertain the parties to whom the amount found due estate should be paid and the court may then decree distribution of the fund. *Ala.*—*Rhodes v. Turner*, 21 Ala. 210. *N. J.*—*Sayre v. Sayre*, 16 N. J. Eq. 505. *Miss.* *Hines v. Noah*, 52 Miss. 192.

Court should not order that the balance found due be paid into court. *Lafon's Heirs v. His Executors*, 3 Mart N. S. (La.) 707.

81. *In re McPhee's Estate*, 156 Cal. 335, 104 Pac. 455; *Estate of Adams*, 131 Cal. 415, 63 Pac. 838; *In re Levinson*, 108 Cal. 450, 41 Pac. 483, 42 Pac. 479; *Miller v. Lux*, 100 Cal. 609, 35 Pac. 345.

Special Findings Permissible.—Special findings of fact and conclusions of law may be made by the court in determining the issues. *Taylor v. Wright*, 93 Ind. 121; *Taylor v. McGrew*, 29 Ind. App. 324, 64 N. E. 651; *Swift v. Harley*, 20 Ind. App. 614, 49 N. E. 1069.

Nature of Special Findings.—When special findings are made, they should pertain to the issues raised by the exceptions and it is not necessary to set out the various items of the account in special findings on exceptions to account. *In re Roberts' Estate* (Ind. App.), 88 N. E. 870.

Findings Required by Statute.—In New York, under §2545, Code of Civ. Proc., the surrogate is required to file with his decision the facts found and conclusions of law. *In re Sprague*, 125 N. Y. 732, 26 N. E. 532; *In re Daymon*, 47 App. Div. 315, 61 N. Y. Supp. 997; *Matter of Bradway*, 74 Hun 630, 26 N. Y. Supp. 838.

82. *Estate of Willard*, 139 Cal. 501,

dividual property to satisfy the decree,⁸³ but no execution can issue on decree unless there is some person named who can demand payment thereon.⁸⁴ The court is sometimes given authority to enforce its decree on final settlement by the issuance of an attachment.⁸⁵

c. *Collateral Attack*.—The court's order settling the accounts of an administrator or executor cannot be collaterally attacked and is a conclusive adjudication upon all questions involved unless appealed from, or vacated, or unless impeached by a direct proceedings in equity.⁸⁶

73 Pac. 240; *Estate of Richmond*, 9 Cal. App. 402, 99 Pac. 554.

83. *Ala.*—Whetstone v. McQueen, 137 Ala. 301, 34 So. 229. *Miss.*—Isom v. McGehee's Heirs, 45 Miss. 712, even though decree does not in terms award execution. *Mo.*—Haenssler v. Scheitlin, 9 Mo. App. 303. *Neb.*—Lydick v. Chaney, 64 Neb. 288, 89 N. W. 801. *N. Y.*—Sherwood v. Judd, 3 Brad. Sur. 419, execution or process of attachment. *Ohio.*—McLaughlin v. McLaughlin, 4 Ohio St. 508.

When Infant Entitled to Fund.—If infant entitled to fund has no general guardian, decree may be rendered in favor of guardian *ad litem*, execution may be issued and fund collected should be paid into court. *Morgan's Admr. v. Morgan's Distributees*, 35 Ala. 303.

Property Subject to Execution.—Execution may issue against the personality (*In re Quackenbos*, 38 Misc. 66, 76 N. Y. Supp. 964); or against the real estate of the administrator or executor (*Lydick v. Chaney*, 64 Neb. 288, 89 N. W. 801).

In Pennsylvania, the recovery of the balance found due may be obtained by an action of debt or *scire facias* on the transcript from orphan's court of the decree which may be filed in common pleas. *Burd's Exrs. v. McGregor's Admr.*, 2 Grant's Cas. (Pa.) 353.

Form of Certificate for Lien.—The certificate of balance due from administrators which must be filed to secure a lien in Pennsylvania, need only be an abstract of substance of the account. *McCracken's Heirs v. Graham*, 14 Pa. 209.

For practice in Delaware allowing writ of sequestration *de bonis propriis*, see *Allen v. Leach*, 7 Del. Ch. 232, 44 Atl. 800.

84. *Hines v. Noah*, 52 Miss. 192.

85. *Vertner v. Martin*, 10 Smed. & M. (Miss.) 103.

In New York, the surrogate has no authority to enforce payment by executors of a sum found due on final accounting, by attachment as for contempt. *McKeon v. Hagan*, 18 Hun (N. Y.) 64; *Matter of Watson v. Nelson*, 69 N. Y. 536. *Compare*, *Matter of Hahlin*, 53 How. Pr. (N. Y.) 501.

86. *U. S.*—*Tate v. Norton*, 94 U. S. 746, 24 L. ed. 222 (case arising in Arkansas); *Barney v. Saunders*, 16 How. 535, 14 L. ed. 1047. *Ala.*—*Gamble v. Jordan*, 54 Ala. 432. *Ark.*—*Floyd v. Newton*, 134 S. W. 934; *Dooley v. Dooley*, 14 Ark. 122. *Cal.*—*Tobelman v. Hildebrandt*, 72 Cal. 313, 14 Pac. 20; *Kowalsky v. Superior Court*, 13 Cal. App. 218, 109 Pac. 158. *Del.*—*Lynch v. Lynch's Admr.*, 2 Marv. 115, 42 Atl. 420. *Ill.*—*McDonald v. The People*, 222 Ill. 325, 78 N. E. 609. *Ind.*—*Jones v. Jones*, 115 Ind. 504, 18 N. E. 20; *Carver v. Lewis*, 105 Ind. 44, 2 N. E. 714; *Peacocke v. Leffler*, 74 Ind. 327; *Sanders v. Loy*, 61 Ind. 298; *Kuhn v. Boehne*, 27 Ind. App. 340, 61 N. E. 199. *Ia.*—*Harlan v. Stevenson*, 30 Iowa 371. *Me.*—*Appeal of Mudgett*, 103 Me. 367, 69 Atl. 575; *Harlow v. Harlow*, 65 Me. 448. *Md.*—*Roberts v. Roberts*, 71 Md. 1, 17 Atl. 568. *Mass.*—*Parcher v. Russell*, 11 Cush. 107. *Mich.*—*Holden v. Lathrop*, 65 Mich. 652, 32 N. W. 879. *Miss.*—*Austin v. Lamar*, 23 Miss. 189. *Mo.*—*Pearson v. Murray*, 230 Mo. 162, 130 S. W. 21; *Michie v. Grainger*, 149 Mo. App. 301, 129 S. W. 983; *Howell v. Jump*, 140 Mo. 441, 41 S. W. 976; *State v. Gray*, 106 Mo. 526, 17 S. W. 500; *Van Bibber v. Julian*, 81 Mo. 618; *State v. Roland*, 23 Mo. 95. *N. J.*—*Voorhees v. Voorhees' Exr.*, 18 N. J. Eq. 223; *Ordinary v. Kershaw*, 14 N. J. Eq. 527. *N. Y.*—*Newcomb v. Trustees of St. Peters Church*, 2 Sand. Ch. 638. *Pa.*—*Lowrie's Appeal*, 1

D. OPENING, VACATING AND SETTING ASIDE ACCOUNTS.—1. Suits in Equity.—*a. Grounds of Equitable Jurisdiction.*—A court of equity has original jurisdiction, independently of statutory provisions, to set aside the settlement of the accounts of an executor or administrator when such settlement was induced by fraud or mistake.⁸⁷

Grant's Cas. 373; Clark *v.* Callaghan, 2 Watts 259. **Tenn.**—Grimstead *v.* Huggins, 13 Lea 728. **Vt.**—Harris *v.* Harris' Estate, 82 Vt. 199, 72 Atl. 912. **Wis.**—Barker *v.* Barker, 14 Wis. 131.

Collateral Attack for Fraud.—In Georgia, the court has allowed an order discharging executor to be attacked collaterally as a nullity, when order was obtained by fraud (*Pass v. Pass*, 98 Ga. 791, 25 S. E. 752); but usually fraud is simply a ground for impeaching a decree by a direct proceedings instituted in equity. **U. S.**—Tate *v.* Norton, 94 U. S. 746, 24 L. ed. 222. **Ark.**—Dooley *v.* Dooley, 14 Ark. 122. **Mo.**—State *v.* Carroll, 101 Mo. App. 110, 74 S. W. 468.

Presumptions.—When decree of probate court made on final settlement is attacked, the same presumptions will be made to support decree as are made in favor of courts of general jurisdiction and advantage cannot be taken of mere irregularities. *Gamble v. Jordan*, 54 Ala. 432; *State v. Gray*, 106 Mo. 526, 17 S. W. 500.

Conclusiveness of Allowance to Attorney.—When administratrix, in her final account, asks an allowance for attorney fees and court makes a decree allowing her a certain sum, such allowance is a judgment binding on administratrix when she is sued by attorney for amount allowed. *Vaughn v. Walsh*, 122 Wis. 486, 100 N. W. 840.

Burden of Proof.—When collateral attack is allowed, the decree operates to cast upon those who impugn the account the burden of proving its incorrectness. *Lippincott v. Bechtold*, 54 N. J. Eq. 407, 34 Atl. 1079.

87. U. S.—Ridenbaugh *v.* Burnes, 14 Fed. 93. **Ala.**—Martinez *v.* Meyers, 52 So. 592; *Seals v. Weldon*, 121 Ala. 319, 25 So. 1021; *Humphreys v. Burleson*, 72 Ala. 1; *Morrow v. Allison*, 39 Ala. 70; *Mock's Heirs v. Steele*, 34 Ala. 198. **Ark.**—Beckett *v.* Whittington, 92 Ark. 230, 122 S. W. 633; *McLeod v. Griffith*, 51 Ark. 1, 8 S. W. 837; *Greely Burnham Grocery Co. v. Graves*,

43 Ark. 171; *Jones v. Graham*, 36 Ark. 383; *Shegogg v. Perkins*, 34 Ark. 117; *Mock v. Pleasants*, 34 Ark. 63; *Osborne v. Graham*, 30 Ark. 66. **Ill.**—*Seymour v. Edwards*, 31 Ill. App. 50. **Ind.**—*Murdock v. Holland's Heirs*, 3 Blackf. 114. **Ia.**—*Bradbury v. Wells*, 138 Iowa 673, 115 N. W. 880; *Tucker v. Stewart*, 121 Iowa 714, 97 N. W. 148; *Daniels v. Smith*, 58 Iowa 577, 12 N. W. 599. **Ky.**—*Turley's Admr. v. Barnes*, 103 Ky. 127, 44 S. W. 446. **Mich.**—*Grady v. Hughes*, 80 Mich. 184, 44 N. W. 1050. **Miss.**—*Green v. Creighton*, 10 Smed. & M. 159, 48 Am. Dec. 742. **Mo.**—*Baldwin v. Dalton*, 168 Mo. 20, 67 S. W. 599; *Smith v. Hauger*, 150 Mo. 437, 51 S. W. 1052; *McLean v. Bergner*, 80 Mo. 414; *State v. Roberts*, 60 Mo. 402; *Clyce v. Anderson*, 49 Mo. 37; *Michie v. Grainger*, 149 Mo. App. 301, 129 S. W. 983; *Mueller v. Grunker*, 145 Mo. App. 611, 123 S. W. 469; *Weinerth v. Trendley*, 39 Mo. App. 333. **N. J.**—*Black v. Whitall*, 9 N. J. Eq. 572, 59 Am. Dec. 423; *Vannmeter v. Exr. of Jones*, 3 N. J. Eq. 520. **N. C.**—*Murphy v. Harrison*, 65 N. C. 246. **Ohio.**—*Rote v. Stratton*, 3 Ohio Dec. 156. **Ore.**—*Johnson v. Savage*, 50 Ore. 294, 91 Pac. 1082; *Froebrieh v. Lane*, 45 Ore. 13, 76 Pac. 351, 106 Am. St. Rep. 634.

In Alabama, the court of chancery is given jurisdiction by statute to correct errors made in the settlement of accounts in the probate court, but the errors of law or fact must be shown to have occurred in the settlement itself (*Martinez v. Meyers* (Ala.), 52 So. 592; *Seals v. Weldon*, 121 Ala. 319, 25 So. 1021); and the errors complained of must be indicated clearly, and it must be made to appear that such errors were not attributable to the fault or neglect of the party complaining (*Humphreys v. Barleson*, 72 Ala. 1).

Distinction Between Opening and Falsifying.—"When account is opened on the ground of fraud, the whole of it may be unraveled; but when permission is merely given to surcharge and falsify it, the account stands as

The mistake must be one of fact and not of law, if it is to be set forth as the ground for equitable interference.⁸⁸

Insufficient Grounds.—A court of equity will not set aside the order of the probate court made upon final settlement of estate upon a petition which sets forth mere irregularities or errors in the accounting and settlement, unless they are sufficient to raise the presumption of fraud.⁸⁹

prima facie correct, and the onus of proving mistakes is on the party alleging them; and therefore, where a bill is filed to impeach a decree on the ground of fraud, if the answer denies all fraud, but admits an error or mistake, the complainant cannot have a decree unless he amends his bill." *Cowan v. Jones*, 27 Ala. 317.

In **Indiana**, the statute authorizes the setting aside of account for mistake, fraud, or illegality within three years from the date of settlement. *Pollard v. Barkley*, 117 Ind. 40, 17 N. E. 294; *Miller v. Steele*, 64 Ind. 79; *Kingan & Company v. Hawley*, 29 Ind. App. 376, 64 N. E. 620; *Jaap v. Digman*, 8 Ind. App. 509, 36 N. E. 50.

Remedy of Equity Concurrent. When suit is founded on fraud, the fact that parties have a remedy at law by appeal does not prevent the institution of a suit in equity to set aside judgment of probate court. *Baldwin v. Dalton*, 168 Mo. 20, 67 S. W. 599; *Baldwin v. Davidson*, 139 Mo. 118, 40 S. W. 765, 61 Am. St. Rep. 460. Compare, *Ayer v. Messer*, 59 N. H. 279.

The voluntary dismissal of an appeal from an order approving an account is no bar to a subsequent proceeding in equity to set aside the order of the probate court for fraud. *Baldwin v. Davidson*, 139 Mo. 118, 40 S. W. 765, 61 Am. St. Rep. 460.

Discretionary action of the probate court will not be reviewed in proceedings to set aside final settlement on ground of fraud. *Clyce v. Anderson*, 49 Mo. 37.

Misrepresentation, although made through mistake, may amount to fraud on the court and on the estate. *Dyer v. Jacoway*, 50 Ark. 217, 6 S. W. 902.

Omission of Assets as Fraud.—When administrator or executor fails to charge himself with assets in his possession at the time of his final settlement, the settlement will be deemed fraudulent (*Stone v. Stillwell*, 23 Ark.

444; *Houts v. Shepherd*, 79 Mo. 141); and heirs may have account set aside where administrator conceals from them the fact that he has collected interest on funds of estate (*Smiley v. Smiley*, 80 Mo. 44).

Fraud must have been perpetrated upon the court in the very act of procuring the judgment approving account. *Smith v. Hauger*, 150 Mo. 437, 51 S. W. 1052; *Moody v. Peyton*, 135 Mo. 482, 36 S. W. 621.

88. *Camper v. Hayeth*, 10 Ind. 528; *Weinerth v. Trendley*, 39 Mo. App. 333. See also *Singer v. Hawley*, 3 Dem. Sur. (N. Y.) 571.

89. **Ark.**—*Dyer v. Jacoway*, 50 Ark. 217, 6 S. W. 902; *Hankins v. Layne*, 48 Ark. 544, 3 S. W. 821; *McLeod v. Griffiths*, 45 Ark. 505 (failure to file inventory); *Greely Burnham Grocery Co. v. Graves*, 43 Ark. 171; *Ringgold v. Stone*, 20 Ark. 526; *Ragsdale v. Stuart*, 8 Ark. 268. **Ill.**—*Diekson v. Hitt*, 98 Ill. 300. **Miss.**—*Smith v. Hurd*, 7 How. 188. **Mo.**—*Moody v. Peyton*, 135 Mo. 482, 36 S. W. 621; *Nelson v. Barnett*, 123 Mo. 564, 27 S. W. 520; *Lewis v. Williams*, 54 Mo. 200. **Ore.**—*Froebrich v. Lane*, 45 Ore. 13, 76 Pac. 351, 106 Am. St. Rep. 634.

Appeal is the proper manner in which to obtain the correcting of mere errors. *Greely Burnham Grocery Co. v. Graves*, 43 Ark. 171; *Dyer v. Jacoway*, 42 Ark. 186; *Ringgold v. Stone*, 20 Ark. 526; *Smith v. Hurd*, 7 How. (Miss.) 188.

In **Kentucky**, settlement of accounts by county courts are only *prima facie* evidence in a suit in chancery to surcharge them and may, by proper proceedings, be purged of all errors. *Frazier v. Cavanaugh's Admr.*, 4 Ky. L. Rep. 711.

Illegal Allowances.—The fact that the court made illegal allowances to executor or administrator is no ground for setting aside in equity, unless they were obtained by fraud. *Jones v. Graham*, 36 Ark. 383; *Mock v. Pleas-*

b. *Time for Filing*.—Unless the statute expressly limits the time within which suit may be instituted in equity to set aside a settlement, a bill may be filed at any reasonable time after cause of action accrues,⁹⁰ but if delay is unreasonably long, complainant's right to relief in equity will be barred by laches.⁹¹

Statute of Limitation.—In some jurisdictions, statutory provisions limit the time within which a bill to set aside settlement may be filed.⁹²

ants, 34 Ark. 63; *Goodman v. Griffith*, 155 Mo. App. 574, 134 S. W. 1051; *Baldwin v. Dalton*, 168 Mo. 20, 67 S. W. 599; *Miller v. Major*, 67 Mo. 247; *Lewis v. Williams*, 54 Mo. 200.

In Indiana, under Rev. St. 1881, §2403, allowing settlement to be set aside for fraud, illegality or mistake, an allowance to an administrator for his personal services as an attorney in settlement of estate constitutes an "illegality" and may be set aside. *Pollard v. Barkley*, 117 Ind. 40, 17 N. E. 294.

Provisional Order.—When order of probate court is only provisional and interlocutory in its nature, equity will not assume jurisdiction, even though order was fraudulently obtained. *Ladd v. Nystol*, 63 Kan. 23, 64 Pac. 985.

Amount Too Small.—When defendant admitted a balance of \$8.42 due to complainants but bill was not sustained as to any other matter in controversy, the sum was held too small to justify a resort to equity. *Cowan v. Jones*, 27 Ala. 317.

Clerical Mistake.—A simple error of calculation in the statement of a partial account is no ground for equitable relief, since such error is amendable in the probate court, *nunc pro tunc*. *Moore v. Lesneur*, 33 Ala. 237.

Prejudice to a substantial right of a party interested must be shown in bill or equity will not disturb for fraud an order settling estate. *Bradbury v. Wells*, 138 Iowa 673, 115 N. W. 880.

Failure to pay taxes not yet levied is not a fraud on the state's right to taxes for which equity will set aside settlement (*State v. Shaw*, 163 Mo. 191, 63 S. W. 371); but in Indiana a final settlement without payment of taxes is illegal within the meaning of Sec. 2558, Burns 1901, and may be set aside (*Cullop v. City of Vincennes*, 34 Ind. App. 667, 72 N. E. 166; *Graham v. Russell*, 152 Ind. 136, 52 N. E. 806).

90. *Froebrieh v. Lane*, 45 Ore. 13, 76 Pac. 351, 106 Am. St. Rep. 634, de-

lay of eight months after knowledge of facts relied upon not fatal. *Hanly v. Snodgrass*, 9 Leigh (Va.) 484, delay of eight years no bar.

91. **Ill.**—*Starrett v. Keating*, 61 Ill. App. 189. **Mo.**—*Lenox v. Harrison*, 88 Mo. 491 (where complainant, with knowledge of alleged fraud, delayed until after death of accountant); *Williams v. Heirs of Petticrew*, 62 Mo. 460. **Va.**—*Hudson v. Hudson's Exr.*, 3 Rand. 117.

Delays Held Sufficient to Bar by Laches.—**U. S.**—*Littell v. Hackley*, 126 Fed. 309, 61 C. C. A. 295, twelve years. **Ky.**—*Skinner v. Skinner*, 1 J. J. Marsh. 594, twelve years after disability removed. **Neb.**—*Shelby v. Creighton*, 65 Neb. 485, 91 N. W. 369, 101 Am. St. Rep. 630, delay of fifteen years fatal in absence of showing that facts constituting fraud were unknown to complainant. **N. J.**—*Wood v. Chetwood*, 33 N. J. Eq. 9, thirty-four years. **N. C.**—*Slaughter v. Cannon*, 94 N. C. 189, thirteen years. **Ohio**.—*Pennock v. Miller*, 1 Ohio Dec. (Reprint) 456, 10 West. Law J. 85, eighteen years. **Tenn.**—*Burton v. Dickinson*, 3 Yerg. 112, twelve years after mistake discovered. **Va.**—*Green's Admr. v. Thompson*, 84 Va. 376, 5 S. E. 507 (twenty-five years after death of administrator and seventeen years after his accounts closed by a subsequent administrator); *Nelson's Admr. v. Kownslars Exr.*, 79 Va. 468 (thirteen years). **W. Va.**—*Hays v. Freshwater*, 47 W. Va. 217, 34 S. E. 831, ten years after partial and six years after final account.

Laches cannot be imputed when no one is in existence capable of instituting proceedings. *Sorrels v. Trantham*, 48 Ark. 386, 3 S. W. 821, 4 S. W. 281; *Riley v. Norman*, 39 Ark. 158.

92. **Alabama**.—Bill barred by Rev. Code, §2274, in two years. *Baldwin v. Deming's Admr.*, 51 Ala. 553; *Ansley's Admr. v. King's Admr.*, 35 Ala. 278. For case deciding above men-

c. Parties. — (I.) Complainants. — Suits to set aside the accounts of an executor or administrator may be instituted by the heirs of decedent,⁹³ creditors,⁹⁴ distributees,⁹⁵ or other persons interested in the distribution of the estate,⁹⁶ but petitioner must be directly interested in the settlement.⁹⁷

(II.) Defendants. — The administrator or executor whose account is sought to be set aside is a necessary party defendant,⁹⁸ and those

tioned section not applicable, see *Mill-sap v. Stanley*, 50 Ala. 319.

Georgia.—Proceedings must be instituted within three years. *Wicker v. Howard*, 126 Ga. 119, 54 S. E. 821.

Michigan.—Suit barred within six years after settlement, unless fraud concealed by administrator. *Duryea v. Granger Estate*, 66 Mich. 593, 33 N. W. 730.

North Carolina.—Under Code §158, an action to impeach the final account must be brought within ten years from filing and auditing. *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294; *Wilkerson v. Dunn*, 52 N. C. 125.

Ohio.—Under Rev., St. §4982, within four years after fraud discovered. *Henry v. Doyle*, 82 Ohio 113, 91 N. E. 990.

South Carolina.—Account cannot be re-opened after the expiration of six years. *Roberts v. Johns*, 24 S. C. 580.

Tennessee.—Code Tenn., §2776, providing that actions against executors and administrators on their bonds "and all other cases not provided for" shall be barred in ten years, applies to a bill in equity to surcharge and falsify account. *Alvis v. Oglesby*, 87 Tenn. 172, 10 S. W. 313.

When Statutes Commence To Run. As to parties capable of suing, statutes of limitation begin to run from the time final settlement is confirmed and administrator or executor discharged. *McGaughy v. Brown*, 46 Ark. 25; *Henf v. Whittington*, 42 Ark. 491; *Tindal v. McMillan*, 33 Tex. 484. See also, *Arial v. Arial*, 29 S. C. 84, 7 S. E. 35.

93. **Ill.**—*Starrett v. Keating*, 61 Ill. App. 189; *Seymour v. Edwards*, 31 Ill. App. 50. **Kan.**—*Gafford v. Dickinson*, 37 Kan. 287, 15 Pac. 175. **Ky.**—*Roll v. Stum*, 20 Ky. L. Rep. 661, 46 S. W. 223. **Ore.**—*Johnson v. Savage*, 50 Ore. 294, 91 Pac. 1082.

Heirs of estate of father cannot maintain a suit to surcharge the ac-

count of the administrator of their grandfather's estate, since the grandfather's distributees or, if they are deceased, their personal representative, are the proper parties to institute proceedings. *Hordage v. Hordage* (Ark.), 1 S. W. 707.

94. *Crowley v. McCrary*, 45 Mo. App. 350; *Johnson v. Hogan*, 37 Tex. 77.

Intervention by Creditors.—Testator's creditors may intervene and be made parties to a suit by legatees and devisees for the purpose of surcharging and falsifying executor's accounts. *Smith's Exr. v. Britton*, 2 Patt. & H. (Va.) 124.

95. **Ala.**—*Morrow v. Allison*, 39 Ala. 70. **Mo.**—*Dillon's Admr. v. Bates*, 39 Mo. 292. **Tex.**—*Johnson v. Hogan*, 37 Tex. 77.

96. *Hall v. Pegram*, 85 Ala. 522, 5 So. 209, 6 So. 612 (by Code, 1886, §3536, bill lies to correct errors in settlement "to the injury of any party, without any fault or neglect on his part"); *Johnson v. Hogan*, 37 Tex. 77.

Where an executor refuses to institute proceedings to surcharge or falsify an account by which the estate which he represents has been injured, legatees or next of kin may institute such proceedings and make defendant the executor or administrator so refusing. *Murphy v. Harrison*, 65 N. C. 246.

97. *Dearing v. Selvey*, 50 W. Va. 4, 40 S. E. 478.

A surety on the individual note of the administrator given in payment of a demand against estate has no such direct interest as will enable him to maintain proceedings to set aside settlement. *Voshage v. Voshage*, 45 Mo. App. 172.

98. *Heitkamp v. Biedenstien*, 3 Mo. App. 450, administrator alone a necessary defendant, if proceedings merely to set aside.

whose rights will be directly affected, if the prayer of the petition is granted, should also be joined as defendants.⁹⁹

d. *Pleadings*.—The bill should show the character in which complainant brings suit,¹ and should state with precision and distinctness all the facts and circumstances relied upon as constituting such fraud or mistake that they entitle complainant to relief.²

99. *Baron v. Baum*, 44 La. Ann. 295, 10 So. 766; *Dillon's Admr. v. Bates*, 39 Mo. 292 (requiring that all distributees be made parties to bill by distributee, either as complainants or respondents, to avoid multiplicity of suits).

In Illinois, a bill charging a conspiracy to defraud legal heirs should make parties all known heirs and as to unknown heirs, summons must issue in conformity with statute. *Seymour v. Edwards*, 31 Ill. App. 50.

Demurrer will lie, if proper parties are not brought before the court, but complainant will be permitted to amend. *Van Winkle v. Blackford*, 33 W. Va. 573, 11 S. E. 26.

Executor cannot demur to bill because a specific legatee is improperly made a co-defendant. *Seabright v. Seabright*, 28 W. Va. 412.

Joinder.—Administrator and administrator *de bonis non* cannot be joined in a suit instituted by a creditor to set aside their several settlements for fraud. *Kerrin v. Roberson*, 49 Mo. 252.

Joinder of Sureties.—Sureties of administrator may be joined as defendants in a bill to correct fraud in accounts. *Reinhardt v. Gartrell*, 33 Ark. 727; *Osborne v. Graham*, 30 Ark. 66. But compare, *Grady v. Hughes*, 80 Mich. 184, 44 N. W. 1050.

Notice to Parties.—The parties to the suit must be brought into court by a summons and not by a notice from one to the other. *Smith v. Hauger*, 150 Mo. 437, 51 S. W. 1052.

1. *Crowley v. McCrary*, 45 Mo. App. 350; *Dunson v. Payne*, 44 Tex. 539.

Allegation of Representative Capacity.—The capacity of one who appears the representative of another must be alleged, although it need not be proved in the absence of a specific denial. *Succession of Hatcher*, 23 La. Ann. 136.

Allegations as to Injury.—It must appear that complainant has suffered injury from the fraud or mistake of which complainant is made. *Seals v.*

Weldon, 121 Ala. 319, 25 So. 1021; *Waldrom v. Waldrom*, 76 Ala. 285; *Massey v. Modawell*, 73 Ala. 421; *Crowley v. McCrary*, 45 Mo. App. 350.

Petition by distributee against administrator after final settlement, charging waste and mismanagement, is fatally defective in not averring that there are no creditors and that the property alleged to have been wasted was not applicable to the payment of debts. *Foster v. Kenrick*, 71 Mo. 422.

Allegations Negating Fault.—Complainant must negative fault in not protecting his interests in the hearing upon final settlement of accounts. *Waldrom v. Waldrom*, 76 Ala. 285; *Bowden v. Perdue*, 59 Ala. 409; *Boswell v. Townsend*, 57 Ala. 308. General averments that complainant was without fault and used due diligence are insufficient. Ala.—*Otis v. Dargan*, 53 Ala. 178. Cal.—*Tynan v. Kerns*, 119 Cal. 447, 51 Pac. 693. Ia.—*Hazlett v. Burge*, 22 Iowa 531.

2. Ala.—*Seals v. Weldon*, 121 Ala. 319, 25 So. 1021; *Massey v. Modawell*, 73 Ala. 421; *Otis v. Dargan*, 53 Ala. 178. Ark.—*Mock v. Pleasants*, 34 Ark. 63; *Ringgold v. Stone*, 20 Ark. 526; *Conway v. Ellison*, 14 Ark. 360. Ky. *Smith's Admr. v. Nuckols*, 5 Ky. L. Rep. 426; *Crow's Admr. v. Crow*, 4 Ky. L. Rep. 909. Ohio.—*Rote v. Stratton*, 3 Ohio Dec. 156. S. C.—*Fraser v. Hext*, 2 Stro. Eq. 250; *Murrel v. Murrel*, 2 Stro. Eq. 148, 49 Am. Dec. 664. Va.—*Radford v. Fowlkes*, 85 Va. 820, 8 S. E. 817; *Green's Admr. v. Thompson*, 84 Va. 376, 5 S. E. 507. W. Va.—*Seabright v. Seabright*, 28 W. Va. 412.

Compare, *Akins v. Hill*, 7 Ga. 573.

Demurrer will lie when there is a mere general averment of fraud and illegality. *Ladd v. Nystol*, 63 Kan. 23, 64 Pac. 983; *Rote v. Stratton*, 3 Ohio Dec. 156.

Bill to surcharge and falsify should specify the improper charges against estate. *Taylor v. Taylor*, 66 W. Va.

e. *Burden of Proof and Evidence.*—Settlements confirmed by the probate court are *prima facie* correct³ and the burden is upon the one seeking to surcharge account or set it aside on the ground of fraud or mistake.⁴ If fraud is alleged, proof of error or mistake is not sufficient to authorize a decree opening the account.⁵

f. *Decree.*—When the court finds that the allegations of the bill seeking to set aside the settlement are true, it should order that the settlement be set aside and should direct a new settlement in the probate court.⁶ But if bill seeks to surcharge and falsify for mistakes or omissions, the court may make a decree finally deciding the issues raised without opening the entire account.⁷

2. *Proceedings in Probate Court.*—a. *Jurisdiction.*—Because of its inherent equitable powers or by reason of statutory provisions, the probate court in most jurisdictions may set aside, modify, or correct its orders made on final settlement of an estate,⁸ but in some

238, 66 S. E. 690; *Seabright v. Seabright*, 28 W. Va. 412.

Sureties of administrator made defendants in a suit to set aside an order settling estate because of fraud, may demur to bill which does not allege that they were in any way parties to the fraud. *Grady v. Hughes*, 80 Mich. 184, 44 N. W. 1050.

When Cross-bill Unnecessary.—When defendant seeks no positive relief against complainant but simply wishes the dismissal of the bill, a cross-bill is not necessary. *Trimble v. James*, 40 Ark. 393.

3. *Eckley v. Clark*, 24 Ill. App. 495; *Raison's Admr. v. Williams*, 19 Ky. L. Rep. 1142, 42 S. W. 1108; *Colevedt v. Holland*, 9 B. Mon. (Ky.) 458.

4. Ark.—*Stone v. Stillwell*, 23 Ark. 444. Ga.—*Walker v. Wootten*, 18 Ga. 119; *Brown v. Wright*, 5 Ga. 29. Ill. *Eckley v. Clark*, 24 Ill. App. 495. Va. *Wimbish v. Rawlins Exr.*, 76 Va. 48. W. Va.—*Campbell's Admr. v. White*, 14 W. Va. 122.

Proof Required.—Fraud should be established by clear and satisfactory evidence. Ia.—*Bradbury v. Wells*, 138 Iowa 673, 115 N. W. 880. Ky.—*Brown v. Wickliffe*, 1 A. K. Marsh 337. La. *Succession of Robb*, 41 La. Ann. 247, 5 So. 757. Mo.—*Phillips v. Broughton*, 30 Mo. App. 148.

5. *Cowan v. Jones*, 27 Ala. 317; *Cooper v. Duncan*, 53 Mo. App. 5.

6. *Hankins v. Layne*, 48 Ark. 544, 3 S. W. 821; *Shegogg v. Perkins*, 34 Ark. 117; compare *Reinhardt v. Gartrell*, 33 Ark. 727; *Doe v. McDonald*, 5 Cush. (Miss.) 610; *Neylaus v. Burge*,

14 Smed. & M. (Miss.) 201; *Searles v. Scott*, 14 Smed. & M. (Miss.) 94; *Green v. Creighton*, 10 Smed. & M. (Miss.) 159, 48 Am. Dec. 742.

Court of chancery has no authority to re-settle an administration account alleged to have been fraudulently settled in the probate court. *Jennison v. Hapgood*, 7 Pick. (Mass.) 1.

Whole account should be opened, when account is impeached on the ground of fraud. *Cowan v. Jones*, 27 Ala. 317.

7. *Shorter v. Hargroves*, 11 Ga. 658; *Speed's Exr. v. Nelson's Exr.*, 8 B. Mon. (Ky.) 499.

Corrections on Both Sides.—When court of equity undertakes to make a decree correcting a settlement, it will relieve accountant of improper charges made against himself as well as charge him with omitted liabilities and correct improper credits. *Trimble v. James*, 40 Ark. 393; *Floyd v. Priester*, 8 Rich Eq. (S. C.) 248.

8. Cal.—*Estate of Hickey*, 129 Cal. 14, 61 Pac. 475; *Wiggins v. Superior Court*, 68 Cal. 398, 9 Pac. 646; *In re Miller's Estate*, 15 Cal. App. 557, 115 Pac. 329, under Cal. Code Civ. Proc., §473. Conn.—*Sellew's Appeal*, 36 Conn. 180, under general equity power. Ga.—*Collier v. Cross*, 20 Ga. 1. Ill.—*Whittemore v. Coleman*, 239 Ill. 450, 83 N. E. 228, affirming 144 Ill. App. 109 (courts exercising probate jurisdiction in Illinois possess equitable powers in settlement of accounts); *Griswold v. Smith*, 221 Ill. 341, 77 N. E. 551; *Heppe v. Szczepanski*, 209 Ill. 88, 70 N. E. 737, 101

jurisdictions the order finally settling the estate can not be set aside or corrected in the probate court after the expiration of the term at which it was entered.⁹ Probate courts may modify, vacate or set aside their judgments at any time during the term at which they are rendered.¹⁰

b. *Time for Instituting.*—In some jurisdictions the statutes limit the time within which proceedings to set aside order confirming an account may be instituted,¹¹ and in the absence of statutes of limita-

Am. St. Rep. 221. **Ind.**—Crum *v.* Meeks, 123 Ind. 360, 27 N. E. 722, under §2403, Rev. St. 1831; Dillman *v.* Barber, 114 Ind. 403, 16 N. E. 325; Miller *v.* Steele, 64 Ind. 79. **Ky.** Manion's Admrs. *v.* Titsworth, 18 B. Mon. 582. **Md.**—Stonesifer *v.* Shriver, 100 Md. 24, 59 Atl. 139; Yakel *v.* Yakel, 96 Md. 240, 53 Atl. 914; Cummings *v.* Robinson, 95 Md. 83, 51 Atl. 1105; Hoffman *v.* Armstrong, 90 Md. 123, 44 Atl. 1012; Hoffman *v.* Hoffman, 88 Md. 60, 40 Atl. 712. **Miss.** Mayo *v.* Clancy, 57 Miss. 674 (bill of review now allowed by statute); Bowers *v.* Williams, 34 Miss. 324; Gadberry *v.* Perry, 27 Miss. 114; Pendleton *v.* Prestridge, 12 Smed. & M. 302 (bill of review only lies to valid settlement). **N. J.**—Crombie *v.* Engle, 19 N. J. L. 82. **N. Y.**—*In re* Bodine, 119 App. Div. 493, 104 N. Y. Supp. 138, under Code Civ. Proc. §2481; Matter of Tilden, 67 How. Pr. 447; Wells *v.* Wallace, 2 Redf. Sur. 58. **Pa.**—Finley's Estate, 196 Pa. 140, 46 Atl. 443; Lehr's Appeal, 98 Pa. 25; Bishop's Appeal, 26 Pa. 470; Downing's Estate, 5 Watts 90; Barr's Estate, 43 Pa. Super. Ct. 540 (review not demandable as of right). **R. I.**—Sherman *v.* Chace, 9 R. I. 166. **Vt.**—Adams *v.* Adams, 21 Vt. 162, may open and revise as to assets not mentioned in decree.

Further Account Without Vacating. When executor failed to include in his account all the debts collected, petitioner is not compelled to move to open former decree confirming final account but may, on motion, obtain an order requiring a further accounting. Matter of Heaney's Estate, 125 App. Div. 619, 110 N. Y. Supp. 80.

9. Ala.—Trawick *v.* Trawick, 67 Ala. 271; Cunningham *v.* Thomas, 59 Ala. 158; Alexander *v.* Nelson, 42 Ala. 462; Watt's Admr. *v.* Watt's Distributees, 37 Ala. 543. **Mich.**—Grady *v.* Hughes, 64 Mich. 540, 31 N. W. 438. **Miss.**

Washburn *v.* Phillips, 5 Smed. & M. 600; Harris *v.* Fisher, 5 Smed. & M. 74; but bill to review is now allowed by statute, see Miss. Code, 1906, §2136. **Mo.**—Smith *v.* Hauger, 150 Mo. 437, 51 S. W. 1052. **Ohio.**—Estate of Koehnken, 25 Ohio C. C. 245; Kinsella *v.* De Camp, 8 Ohio Cir. Dec. 352, 15 Ohio C. C. 494; Johnson *v.* Johnson, 26 Ohio St. 357. **Ore.**—*In re* Conant's Estate, 43 Ore. 530, 73 Pac. 1018. **S. C.**—Harris *v.* Stilwell, 4 Rich. 19.

In South Dakota, under §287 of the revised probate code, the settlement of an account in probate court is conclusive, except as to persons under disability, and relief can be obtained only by appeal or in another court. *In re* Nelson's Estate (S. D.), 129 N. W. 113.

10. Ill.—Griswold *v.* Smith, 221 Ill. 341, 77 N. E. 551. **Mo.**—Rottmann *v.* Schmucker, 94 Mo. 139, 7 S. W. 117. **Pa.**—Appeal of Metz, 11 Serg. & R. 204.

Clerical Errors.—Court may correct a mere clerical error or mistake, when judgment entered does not represent the decision actually made by the court. *In re* Beach's Estate, 3 Misc. 393, 24 N. Y. Supp. 717; Kinsella *v.* De Camp, 8 Ohio Cir. Dec. 352, 15 Ohio C. C. 494. And a mere motion is all that need be presented by one seeking to have clerical error corrected. Bishop's Appeal, 26 Pa. 470.

11. California.—Application must be made within a reasonable time not exceeding six months after judgment or order. Estate of Hickey, 129 Cal. 14, 61 Pac. 475.

Indiana.—Proceedings must be instituted within three years after settlement. Crum *v.* Meeks, 123 Ind. 360, 27 N. E. 722; Dickey *v.* Tyner, 85 Ind. 100; Spicer *v.* Hockman, 72 Ind. 120; Reed *v.* Reed, 44 Ind. 429.

Iowa.—Code 1873, §2475, limits to three months the time within which

tion, proceedings must be commenced within a reasonable time or they will be barred by laches.¹²

c. *Grounds for Application.*—In some jurisdictions statutes provide the grounds upon which an application to open or set aside a final settlement may be made,¹³ and in the absence of statutory provisions,

applications may be made to open accounts of executors or administrators settled in the absence of parties in interest but this statute has no application to mistakes or fraud in settlement. *Dorris v. Miller*, 105 Iowa 564, 75 N. W. 482; *Arnold v. Spates*, 65 Iowa 570, 22 N. W. 680.

Michigan.—Under Act No. 271, Pub. Acts 1905, the probate court may modify and set aside its order upon petition filed within ninety days of the entry of order. *In re Mill's Estate*, 158 Mich. 504, 122 N. W. 1080.

Mississippi.—Bills of review or proceedings to surcharge and falsify should be filed within two years from date of settlement. *Gadberry v. Perry*, 27 Miss. 114. See also, Code, 1906, §2136.

Pennsylvania.—Proceedings for review must be brought within five years after final decree. *Bagg's Appeal*, 43 Pa. 512, 82 Am. Dec. 583; *Weiting v. Nissley*, 6 Pa. 141.

Texas.—Petition to revise settlement must be filed within two years from final decree of probate court. *Dunson v. Payne*, 44 Tex. 539.

Persons Under Disabilities.—Statutes limiting time for setting aside settlements do not run against persons under disabilities until after the removal of such disabilities. *Beard v. First Presbyterian Church*, 15 Ind. 490; *Matter of Accounting Exrs. of Tilden*, 98 N. Y. 434.

12. Cases Where Delay Held Fatal.
Ala.—*Barnett's Exr. v. Tarrence*, 23 Ala. 463, twenty years. **Ind.**—*Dickey v. Tyner*, 85 Ind. 100. **Ia.**—*Matter of Estate of Holderbaum*, 82 Iowa 69, 47 N. W. 898, five years. **Md.**—*Richardson v. Billingslea*, 69 Md. 407, 16 Atl. 65, eight years; *Yearley v. Cockey*, 68 Md. 174, 11 Atl. 586, eighteen years. **N. Y.**—*Matter of Cook*, 68 Hun 280, 22 N. Y. Supp. 969; *Estate of Deyo*, 36 Hun 512, nine years; *Hart v. Duffy*, 2 Redf. Sur. 151, six years. **Pa.**—*Michener's Estate*, 225 Pa. 66, 73 Atl. 1059; *Young's Estate*, 166 Pa. 645, 31 Atl. 373, eight years; *Fletcher's Appeal*, 125 Pa. 352, 17 Atl. 340; *Barr's Es-*

tate, 43 Pa. Super. Ct. 540, five years; *Bickford's Estate*, 16 Pa. Super. Ct. 572. **Va.**—*Bradley v. Bradley*, 83 Va. 75, 1 S. E. 477, three years; *Gibboney's Exrs. v. Kent*, 82 Va. 333, 4 S. E. 610, sixteen years.

Delays Insufficient To Bar.—The fact that heirs do not file petition to vacate until a little more than a month after account confirmed does not constitute laches. *In re Wicke*, 74 App. Div. 221, 77 N. Y. Supp. 558. And a lapse of four years does not necessarily import laches. *Sipperly v. Baucus*, 24 N. Y. 46.

13. California Code Civ. Proc. §473, gives court authority to vacate decree settling final account on application of party interested when decree taken on account of his "mistake, inadvertence, surprise or excusable neglect." *Estate of Hickey*, 129 Cal. 14, 61 Pac. 475.

Indiana.—Under §2403 Rev. St., final settlement may be set aside for "illegality, fraud or mistake" by a person interested not personally served with summons and who did not appear at the hearing. *Crum v. Meeks*, 128 Ind. 360, 27 N. E. 722, quoting statute.

Iowa.—§2474 Iowa St. permits mistakes to be corrected on a showing of such grounds of relief in equity as will justify the interference of the court. *Arnold v. Spates*, 65 Iowa 570, 22 N. W. 680. See also, *Bradbury v. Wells*, 138 Iowa 673, 115 N. W. 880.

Michigan.—Under Act No. 271, Pub. Acts, 1905, the probate court may allow a rehearing of an administrator's final account on a showing of mistake or fraud. *In re Mills' Estate*, 158 Mich. 504, 122 N. W. 1080.

New York.—By Code Civ. Proc. §2481, the surrogate is given authority to vacate a decree for fraud, newly discovered evidence, clerical error, or other sufficient cause." *Matter of Bodine*, 119 App. Div. 493, 104 N. Y. Supp. 138, quoting statute; *In re Douglas*, 52 App. Div. 303, 65 N. Y. Supp. 103.

the application must seek relief on the equitable ground of mistake or fraud.¹⁴ A mistake of law is not a sufficient ground on which to base application in the probate court to set aside settlement.¹⁵

d. *Parties*.—Proceedings to set aside settlement may be instituted by the heirs,¹⁶ legatees or distributees,¹⁷ or other persons interested in the settlement of the estate.¹⁸ The executor or administrator who

Pennsylvania.—Under §1, Act of October 13, 1840, P. L. (1841) 1, as construed, account can be reviewed for error of law apparent on the face of the record, or for newly discovered evidence which has arisen since the decree. *Dox's Estate*, 227 Pa. 606, 76 Atl. 318; *Milliken's Appeal*, 227 Pa. 597, 76 Atl. 248; *Priestley's Appeal*, 127 Pa. 420, 17 Atl. 1084; *Russell's Admr.'s Appeal*, 34 Pa. 258.

14. **Ill.**—*Griswold v. Smith*, 221 Ill. 341, 77 N. E. 551; *Heppe v. Szczepanski*, 209 Ill. 88, 70 N. E. 737. **Me.** *Smith v. Dutton*, 16 Me. 308. **Md.** *Gallagher v. Martin*, 102 Md. 115, 62 Atl. 247; *Hoffman v. Hoffman*, 88 Md. 60, 40 Atl. 712; *Estate of Stratton*, 46 Md. 551. **Mass.**—*Davis v. Cowdin*, 20 Pick. 510. **N. J.**—*Crombie v. Engle*, 19 N. J. L. 82.

Consult, also cases cited *supra*, IX, D, I, a.

15. *In re Peterson's Estate*, 68 Misc. 10, 124 N. Y. Supp. 907; *In re Monteith's Estate*, 27 Misc. 163, 58 N. Y. Supp. 379; *Farmers Loan & Trust Co. v. Hill*, 4 Dem. Sur. (N. Y.) 41; *Singer v. Hawley*, 3 Dem. Sur. (N. Y.) 571.

Mere errors should be corrected by appeal and not by an application in probate court to set aside settlement (*In re Bodine*, 119 App. Div. 493, 104 N. Y. Supp. 138; *In re Walrath*, 37 Misc. 696, 76 N. Y. Supp. 448; *In re Mount's Estate*, 27 Misc. 411, 59 N. Y. Supp. 176); but court may open an intermediate account of an executor on ground of an arithmetical error therein (*Matter of Henderson*, 33 App. Div. 545, 53 N. Y. Supp. 957, *affirmed*, 157 N. Y. 423, 52 N. E. 183).

In New York, failure to file vouchers is a sufficient ground for setting aside a decree finally settling the accounts of an executor. *Matter of Wicke*, 74 App. Div. 221, 77 N. Y. Supp. 558.

16. **Cal.**—*Estate of Hickey*, 129 Cal. 14, 61 Pac. 475. **Ind.**—*Mefford*

v. Lamkin, 38 Ind. App. 33, 76 N. E. 1024, 77 N. E. 960. **Miss.**—*Bowers v. Williams*, 34 Miss. 324.

Guardian of a minor heir may present a petition to open decree on behalf of heir. *In re Nelson's Estate* (S. D.), 129 N. W. 113.

17. **Cal.**—*In re Miller's Estate*, 15 Cal. App. 557, 115 Pac. 329. **Ind.** *Harrell v. Seal*, 121 Ind. 193, 22 N. E. 983. **N. Y.**—*Matter of Wicke*, 74 App. Div. 221, 77 N. Y. Supp. 558. **Pa.** *Wright's Estate*, 12 Pa. Co. Ct. 589, 2 Pa. Dist. 195.

When legatee is deceased, his administrator or executor and not his heirs should institute proceedings to set aside the settlement of the executor of will in which legacy was given. *Collins v. Warner*, 32 Ark. 87.

Assignee of Legatee.—Decree settling accounts will not be opened on petition of one who claims as assignee of a legatee, the validity of assignment being denied, since surrogate has no jurisdiction to determine the validity of assignment. *Matter of Cook*, 68 Hun 280, 22 N. Y. Supp. 969.

18. *Manion's Admr. v. Titworth*, 18 B. Mon. (Ky.) 582; *Crum v. Meeks*, 128 Ind. 360, 27 N. E. 722, under §2403, Rev. St. 1881.

Sureties of Accountant.—Sureties of an administrator or executor may maintain proceedings to review a final settlement (*Bishop's Estate*, 10 Pa. 469); even though executor or administrator may not be entitled to such review (*Simmon's Estate*, 30 W. N. C. (Pa.) 503, 12 Pa. Co. Ct. 139); but surety cannot maintain an action to set aside surrogate's decree in the absence of fraud leading to decree (*Bodine v. Williamson*, 134 App. Div. 688, 119 N. Y. Supp. 500).

Creditor who has failed to present or give notice of his claim has not sufficient interest to maintain proceedings to set aside. *Spicer v. Hockman*, 72 Ind. 120.

accounted may himself make application for the correction of his account.¹⁹

Defendants. — Statutes sometimes provide who must be made defendants.²⁰

e. *Petition.* — (I.) **On Statutory Grounds.** — If proceedings are based upon special statutory provisions, the petition must contain averments sufficient to bring petitioner within the class entitled to relief.²¹ Relief

19. *Sellew's Appeal*, 36 Conn. 186; *Griswold v. Smith*, 221 Ill. 341, 77 N. E. 551.

One of three co-executors may petition to have set aside an order ratifying an account filed by his co-executors and in which he had refused to join. *Yakel v. Yakel*, 96 Md. 240, 53 Atl. 914.

Former administrator or his personal representative may be called upon by a subsequent administrator to show cause why his account should not be opened. *Crombie v. Engle*, 19 N. J. L. 82. Compare, *Murphey v. Menard*, 11 Tex. 673.

20. **Parties Necessary in Indiana.** In a petition to set aside a final settlement in Indiana, under §2558, Burns' Ann. St. 1901, the executor or administrator is a necessary party defendant and it is insufficient to make such executor or administrator a party in his individual capacity as heir. *Clark v. Schindler* (Ind.), 87 N. E. 44.

21. **Indiana.** — Under Burns' Ind. St. 1908, §2925, providing that settlement may be set aside by any person interested in the estate, not appearing at final settlement and not personally summoned to attend, upon the filing of a petition particularly setting forth the illegality, fraud or mistake which affected him adversely, petition must allege: 1. Facts sufficient to show that petitioner had such an interest in the estate as caused him to be injured by the illegality, fraud or mistake of which complaint is made (*Smith v. Miller*, 21 Ind. App. 82, 51 N. E. 508; *Spicer v. Hockman*, 72 Ind. 120); but widow seeking to set aside need not allege that she has neither lost nor waived her right to statutory allowance, such matter constituting defense (*Rush v. Kelley*, 34 Ind. App. 449, 73 N. E. 130). 2. That petitioner was not present at the settlement and was not served with summons to be present (*Williams v. Williams*, 125 Ind. 156, 25 N. E. 176); but county auditor

seeking to open account because taxes unpaid need not allege that he was not served with summons (*Graham v. Russell*, 152 Ind. 186, 52 N. E. 806). 3. The specific facts relied upon as constituting fraud, illegality or mistake (*Kingan & Co. v. Hawley*, 29 Ind. App. 376, 64 N. E. 620; *Jaap v. Digman*, 8 Ind. App. 509, 36 N. E. 50; *Chase v. Beeson*, 92 Ind. 61).

Departure. — Where petition of claimant, asking that settlement be set aside, shows that he appeared by counsel at the hearing, an allegation in his reply that he did not appear is a departure and should be disregarded. *Dillman v. Barber*, 114 Ind. 403, 16 N. E. 825.

Michigan. — For petition sufficient under Michigan Act No. 271, Pub. Acts, 1905, consult *In re Mill's Estate*, 158 Mich. 544, 122 N. W. 1080.

Pennsylvania. — Under Act Oct., 1840 (P. L. 1841), providing for a re-hearing of so much of account as is alleged to be erroneous, upon petition of a person interested when accountant has not paid balance found due estate, petitioner must allege that such balance has not been paid by administrator or executor to the persons entitled thereto (*Bear's Estate*, 162 Pa. 547, 29 Atl. 856; *Beck's Estate*, 4 Pa. Co. Ct. 385; *Clothier's Estate*, 20 W. N. C. 379, 4 Pa. Co. Ct. 214; *Lehr's Appeal*, 98 Pa. 25; *Cramp's Appeal*, 81 Pa. 90; *Russell's Admrs. Appeal*, 34 Pa. 258); petitioner must also set forth specifically the errors of which complaint is made (*Snyder's Estate* [No. 1], 18 Pa. Super. Ct. 462; *Cramp's Appeal*, 81 Pa. 90; *Russell's Admrs. Appeal*, 34 Pa. 258); and should also state why petitioner could not, by the exercise of reasonable diligence, have discovered errors before account was finally confirmed (*Le Moyne's Appeal*, 104 Pa. 321).

Affidavit Insufficient. — Review will not be granted when application is in the form of an affidavit and contains

is sometimes granted without formal pleadings upon the filing of a motion.²²

(II.) **On Equitable Grounds.** — A petition seeking to set aside accounting on the ground of fraud or mistake must set forth specifically the facts upon which reliance is placed.²³

f. *Hearing and Decree.* — When averments in a petition, if true, entitle plaintiff to the relief asked and accountant files no answer, decree may be granted without evidence.²⁴

Extent of Inquiry. — On petition of executor to open account to allow him to account for certain mortgages, the court need not consider objections to charges made by executor.²⁵ Decree should state as to which items the account is opened and a re-examination allowed,²⁶ since the court need not set aside the whole decree but may vacate it in so far as it relates to the error proved on the hearing.²⁷

no prayer for relief. *Cramp's Appeal*, 81 Pa. 90.

Verification. — Petitioner should verify his allegations. *Hartz' Appeal*, 2 Grant's Cas. (Pa.) 83.

Replication must be filed by petitioner or the averments in the answer will be taken as true. *Russell's Admrs. Appeal*, 34 Pa. 258.

22. *Estate of Willard*, 139 Cal. 501, 73 Pac. 240; *In re Miller's Estate*, 15 Cal. App. 557, 115 Pac. 329, under Code Civ. Proc. §473; *Griswold v. Smith*, 221 Ill. 341, 77 N. E. 551.

Motion to Question Jurisdiction. The question of the jurisdiction of the surrogate to make a decree directing a payment of counsel fees may be raised by a motion before surrogate to set aside that portion of decree. *Seaman v. Whitehead*, 78 N. Y. 306.

23. *Kows v. Mowrey*, 57 Iowa 20, 10 N. W. 283; *Hyer v. Morehouse*, 20 N. J. L. 125. See cases cited *supra*, IX, D, I, d.

In Texas, petition in probate court to revise a settlement must contain the substance of matters sought to be corrected or a copy of the proceedings sought to be revised must be filed with petition. *Dunson v. Payne*, 44 Tex. 539.

24. *Van Aken v. Welch*, 80 Iowa 114, 45 N. W. 406.

25. *Estate of Greenwood*, 83 Neb. 429, 119 N. W. 671.

In Pennsylvania, upon hearing on a bill of review, the court should not inquire as to the correctness of items to which no objection has been taken in pleadings. *Snyder's Estate* (No. 1), 18 Pa. Super. 462.

26. *Long's Estate*, 168 Pa. 341, 31 Atl. 1093.

Discretion of Court. — In Washington, the vacation of decree settling an account is largely discretionary and the court may annex to decree of vacation a condition that accountant be allowed credit on his account for any disbursements made subsequent to decree of confirmation (*Shufeldt v. Hughes*, 55 Wash. 246, 104 Pac. 253); but in New Jersey, court must grant prayer of petition, if supported by sufficient evidence (*Crombie v. Engle*, 19 N. J. L. 82).

Decree Conclusive, If No Appeal. Where person interested petitions probate court for correction of account and court decides, upon hearing, that no mistake has been made, petitioner cannot again try the question, no appeal having been taken. *Coburn v. Loomis*, 49 Me. 406.

27. *Trimmer's Exr. v. Adams*, 18 N. J. Eq. 505; *Stevenson v. Phillips*, 15 N. J. Eq. 236; *Matter of Dey Ermand*, 24 Hun (N. Y.) 1.

Manner of Correcting Account. — "If fraud or mistake is established to the satisfaction of the court, the original account ought not to be mutilated or set aside, but a new account stated making the footings of the old one the basis of such new account; adding thereto or deducting therefrom such sums as the discovery of the fraud or mistakes show ought to have been charged or credited to the accountant, thus showing upon the face of the account, the particulars in which the former account had been defectively or improperly stated." *Hyer v. More-*

3. Correction of Partial Accounts.—Partial accounts are only *prima facie* correct, although approved by the court and not excepted to, and on final settlement of estate the probate court may open such accounts and correct errors therein.²⁸

E. REVIEW.—1. Orders Subject To Review.—Any order made upon proceedings for accounting which is final is reviewable upon appeal or writ of error,²⁹ and an order settling the final account of an

house, 20 N. J. L. 125. To same effect, *Stevenson's Admr. v. Phillip's Exr.*, 21 N. J. L. 70. See, also, *Eakin v. Brick's Admr.*, 16 N. J. L. 98. But if account was improvidently allowed contrary to the statute, it should be set aside altogether, and the parties allowed to contest every item therein. *Trimmer's Exr. v. Adams*, 18 N. J. Eq. 505.

Effect of Opening.—If account is opened on petition of accountants, persons interested may attack charges in the account. *Gibbons v. Jones*, 56 Ga. 297; *Saxton v. Chamberlain*, 6 Pick. (Mass.) 422.

Effect of Refusal to Set Aside.—The fact that orphans' court dismissed petition of party asking that account be set aside in order that petitioner's claim as creditor might be satisfied does not prevent such party from proceeding in equity to enforce his claim. *Houck v. Houck*, 112 Md. 122, 76 Atl. 581.

28. Ala.—*Tayloe v. Bush*, 75 Ala. 432; *Smith's Heirs v. Smith's Admr.*, 13 Ala. 329. **Conn.**—*Clement's Appeal*, 49 Conn. 519; *Mix Appeal*, 35 Conn. 121, 95 Am. Dec. 222. **Ind.**—*Harrell v. Seal*, 121 Ind. 193, 22 N. E. 983; *Goodwin v. Goodwin*, 48 Ind. 584. **Me.**—*Arnold v. Mower*, 49 Me. 561. **Md.**—*Estate of Stratton*, 46 Md. 551. **Mass.**—*Denholm v. McKay*, 148 Mass. 434, 19 N. E. 551, 12 Am. St. Rep. 574; *Granger v. Bassett*, 98 Mass. 462; *Wiggin v. Swett*, 6 Mete. 194, 39 Am. Dec. 716; *Stetson v. Bass*, 9 Pick. 26; *Stearns v. Stearns*, 1 Pick. 157. **Miss.**—*Dement v. Heth*, 45 Miss. 388; *Harper v. Archer*, 9 Smed. & M. 71. **Mo.**—*Springfield Grocer Co. v. Walton*, 95 Mo. App. 526, 69 S. W. 477; *McClelland v. McClelland*, 42 Mo. App. 32; *In re Davis*, 62 Mo. 450. **N. H.**—*Allen v. Hubbard*, 8 N. H. 487. **N. J.**—*Liddel v. McKiever*, 11 N. J. L. 44, 19 Am. Dec. 369. **N. C.**—*Medlin v. Simpson*, 144 N. C. 397, 57 S. E. 24. **Ohio.**—*Watts v. Watts*, 38 Ohio St.

480; *Slagle v. Assignees of Slagle*, 3 Ohio Dec. 549; *compare, Campbell v. McCormick*, 1 Ohio C. C. 504. **Pa.**—*McGrew's Appeal*, 14 Serg. & R. 396. **R. I.**—*Sherman v. Chace*, 9 R. I. 166. **Tex.**—*Ingraham v. Rogers*, 2 Tex. 465.

In California, a partial account is conclusive as to all items contained therein, if no appeal is taken from the order confirming it. *Estate of Grant*, 131 Cal. 426, 63 Pac. 731, citing California cases.

When Partial Account Contested. When certain items in a partial account are excepted to and an adjudication had thereon, such items cannot be contested by the same parties upon final settlement. **La.**—*Succession of Triche*, 39 La. Ann. 289, 2 So. 52. **Minn.**—*Kittson v. St. Paul Trust Co.*, 78 Minn. 325, 81 N. W. 7. **Ohio.**—*Watts v. Watts*, 38 Ohio St. 480.

Petition To Set Aside Unnecessary. When final settlement is set aside, annual statements are open to examination and correction without the necessity of petitioning to have them set aside. See *Sheetz v. Kirtley*, 62 Mo. 417.

29. Colo.—*Clemes v. Fox*, 6 Colo. App. 377, 40 Pac. 843. **Ind.**—*Covey v. Neff*, 63 Ind. 391. **Mass.**—*Cook v. Horton*, 129 Mass. 527. **Mo.**—*Branson v. Branson*, 102 Mo. 613, 15 S. W. 74. **Neb.**—*Etmund v. Etmund*, 83 Neb. 151, 119 N. W. 239. **N. J.**—*Cooley v. Vansyckle*, 14 N. J. Eq. 496. **Ohio.**—*McMahon v. Ambach & Co.*, 79 Ohio St. 103, 86 N. E. 512. **Pa.**—*Rhoad's Appeal*, 39 Pa. 186. **Vt.**—*Adams v. Adams*, 21 Vt. 162.

Appeal From Part of Decree.—Appeal cannot be taken from disallowance of certain items in an account, but appeal must be from order itself so that re-hearing may be had on entire account (*Showers' Estate*, 41 Mich. 700, 3 N. W. 193); but an appeal from a part of a final order may be taken, if part whereby appellant is aggrieved

executor or administrator,³⁰ or an order refusing to set aside a decree confirming an account,³¹ is a final order and appealable.

Orders Not Appealable.—A decree rendered on a partial or annual settlement of an executor is interlocutory only and not subject to review on appeal or writ of error.³² No appeal lies from an order of the probate court vacating a prior order settling the final account of an executor or administrator;³³ nor from an order refusing to allow account informally presented;³⁴ nor from an order not sufficiently specific to constitute final decree;³⁵ nor from an order inadvertently omitting items allowed by court in its findings which probate court

is so far distinct that it may be adjudicated without review of entire order (*St. Paul Trust Co. v. Kittson*, 84 Minn. 493, 87 N. W. 1012). See, also, *Estate of Wilson*, 83 Neb. 252, 119 N. W. 522.

Certiorari.—In Texas, heirs may obtain relief by a writ of certiorari, although they failed to appeal from the order settling accounts and discharging accountant. *Friend v. Boren*, 43 Tex. Civ. App. 33, 95 S. W. 711.

30. **Cal.**—*Estate of Grant*, 131 Cal. 426, 63 Pac. 731; *In re Delaney*, 110 Cal. 563, 42 Pac. 981; *In re Coutts*, 87 Cal. 480, 25 Pac. 685; *In re Sander-son*, 74 Cal. 199, 15 Pac. 753; *Dean v. Superior Court*, 63 Cal. 473. **Conn.** *Edmond v. Canfield*, 8 Conn. 87. **Idaho.** *Estate of Coryell*, 16 Idaho, 201, 101 Pac. 723. **Ill.**—*Crowe v. Morrison*, 147 Ill. App. 107. **Ind.**—*Covey v. Neff*, 63 Ind. 391. **Ky.**—*Caplinger v. Pritchard*, 136 Ky. 349, 124 S. W. 352. **La.**—*Suc-cession of McCan*, 49 La. Ann. 968, 22 So. 225. **Minn.**—*St. Paul Trust Co. v. Kittson*, 84 Minn. 493, 87 N. W. 1012. **Mo.**—*Branson v. Branson*, 102 Mo. 613, 15 S. W. 74; *State v. Hender-son*, 164 Mo. 347, 64 S. W. 138, 86 Am. St. Rep. 618. **Mont.**—*State v. District Court*, 34 Mont. 303, 87 Pac. 614; *In re Barker's Estate*, 26 Mont. 279, 67 Pac. 941. **Neb.**—*Estate of Wilson*, 86 Neb. 175, 125 N. W. 158; *Etmund v. Etmund*, 83 Neb. 151, 119 N. W. 239. **Nev.**—*Bowman v. Bowman*, 27 Nev. 413, 76 Pac. 634. **S. C.**—*Mitchell v. Connolly*, 1 Bailey 203. **Va.**—*Farney-hough's Exrs. v. Dickerson*, 2 Rob. 582.

In **Illinois**, appeal lies although no exceptions taken to order approving final account and no objections filed to administrator's report. *Crowe v. Mor-ri-son*, 147 Ill. App. 107.

In **Kentucky**, the judgment of the county court admitting an adminis-

trator's settlement to record is not appealable. *Turner v. Johnson County Court*, 14 Bush. (Ky.) 411.

In **Virginia**, an account of an execu-tor or administrator, although con-firmed by the court, is not a final set-tlement subject to review on appeal until surcharged and falsified in the manner indicated by section 2699 of the statutes. *Owens v. Owens' Exr.*, 109 Va. 432, 63 S. E. 990.

31. **Ill.**—*Griswold v. Smith*, 116 Ill. App. 223, writ of error dismissed; 214 Ill. 323, 73 N. E. 400. **N. J.**—*Gith-ens v. Goodwin*, 32 N. J. Eq. 286. **Vt.** *Adams v. Adams*, 21 Vt. 162.

Contra, *In re Kelly's Estate*, 31 Mont. 356, 78 Pac. 579, 79 Pac. 244.

32. **Ala.**—*Thompson v. Hunt*, 22 Ala. 517; *Stewart v. Price*, 16 Ala. 40; *compare*, *Savage v. Benham*, 11 Ala. 49. **Ind.**—*Goodwin v. Goodwin*, 48 Ind. 584. **Mo.**—*North v. Priest*, 81 Mo. 561; *Baker v. Runkle's Exr.*, 41 Mo. 391, *following* *Picot v. Biddle's Admr.*, 35 Mo. 29. **Pa.**—*Light's Appeal*, 22 Pa. 445.

Compare, *In re Ward's Estate*, 152 Mich. 218, 116 N. W. 23.

In **California**, where partial account is conclusive as to all items contained therein, an appeal lies from an order approving such an account. *Estate of Grant*, 131 Cal. 426, 63 Pac. 731. *Con-sult*, also, *In re Bottoms' Estate*, 156 Cal. 129, 103 Pac. 849.

33. **Cal.**—*Estate of Hickey*, 121 Cal. 378, 53 Pac. 818. **Kan.**—*Branner v. Webb*, 61 Kan. 181, 59 Pac. 270. **Pa.** *Long's Estate*, 168 Pa. 341, 31 Atl. 1093.

34. *Trammel's Exrs. v. Trammel's Heirs*, 50 Ala. 39.

35. *Watt's Admr. v. Watt's Dis-tributees*, 37 Ala. 543.

might correct on application;³⁶ nor from an order settling part of account but continuing the remainder for further consideration;³⁷ nor from an order granting motion to strike out objections to account.³⁸

2. Persons Entitled To Review.—An appeal from a final order made upon proceedings for accounting may be taken by creditors of estate,³⁹ heirs or devisees,⁴⁰ legatees or distributees,⁴¹ executors or administrators,⁴² or other persons interested in the estate,⁴³ providing

36. *Estate of Byrne*, 122 Cal. 260, 54 Pac. 957.

37. *Estate of Coryell*, 16 Idaho 201, 101 Pac. 723.

38. *State v. District Court*, 34 Mont. 303, 87 Pac. 614.

39. **La.**—*Succession of Hartigan*, 51 La. Ann. 126, 24 So. 794; *Succession of Lacroix*, 29 La. Ann. 366; *Succession of Bellocq*, 28 La. Ann. 154. **Mo.** *Taylor v. Bader*, 117 Mo. App. 72, 98 S. W. 80. **N. Y.**—*Matter of Sullivan*, 84 App. Div. 51, 82 N. Y. Supp. 32. **Tex.**—*Davenport v. Harvey*, 30 Tex. 308.

One having claim against executor or administrator for services rendered in the settlement of the estate is not a creditor of the estate and has no right to appeal from a decree settling a final account. *In re Estate of Kruger*, 143 Cal. 141, 76 Pac. 891 (dismissing appeal by attorney for executor); *Burke v. Terry*, 28 Conn. 414.

40. **Me.**—*Paine v. Goodwin*, 56 Me. 411. **Mass.**—*Smith v. Haynes*, 111 Mass. 346. **N. H.**—*Mathes v. Bennett*, 21 N. H. 188.

A grantee of a devisee (*Leavitt v. Wooster*, 14 N. H. 550), or of an heir (*Bryant v. Allen*, 6 N. H. 116), may appeal, if aggrieved by an order settling a final account. Compare, *Gunn v. Green*, 14 Wis. 316.

41. **Me.**—*Tillson v. Small*, 80 Me. 90, 13 Atl. 402. **Mass.**—*Pierce v. Gould*, 143 Mass. 234, 9 N. E. 568. **Mo.** *Estate of Danforth*, 66 Mo. App. 586.

Legatee cannot appeal from order confirming account when his legacy is ordered paid and there is a surplus for distribution beyond what is necessary to satisfy his claim. *Labar v. Nichols*, 23 Mich. 310.

Grantee of residuary legatee may appeal from order allowing account when there is no property to satisfy debts except that conveyed to grantee. *Blastow v. Hardy*, 83 Me. 28, 21 Atl. 179.

42. **Cal.**—*In re Hall's Estate*, 154 Cal. 527, 98 Pac. 269. **Ill.**—*Whittemore v. Coleman*, 239 Ill. 450, 88 N. E. 228. **Ind. Ter.**—*In re Overton's Estate*, 5 Ind. Ter. 334, 82 S. W. 766.

La.—*Succession of Heffner*, 49 La. Ann. 407, 21 So. 905; *Succession of Cassidy*, 40 La. Ann. 827, 5 So. 292. **Neb.**—*Estate of Wilson*, 83 Neb. 252, 119 N. W. 522. **N. Y.**—*Matter of Hodgman*, 23 N. Y. Supp. 725, 69 Hun 484.

Revocation of letters of administration after order settling accounts of administrator does not affect administrator's right to appeal from the order of settlement. *In re McPhee's Estate* (Cal.), 97 Pac. 878.

An administrator *de bonis non* may appeal from a decree allowing the account of the original administrator or executor. *Wiggin v. Swett*, 6 Mete. (Mass.) 194, 39 Am. Dec. 716.

A co-executor may appeal from an order approving a separate account of the other executor in which the latter is allowed a claim against estate. *Hesson v. Hesson*, 14 Md. 8.

Administrator or executor whose individual claim has been rejected must appeal as an individual and not in his official capacity. *Succession of Hartigan*, 51 La. Ann. 126, 24 So. 794. See, also, *Succession of Mauseberg*, 37 La. Ann. 126; *Payne v. Dejean*, 32 La. Ann. 889.

Certiorari.—An administrator ordered on settlement to turn over certain property, which came into his hands as administrator but which he claims as agent of a third party, cannot bring certiorari to have the court's action reviewed. *State ex rel. Barker v. District Court*, 26 Mont. 369, 68 Pac. 856.

43. **Ind.**—*Reed v. Reed*, 44 Ind. 429. **Me.**—*Blastow v. Hardy*, 83 Me. 28, 21 Atl. 179. **Neb.**—*Gannon v. Phelan*, 64 Neb. 220, 89 N. W. 1028. **N. H.**—*Bryant v. Allen*, 6 N. H. 116. **N. Y.**—*Mat-*

the party seeking to appeal is injuriously affected by such final order.⁴⁴

X. PROCEEDINGS TO OBTAIN ORDER FOR DISTRIBUTION.

A. JURISDICTION OF PROBATE COURT.—In nearly all jurisdictions, application for an order of distribution may be made to the probate court.⁴⁵ An order of distribution should be obtained from the court,⁴⁶ since such an order is a full and complete protection to an administra-

ter of Sullivan, 84 App. Div. 51, 82 N. Y. Supp. 32, *quoting* §2569 N. Y. Code Civ. Proc.

Surety upon the bond of an executor or administrator cannot appeal in his own name from a decree settling the account of his principal. *Tuxbury's Appeal*, 67 Me. 267, *following* *Woodbury v. Hammond*, 54 Me. 332.

Estoppel.—When person interested appends to his account a statement that he has examined account and asks for its confirmation as stated, he is estopped from subsequently taking an appeal on the ground that there are errors in certain items of account. *In re Sherwood's Estate*, 206 Pa. 465, 56 Atl. 20.

44. See the title, "Appeals."

45. **Ark.**—*Ferguson v. Carr*, 85 Ark. 246, 107 S. W. 1177 (probate court alone has jurisdiction to order distribution); *State v. Roth*, 47 Ark. 222. **Cal.**—*Estate of Richards*, 133 Cal. 524, 65 Pac. 1034; *Estate of Sheid*, 122 Cal. 528, 55 Pac. 328. **Conn.**—*State v. Culhane*, 78 Conn. 622, 63 Atl. 636; *Mack's Appeal from Probate*, 71 Conn. 122, 41 Atl. 242. **Ill.**—*Reynolds v. The People*, 55 Ill. 328. **Ind.**—*Chapell v. Shuee*, 117 Ind. 481, 20 N. E. 417. **Ia.** *Duffy v. Duffy*, 114 Iowa 581, 87 N. W. 500, jurisdiction exclusively in probate court. **Kan.**—*Lewis v. Woodrum*, 76 Kan. 384, 92 Pac. 306; *Holden v. Spier*, 65 Kan. 412, 70 Pac. 348; *Proctor v. Dicklow*, 57 Kan. 119, 45 Pac. 86. **Md.** *Williams v. Holmes*, 9 Md. 281. **Me.** *Stilhen, Appellant*, 100 Me. 146, 60 Atl. 888; *Healy v. Cole*, 95 Me. 272, 49 Atl. 1065. **Mass.**—*Pierce v. Prescott*, 128 Mass. 140. **Mich.**—*Byrne v. Hume*, 86 Mich. 546, 49 N. W. 516; *Cross v. Eaton*, 48 Mich. 184, 12 N. W. 35. **Minn.**—*Schmidt v. Stark*, 61 Minn. 91, 63 N. W. 255. **Miss.**—*Hoover v. Brem*, 43 Miss. 603; *Wells v. Mitchell*, 39 Miss. 800. **Mo.**—*Lietman's Exr. v. Lietman*, 149 Mo. 112, 50 S. W. 307, 73 Am. St. Rep. 374; *Aull v. St. Louis Trust Co.*, 149 Mo. 1, 50 S. W. 289;

Darneal v. Reeves' Exr., 25 Mo. 295. **Neb.**—*In re Manning's Estate*, 83 Neb. 417, 119 N. W. 672. **N. J.**—*Van Houten v. Stevenson*, 74 N. J. Eq. 1, 77 Atl. 612; *Wyckhoff v. O'Neil*, 71 N. J. Eq. 681, 63 Atl. 982. **N. Y.**—*Beers v. Strong*, 128 App. Div. 20, 112 N. Y. Supp. 382; *Matter of Lattan*, 42 Misc. 467, 87 N. Y. Supp. 246. **N. C.**—*Hendrick v. Mayfield*, 74 N. C. 626 (exclusive jurisdiction in probate court); *Bell v. King*, 70 N. C. 330. **Pa.**—*Kelly's Appeal*, 77 Pa. 232; *Mussleman's Appeal*, 65 Pa. 480. **Tex.**—*Dodson v. Wortham*, 18 Tex. Civ. App. 666, 45 S. W. 858. **Va.**—*Carter's Admr. v. Skillman*, 108 Va. 204, 60 S. E. 775. **Vt.** *Keeler v. Exrs. of Keeler*, 39 Vt. 550. **Wash.**—*Reformed Presbyterian Church v. McMillan*, 31 Wash. 643, 72 Pac. 502. **Wis.**—*Will of Hess*, 97 Wis. 244, 72 N. W. 638.

In Ohio, the probate court has no jurisdiction to determine the persons to whom distribution is to be made and the amount going to each (*First National Bank of Cadiz v. Beebe*, 62 Ohio St. 41, 56 N. E. 485, citing Ohio cases); and if personal representative ordered to pay to the persons entitled thereto pays to the wrong persons, he may be compelled to pay in an action by the person entitled to distribution (*Estate of Koehnken*, 25 Ohio C. C. 245).

46. **Conn.**—*State v. Culhane*, 78 Conn. 622, 63 Atl. 636. "It is the duty of an executor to apply to the court of probate, within a reasonable time after the settlement of his administration account, for an order of distribution; and where property is lost by his neglect to do this, he is chargeable with the loss." *Sanford v. Thorp*, 45 Conn. 241. **Ill.**—*Haskins v. Martin*, 103 Ill. App. 115. **Neb.**—*Howe v. Blumenkamp*, 88 Neb. 389, 129 N. W. 539; *Boales v. Ferguson*, 55 Neb. 565, 76 N. W. 18 (one who distributes without authority assumes responsibility of distribution to proper persons).

tor or executor who acts in good faith and makes distribution under it.⁴⁷

B. TIME FOR FILING PETITION.—Statutes usually provide when persons interested may require distribution or payment of legacies.⁴⁸ As a general rule, a petition for final distribution should not be filed prior to the settlement of the final account of the executor or administrator,⁴⁹ but a petition for partial distribution may be presented at any time previous to final settlement when it appears that there are more than sufficient assets to satisfy all demands against the estate.⁵⁰

C. PERSONS ENTITLED TO ASK FOR ORDER.—The executor or administrator may apply for an order of distribution⁵¹ and statutory

47. **Colo.**—*Wilson v. Board of Regents*, 46 Colo. 100, 102 Pac. 1088. **Ill.** *Strawn v. Jacksonville Academy*, 240 Ill. 111, 88 N. E. 460. **Md.**—*Shriver v. Dwyer*, 65 Md. 278, 4 Atl. 679; *Wilson v. McCarthy*, 55 Md. 277. **Mass.** *Cleaveland v. Draper*, 194 Mass. 118, 80 N. E. 227. **Mich.**—*Ernst v. Freeman's Estate*, 129 Mich. 271, 88 N. W. 636, even though time for appeal has not expired. **Va.**—*Carter's Admr. v. Skillman*, 108 Va. 204, 60 S. E. 775.

Distribution Without Order.—Distribution of assets without an order of court may be made legally, if debts against estate are paid, although personal representative assumes risk of distributing to the proper parties. *Miller-Shoemaker Real Estate Co. v. Sturgeon*, 31 App. Cas. (D. C.) 406.

Legatee is not bound to accept payment in instalments when tendered, unless administrator or executor has obtained an order for partial distribution. *Welch v. Adams*, 152 Mass. 74, 25 N. E. 34.

48. **In California**, under Civ. Code, section 1663, legatee may present his petition for distribution at any time after the "lapse of one year from the issuance of letters testamentary." *In re Mayhew's Estate*, 4 Cal. App. 162, 87 Pac. 417.

In Texas, under Rev. St., Art. 2158 *et seq.*, distribution of all estate that can be distributed may be compelled when the administration has been pending twelve months. *Routledge v. Elmerdorf*, 54 Tex. Civ. App. 174, 116 S. W. 156.

49. *Estate of Sheid*, 122 Cal. 528, 55 Pac. 328 (dismissing petition for distribution pending final settlement, although Cal. Stat. section 1634 permits a petition for distribution to be filed "with" the final account); *Lowe v. Lowe*, 6 Md. 347. Compare, *Clarke*

v. Sandrock (Md.), 77 Atl. 644, holding passage of final account not jurisdictional where former accounts show a balance due distributees after payment of debts.

When executor or administrator refuses to file his final account, the court may order the estate assigned to the sole devisee, after all parties interested have satisfactorily adjusted the affairs of the estate. *In re Lambie's Estate*, 112 Mich. 118, 70 N. W. 442.

50. *Reynolds v. The People*, 55 Ill. 328; *Chapell v. Shuee*, 117 Ind. 481, 20 N. E. 417, quoting Indiana statute.

The better practice is to require a written account or report by the executor or administrator before ordering a partial distribution. *Murdock v. Murdock*, 111 Ill. App. 375.

Distribution During Special Administration.—A partial distribution will not be ordered on application made while estate is in the hands of a special administrator. *In re Welch*, 106 Cal. 427, 39 Pac. 805.

Distribution Pending Will Contest. After notice of application to revoke probate of will, the court cannot grant application for an order directing that a portion of estate be distributed among legatees. *Matter of McGowan*, 28 Hun (N. Y.) 246.

51. **Cal.**—*Estate of Wickersham*, 138 Cal. 355, 71 Pac. 437, 70 Pac. 1076; *Estate of Sheid*, 122 Cal. 528, 55 Pac. 328 (petition may be filed with account under Cal. St., §1634). **Conn.** *State v. Culhane*, 78 Conn. 622, 63 Atl. 636; *Sanford v. Thorp*, 45 Conn. 241; *Davenport v. Richards*, 16 Conn. 309. **Ill.**—*Haskins v. Martin*, 103 Ill. App. 115, it is part of duty of personal representative to apply for order. **Kan.**—*Holden v. Spier*, 65 Kan. 412, 70 Pac. 348.

In Mississippi, an application for a

provisions are usually sufficiently broad to authorize applications by heirs, devisees or legatees.⁵²

D. PARTIES.—The administrator or executor is a necessary party to proceedings for an order of distribution,⁵³ and other distributees whose rights must be determined in order to afford protection to the personal representative should also be made parties.⁵⁴

E. PLEADING.—The technical rules of pleading are not, as a general rule, applied in proceedings for distribution in the probate court,⁵⁵ and a petition in writing is not always required.⁵⁶ Petition should

division of lands among the heirs and devisees cannot be made by executor. *Temple v. Hammock*, 52 Miss. 360.

In California, a petition for partial distribution cannot be presented by an administrator or executor. *Alcorn v. Gieseke*, 158 Cal. 396, 111 Pac. 98; *Alcorn v. Buschke*, 133 Cal. 655, 66 Pac. 15; *In re Letellier*, 74 Cal. 311, 15 Pac. 847.

52. Cal.—*Bell v. Wilson*, 159 Cal. 57, 112 Pac. 1100; *Alcorn v. Gieseke*, 158 Cal. 396, 111 Pac. 98 (heirs, devisees or legatees); *In re Mayhew's Estate*, 4 Cal. App. 162, 87 Pac. 417. **Ind.** *Conner v. Hawkins*, 8 Blackf. 236, heirs. **Md.**—*Clarke v. Sandrock*, 113 Md. 422, 77 Atl. 644, distributees. **Mich.**—*Langrick v. Gospel*, 48 Mich. 185, 12 N. W. 38, legatee or devisee. **Miss.**—*Crowder v. Shackelford*, 35 Miss. 321, distributees. **Mont.**—*In re Davis' Estate*, 27 Mont. 490, 71 Pac. 757. **Nev.**—*Estate of Foley*, 24 Nev. 197, 52 Pac. 649, heir, devisee or legatee. **Tex.**—*Routledge v. Elmerdorf*, 54 Tex. Civ. App. 174, 116 S. W. 156, heirs.

Widow of decedent may compel distribution. *Grant v. Spann*, 33 Miss. 134.

Guardian of distributee may petition for distribution in his own name. *Gammage v. Noble*, 24 Miss. 150.

Assignee of Heir.—In Mississippi, assignee of an heir may petition for distribution (*McIntosh v. Rutland*, 88 Miss. 718, 41 So. 372); but under New York statute authorizing petition to require payment of legacies, surrogate cannot compel assignment of whole estate on petition of assignee of sole heir (*Matter of Wood*, 38 Misc. 64, 76 N. Y. Supp. 967).

In New York, assignee of legatee cannot petition for payment of legacy under statute authorizing legatee to require payment of legacy after lapse of one year. *Matter of Brewster*, 1

Con. Sur. 172, 3 N. Y. Supp. 556; *Peyser v. Wendt*, 2 Dem. Sur. (N. Y.) 221.

Joinder.—A petition for partial distribution may be presented by several legatees. *In re Crocker*, 105 Cal. 368, 38 Pac. 954.

53. Ala.—*Ward v. Oates*, 42 Ala. 225, holding administrator only indispensable party in proceedings to require partial distribution. **Ky.**—*Haden v. Haden's Heirs*, 7 J. J. Marsh 168. **Miss.**—*Porter's Heirs v. Porter*, 7 How. 106.

Compare, *Pringle v. Hunt*, 31 Miss. 351.

54. Ark.—*Norwood v. Holliman*, 27 Ark. 445. **Ia.**—*Succession of Bothick*, 109 La. 1, 33 So. 47. **Miss.**—*Murff v. Frazier*, 41 Miss. 408; *Mundy v. Calvert*, 40 Miss. 181; *Shattuck v. Young*, 2 Smed. & M. 30; *Porter's Heirs v. Porter*, 7 How. 106. **N. J.**—*Wyckoff v. O'Neil*, 71 N. J. Eq. 681, 63 Atl. 982. **N. Y.**—*Beekman v. Vanderveer*, 3 Dem. Sur. 221; *Clock v. Chadeagne*, 10 Hun 97.

Intervention.—One who purchases land from a devisee while administration is pending is not entitled to intervene when application is made by administrator for an order of distribution. *Hallam v. Moore* (Tex. Civ. App.), 126 S. W. 908.

55. Cal.—*Estate of Murphy*, 145 Cal. 464, 78 Pac. 960, "elaborate pleadings are not required or contemplated in this proceeding." **Ind.** *Gray v. Swerer*, 94 N. E. 725, although statutes provide that civil rules of practice and procedure are applicable. **Miss.**—*Anderson v. Gregg*, 44 Miss. 170; *Mundy v. Calvert*, 40 Miss. 181; *French v. Davis*, 38 Miss. 167.

56. Walker v. Bradbury, 15 Me. 207.

In Indiana, the filing of the final account confers upon the court jurisdiction to make an order of distribution of the surplus without a subse-

contain the necessary allegations to bring petitioner within the class entitled to relief under the statute.⁵⁷

Answer.—A formal answer by personal representative is not required in order to enable him to show cause on the hearing why a decree for distribution should not be made.⁵⁸

F. NOTICE.—Notice of the application for an order of distribution must be given to the administrator or executor⁵⁹ and to all distributees

quent petition or pleading. *Jones v. Jones*, 115 Ind. 504, 18 N. E. 20.

In New York, under §2722, Code of Civ. Proc., an application to surrogate for an order directing the payment of a legacy or distributive share must be by petition and citation, and such application is not a motion in a pending proceeding which can be founded upon an affidavit. *Matter of Moran*, 58 Misc. 488, 111 N. Y. Supp. 640; *Estate of Lyons*, 1 Misc. 447, 23 N. Y. Supp. 146.

57. California.—For sufficient petition under statute, see *Estate of Murphy*, 145 Cal. 464, 78 Pac. 960; *In re Levinson*, 98 Cal. 654, 33 Pac. 726.

Petition by several legatees and devisees is not fatally defective because it describes the petitioners as "heirs at law." *In re Crocker*, 105 Cal. 363, 38 Pac. 954.

Mississippi.—Petition to compel distribution should show that there has been a final settlement of estate, or aver that petitioner has executed a re-funding bond. *Crosby v. Covington*, 24 Miss. 619. But it is not necessary to allege that administration was granted in the court in which petition is filed, since this will be presumed. *Hargroves v. Thompson*, 31 Miss. 211.

New York.—A petition by a legatee for an order directing payment of a legacy, under §§2717, 2718, N. Y. Code Civ. Proc., must show "that there is money or other personal property of the estate applicable to the payment or satisfaction of petitioner's claim and which may be applied without injuriously affecting the rights of others." Petition should not embody a prayer for an intermediate accounting. *Baylis v. Swartwout*, 4 Redf. Sur. (N. Y.) 395.

Prayer.—In a petition for distribution by a personal representative it is improper to ask that a distributee be compelled to account for property re-

ceived by him in another state. *In re Cook*, 77 Cal. 220, 17 Pac. 923, 19 Pac. 431, 11 Am. St. Rep. 267.

Verification.—A petition to require payment of a legacy, under New York statute, should be verified. *Matter of Application of Macaulay*, 94 N. Y. 574.

58. French v. Davis, 38 Miss. 167.

Answer Proper.—Executor or administrator should be permitted to file a verified answer to a petition for distribution. *Matter of Feeks*, 6 N. Y. St. 60.

Pleading by Intervenor.—An interested party not made a party who wishes to intervene should present "some pleading or statement as to the grounds upon which he claims the right to be heard." *In re Estate of Crooks*, 125 Cal. 459, 58 Pac. 89.

Reply.—If objections to an answer to petition are overruled, the proceedings should not be dismissed but petitioner should be permitted to file a reply. *Conner v. Hawkins*, 8 Blackf. (Ind.) 236.

59. Ala.—*Brazeale's Admr. v. Brazeale's Distributees*, 9 Ala. 491, unless distribution made at final settlement. **Ia.**—*Huey v. Huey*, 26 Iowa 525. **N. Y.** *Kerrigan v. Kerrigan*, 2 Redf. Sur. 517.

See, however, *Harrison's Admr. v. Meadors*, 41 Ala. 274.

In Missouri, administrator or executor is not entitled to notice of an application for an order of distribution of funds found to be in his hands at final settlement. *State v. Henderson*, 164 Mo. 347, 64 S. W. 138, 86 Am. St. Rep. 618.

Form of Citation.—Citation to administrator to show cause why partial distribution should not be ordered should run in name of the people. *Reynolds v. The People*, 55 Ill. 328.

When administrator is a resident of another state, service of notice on him in that state is sufficient. *Huey v. Huey*, 26 Iowa 525.

whose rights are to be affected by such order of distribution.⁶⁰

Manner of Giving Notice.—Statutes usually prescribe the manner of giving notice or authorize the court to direct what notice shall be given.⁶¹ Notice of the filing of final account is not sufficient to authorize a decree for final distribution,⁶² except in those jurisdictions where final settlement and distribution are treated as parts of the same proceeding.⁶³

G. APPOINTMENT AND PROCEEDINGS OF COMMISSIONERS.—In some jurisdictions the probate court may appoint commissioners or auditors to ascertain the shares to which distributees are entitled.⁶⁴ Commissioners or auditors have no power to review the proceedings of the probate court or to alter or re-state the account,⁶⁵ and they must report to the court which appointed them.⁶⁶ The probate court may modify

60. **U. S.**—Rich *v. Victoria Copper Min. Co.*, 147 Fed. 380, 77 C. C. A. 558, notice required by Michigan statute. **Ala.**—Gardner's Exr. *v. Gardner's Heirs*, 42 Ala. 161. **Ark.**—Neal *v. Robertson*, 55 Ark. 79, 17 S. W. 587. **Cal.**—Estate of Mitchell, 126 Cal. 248, 58 Pac. 549; Asher *v. Yorba*, 125 Cal. 513, 58 Pac. 137; Abila *v. Burnett*, 33 Cal. 658. **Ill.**—Long *v. Thompson*, 60 Ill. 27. **Ind.**—Glessner *v. Clark*, 140 Ind. 427, 39 N. E. 544. **Md.**—Wilson *v. McCarty*, 55 Md. 277. **Mass.**—Lamson *v. Knowles*, 170 Mass. 295, 49 N. E. 440. **Minn.**—Greenwood *v. Murray*, 28 Minn. 120, 9 N. W. 629; Wood *v. Myrick*, 16 Minn. 494. **Miss.**—Mundy *v. Calvert*, 40 Miss. 181. **Mo.**—State *v. Burnes*, 129 Mo. App. 474, 107 S. W. 1094 (quoting Missouri statute); Lilly *v. Menke*, 126 Mo. 190, 28 S. W. 643; State *v. St. Gemme's Admr.*, 31 Mo. 230. **N. J.**—Van Houten *v. Stevenson*, 74 N. J. Eq. 1, 77 Atl. 612; Adams *v. Adams*, 46 N. J. Eq. 298, 19 Atl. 14. **N. Y.**—Matter of Rainforth, 37 Misc. 660, 76 N. Y. Supp. 314. **Ore.**—State *v. O'Day*, 41 Ore. 495, 69 Pac. 542. **Pa.**—Purviance *v. Com.*, 17 Serg. & R. 31. **S. C.**—Brown *v. Brown*, 75 S. C. 25, 54 S. E. 833. **Vt.**—*Ex parte Robinson*, 1 D. Chip. 357. **Wash.**—*In re Ostlund's Estate*, 57 Wash. 359, 106 Pac. 1116, notice by publication sufficient. **Wis.**—Bresee *v. Stiles*, 22 Wis. 120.

In Utah, the failure to give notice does not deprive the court of jurisdiction to decree final distribution. *Barrette v. Whitney*, 36 Utah 574, 106 Pac. 522.

Notice to Attorney General is unnecessary under New York Code Civ.

Proc., §2747, requiring that, "when a person entitled to a legacy or distributive share is unknown, the decree must direct that the amount be paid into the state treasury." *In re Davenport*, 141 App. Div. 41, 126 N. Y. Supp. 693.

61. See *Asher v. Yorba*, 125 Cal. 513, 58 Pac. 137, quoting California statute authorizing court to direct notice.

Personal notice is not essential unless required by statute. **Cal.**—Daly *v. Pennie*, 86 Cal. 552, 25 Pac. 67, 21 Am. St. Rep. 61. **Tex.**—Porter *v. Sweeney*, 61 Tex. 213. **Wash.**—*In re Ostlund's Estate*, 57 Wash. 359, 106 Pac. 1116.

62. *Adams v. Adams*, 46 N. J. Eq. 298, 19 Atl. 14.

63. *Ex parte Pearce*, 44 Ark. 509; *Seruggs v. Seruggs*, 69 Kan. 487, 77 Pac. 269.

64. **Ala.**—Chambers *v. Perry*, 17 Ala. 726; *Harrison v. Harrison*, 9 Ala. 470. **Ky.**—Williams' Heirs *v. Williams' Heirs*, 13 Ky. 40. **Miss.**—Bradley *v. Byrd*, 12 Smed. & M. 269. **Pa.**—Heyer's Appeal, 34 Pa. 183; *Kittera's Estate*, 17 Pa. 416.

Appointment of Distributors.—When widow, given authority by will to select half of testator's estate, dies before completing selection, distributors must be appointed by court to complete selection. *Walker v. Upson*, 74 Conn. 128, 49 Atl. 904.

65. *Meeker v. Exrs. of Vanderveer*, 15 N. J. L. 392; *Wither's Appeal*, 16 Pa. 151.

66. *Harrison v. Harrison*, 9 Ala. 470; *Bradley v. Byrd*, 12 Smed. & M. (Miss.) 269.

or correct the report presented by the auditors or commissioners.⁶⁷

H. QUESTIONS DETERMINABLE BY COURT UPON HEARING. — On the hearing the court has power to decide all questions necessary for a proper distribution⁶⁸ and may therefore determine what is to be distributed,⁶⁹ who are entitled to share in distribution,⁷⁰ and the share to which each legatee or distributee is entitled.⁷¹ The probate court

Report of majority of commissioners is sufficient. *Chambers v. Perry*, 17 Ala. 726.

Exceptions may be taken to report by any person interested. *Harrison v. Harrison*, 9 Ala. 470; *Bracken's Estate*, 138 Pa. 104, 22 Atl. 20.

67. *Aull v. St. Louis Trust Co.*, 149 Mo. 1, 50 S. W. 289.

68. *King's Estate*, 215 Pa. 59, 64 Atl. 324; *Williamson's Appeal*, 94 Pa. 231; *Dundas' Appeal*, 73 Pa. 474; *Brittain's Estate*, 28 Pa. Super. Ct. 144.

Validity of an ante-nuptial agreement made by decedent in contemplation of the future distribution of his property may be determined in proceedings for distribution. *In re Jones' Estate*, 3 Misc. 584, 24 N. Y. Supp. 706; *Winkle v. Winkle*, 8 Ore. 193.

In New York, under Code Civ. Proc., §§2717, 2718, the surrogate must dismiss petition by one claiming a legacy when executor "files a written answer, duly verified, setting forth facts which show that it is doubtful whether the petitioner's claim is valid and legal, and denying its validity." *Fiester v. Shepard*, 92 N. Y. 251 (quoting statute); *Cuthbert v. Jacobson*, 2 Dem. Sur. (N. Y.) 134.

69. *Md.*—*Pole v. Simmons*, 45 Md. 246. *Miss.*—*McWillie v. Van Vaeter*, 35 Miss. 428, 72 Am. Dec. 127. *Pa.* *Dundas' Appeal*, 73 Pa. 474; *Dewald v. Berkheiser*, 19 Pa. Super. 570. *Vt.*—*Ex parte Robinson*, 1 D. Chip. 357.

Estoppel.—The order for partial distribution, in pursuance of an application of distributee, does not estop him from later proving that personal representative had, at the time of the order, a larger sum subject to distribution than was ordered distributed. *The State v. Berning*, 6 Mo. App. 105.

70. *Cal.*—*Crew v. Pratt*, 119 Cal. 139, 51 Pac. 38; *Estate of Hinkley*, 58 Cal. 457. *Conn.*—*Mack's Appeal*, 71 Conn. 122, 41 Atl. 242; *Davenport v. Richards*, 16 Conn. 309. *Md.*—*Pole v. Simmons*, 45 Md. 246. *Miss.*—*Lowry v. McMillan*, 35 Miss. 147, 72 Am. Dec.

119. *Mo.*—*Bramell v. Cole*, 136 Mo. 201, 37 S. W. 924, 98 Am. St. Rep. 619. *N. Y.*—*Tappen v. Church*, 3 Dem. Sur. 187; *Estate of York*, 6 Civ. Proc. 245; *Estate of Oser*, 4 Civ. Proc. 129. *Pa.*—*Purviance v. Com.*, 17 Serg. & R. 31. *Vt.*—*Ex parte Robinson*, 1 D. Chip. 357. *Wash.*—*Reformed Presbyterian Church v. McMillan*, 31 Wash. 643, 72 Pac. 502.

In New York, the report of referee, when confirmed by the supreme court, is binding upon the surrogate and distribution must be decreed in accordance therewith. *Matter of Gray*, 42 Hun (N. Y.) 411.

71. *Cal.*—*William Hill Co. v. Lawler*, 116 Cal. 359, 48 Pac. 323. *Ga.* *Cook v. Weaver*, 77 Ga. 9. *Kan.*—*Holden v. Spier*, 65 Kan. 412, 70 Pac. 348. *Me.*—*Appeal of Stilpen*, 100 Me. 146, 60 Atl. 888. *Md.*—*Pole v. Simmons*, 45 Md. 246. *Mo.*—*Lietman's Exr. v. Lietman*, 149 Mo. 112, 50 S. W. 307, 73 Am. St. Rep. 374. *Utah.*—*Snyder v. Murdock*, 26 Utah 233, 73 Pac. 22. *Vt.*—*Ex parte Robinson*, 1 D. Chip. 357, court should determine what advancements were made by testator.

In Ohio, probate court has no jurisdiction to determine the persons to whom distribution is to be made, or the amount to which each distributee is entitled. *First National Bank of Cadiz v. Beebe*, 62 Ohio St. 41, 56 N. E. 485; *Armstrong v. Grandin*, 39 Ohio St. 365; *Cox v. John*, 32 Ohio St. 532; *Swearingen v. Morris*, 14 Ohio St. 424.

Distributee's indebtedness to the estate may be determined by the probate court and a deduction of the same made from his share (*Holden v. Spier*, 65 Kan. 412, 70 Pac. 348), without intervention of court of chancery (*Lietman's Exr. v. Lietman*, 149 Mo. 112, 50 S. W. 307, 73 Am. St. Rep. 374); but court can go no further and decide that distributee is indebted beyond his share of estate (*Springer's Appeal*, 29 Pa. 208).

On court's authority to determine distributee's indebtedness, see also,

may construe a will or other written instrument so far as is necessary to determine to whom distribution should be made.⁷²

1. DECREE.—1. Contents and Sufficiency.—The decree of distribution should name the distributees⁷³ and should state the amount

Ford *v.* Talmage, 36 Mo. App. 65; Estate of Colwell, 15 N. Y. St. 742; Rudd *v.* Rudd, 4 Dem. Sur. (N. Y.) 335.

72. **Cal.**—Goad *v.* Montgomery, 119 Cal. 552, 51 Pac. 681. **Conn.**—Mack's Appeal, 71 Conn. 122, 41 Atl. 242. **Md.** Pole *v.* Simmons, 45 Md. 246. **Mich.** Byrne *v.* Hume, 86 Mich. 546, 49 N. W. 576. **Minn.**—Bengtsson *v.* Johnson, 75 Minn. 321, 78 N. W. 3. **N. J.** Hill *v.* Bloom, 41 N. J. Eq. 276, 7 Atl. 438. **N. Y.**—Garlock *v.* Vandevort, 128 N. Y. 374, 28 N. E. 599; Purdy *v.* Hayt, 92 N. Y. 446; Riggs *v.* Cragg, 89 N. Y. 479; Matter of Kiek, 11 N. Y. St. 688; Matter of Verplanck, 27 Hun 609.

But see, Hanscom *v.* Marston, 82 Me. 288, 19 Atl. 460.

Probate court cannot determine whether legatee takes an absolute or a limited right under will (Bramell *v.* Cole, 136 Mo. 201, 37 S. W. 924, 58 Am. St. Rep. 619); and it is not within ordinary's power to construe intricate bequests and settle difficult legal questions arising under will (Cook *v.* Weaver, 77 Ga. 9).

Rights of Assignees.—The probate court usually has no authority to determine as to the validity of an assignment by a legatee or distributee or to order payment on distribution to an assignee without consent of assignor. **Me.**—Bergeron *v.* Cote, 98 Me. 415, 57 Atl. 584. **Miss.**—Portecant *v.* Neylaus, 38 Miss. 104; Locke *v.* Williams, 36 Miss. 187; Dixon *v.* Houston, 35 Miss. 636; Hill *v.* Hardy, 34 Miss. 289. **Mo.**—Johnson *v.* Jones, 47 Mo. App. 237. **N. Y.**—Matter of Grant, 37 N. Y. 151, 74 N. Y. Supp. 958; Fraenznick *v.* Miller, 1 Dem. Sur. 136; *In re* Brown, 3 Civ. Proc. 39; Hitchcock *v.* Marshall, 2 Redf. Sur. 174. **Ore.**—Harrington *v.* La Rocque, 13 Ore. 344, 10 Pac. 498.

Compare, Matter of Geis, 27 Misc. 490, 59 N. Y. Supp. 175. But in some states, court may order payment to assignee. Shepherd *v.* Clark, 38 Ill. App. 66; Lex' Appeal, 97 Pa. 289; Otterson *v.* Gallagher, 88 Pa. 355.

Validity of Release.—The probate court cannot determine the validity of releases made to personal representative by distributees. Hanscom *v.* Marston, 82 Me. 288, 19 Atl. 460; Shafer *v.* Shafer, 85 Md. 554, 37 Atl. 167.

73. **Ark.**—Ferguson *v.* Carr, 85 Ark. 246, 107 S. W. 1177, order directing payment into court for benefit of heirs is insufficient. **Cal.**—Bell *v.* Wilson, 159 Cal. 57, 112 Pac. 1100. **Conn.**—Mack's Appeal, 71 Conn. 122, 41 Atl. 242. **Mass.**—Loring *v.* Steineman, 42 Mass. 204. **Neb.**—Boales *v.* Ferguson, 55 Neb. 565, 76 N. W. 18, quoting Nebraska statute. **N. Y.**—Tappen *v.* Church, 3 Dem. Sur. 187. **Pa.**—Purvi-ance *v.* Com., 17 Serg. & R. 31.

In New York, §2743, Code Civ. Proc., provides that, when validity of distributive share has been established, the decree must determine to whom it is payable, the sum to be paid, and all questions concerning distribution. Armstrong *v.* Stone, 64 Misc. 504, 118 N. Y. Supp. 998.

Under Alabama statute, the decree for partial distribution should be rendered only in favor of those distributees who join in application. Harrison's Admr. *v.* Meadors, 41 Ala. 274.

Form of Decree.—The decree should have only one minute entry which should award successively to the parties entitled thereto the amounts respectively judged to be due them. King *v.* Brown, 108 Ala. 68, 18 So. 935.

When legatee is deceased, the decree of distribution should be in favor of his personal representative. Luster *v.* Middlecoff, 8 Gratt. (Va.) 54, 56 Am. Dec. 129.

When distributee is an infant, decree should be in his name, by his guardian, if he has one, but if it is in the name of infant alone, the decree is not on that ground reversible. Fagan's Admr. *v.* Fagan's Distributees, 15 Ala. 335; Sankey's Exrs. *v.* Sankey's Distributees, 8 Ala. 601.

When distributee is a married woman, decree should be in favor of herself alone. King *v.* Brown, 108 Ala.

or share to which each distributee is entitled.⁷⁴ All of the residue should be distributed by a decree of final distribution and the court is not limited to the property specifically enumerated in the petition.⁷⁵

Decree of Dismissal.—When a petition for distribution is prematurely filed, it should be dismissed without prejudice to the right to renew it at the proper time.⁷⁶

Entry of Decree.—Entry of a formal decree upon the record is not absolutely essential when proceedings are had and court by indorsement on account approves distribution agreed upon by claimants to fund;⁷⁷ and a decree is not invalid because the clerk delayed entering it until after the beginning of the next term of court.⁷⁸

2. Amendment or Vacation.—A decree of distribution may be amended at any time during the term at which it is rendered,⁷⁹ and in some jurisdictions the probate court is authorized to correct or set aside its decree upon petition filed within time prescribed by statute, or within a reasonable time, in the absence of statutory limitation.⁸⁰

68, 18 So. 935, citing former Alabama cases which were *contra*.

74. Ala.—*Sankey's Exrs. v. Sankey's Distributees*, 8 Ala. 601; *Davis v. Davis*, 6 Ala. 611. Cal.—*Bell v. Wilson*, 159 Cal. 57, 112 Pac. 1100. Ky. *Robert's Exr. v. Dale*, 7 B. Mon. 199; *White's Heirs v. White's Admr.*, 3 Dana 374; *Banton v. Campbell's Heirs*, 2 Dana 421. Neb.—*Boales v. Ferguson*, 55 Neb. 565, 76 N. W. 18. N. Y.—*Tappen v. Church*, 3 Dem. Sur. 187.

75. *Humphrey v. Protestant Episcopal Church*, 154 Cal. 170, 97 Pac. 187.

Refunding bond should be required from distributees, where sufficient time has not elapsed to raise the presumption that all the debts due from estate have been paid. *Roberts' Exr. v. Dale*, 7 B. Mon. (Ky.) 199; *Neely's Admr. v. Neely's Heirs*, 1 Litt. (Ky.) 293.

Contingent Decree Improper.—A decree after final settlement is intended to cause a final distribution of estate and should not be made contingent upon the establishment of conditions inserted in decree. *In re Garrity*, 108 Cal. 463, 38 Pac. 628, 41 Pac. 485.

Decree of Joint Distribution.—It is error to decree a joint distribution where executors file separate accounts. *The Evangelical Association's Appeal*, 35 Pa. 316. But where all the parties interested have stipulated that one of two administrators shall account, the court may consolidate the proceedings and direct distribution to be made by both administrators. *In re Smith's Estate*, 40 Misc. 331, 81 N. Y. Supp. 1035.

Decree may direct legatees to pay sums equal to their overdrafts to other legatees in order to equalize the entire drawings made. *Matter of Mount*, 27 Misc. 411, 59 N. Y. Supp. 176. But where there has been an over-payment to a legatee, the surrogate has no authority to render an affirmative judgment for the excess against the legatee and in favor of executor. *Matter of Underhill*, 117 N. Y. 471, 22 N. E. 1120.

76. *Sinnott v. Kenaday*, 12 App. Cas. (D. C.) 115.

77. *Garrett v. Kerney*, 107 Md. 501, 68 Atl. 1051. *Compare, Brownell v. Superior Court*, 157 Cal. 703, 109 Pac. 91.

78. *State v. Henderson*, 164 Mo. 347, 64 S. W. 138, 86 Am. St. Rep. 618.

79. *Aull v. St. Louis Trust Co.*, 149 Mo. 1, 50 S. W. 289.

Change Before Entry.—"No findings being required, and the court having merely made an oral statement of its decision, it might, before that decision was recorded, or signed and filed, change it in any respect and render a different decision." *Brownell v. Superior Court*, 157 Cal. 703, 109 Pac. 91.

80. Cal.—*Estate of Ross*, 140 Cal. 282, 73 Pac. 976 (decree vacated); *In re Pedorena*, 80 Cal. 144, 22 Pac. 71 (decree may be set aside within six months after entry); *Ingram's Estate*, 78 Cal. 586, 21 Pac. 435, 12 Am. St. Rep. 80 (decree amended on motion). Ill.—*Thornley v. Kershaw*, 109 Ill. App. 113; *Kinne v. Schumacher*, 65 Ill. App. 342 (may be set aside for equitable

An error of law in making the decree can not be corrected in the probate court on application filed after the term at which the decree is rendered.⁸¹

Notice.—A decree for final distribution will not be set aside or modified at a subsequent term without notice to distributees.⁸²

Jurisdiction of Equity.—A decree for distribution may be attacked by bill in equity alleging fraud or mistake.⁸³

3. Enforcement.—In some jurisdictions, the decree for distribution may be enforced by execution against the property of administra-

reasons); *Long v. Thompson*, 60 Ill. 27 (setting aside without notice). **Ind.**—*Glessner v. Clark*, 140 Ind. 427, 39 N. E. 544. **Me.**—*Bergeron v. Cote*, 98 Me. 415, 57 Atl. 584, court may annul decree for manifest errors and mistakes before decree executed. **Mass.**—*Harris v. Starkey*, 176 Mass. 445, 57 N. E. 698, 79 Am. St. Rep. 322, revision may be allowed after estate has been distributed as ordered. **N. Y.**—*Matter of Gall*, 182 N. Y. 270, 74 N. E. 875; *Matter of Hoes*, 119 App. Div. 288, 104 N. Y. Supp. 529 (decree amended); *Matter of Robertson*, 51 App. Div. 117, 64 N. Y. Supp. 385, *affirmed*, 165 N. Y. 675, 59 N. E. 1129; *Smith v. Baylis*, 4 Dem. Sur. 30. **Wis.**—*Hall v. Hall*, 98 Wis. 193, 73 N. W. 1000 (record corrected to conform to judgment actually pronounced and rendered); *Creamer v. Ingalls*, 89 Wis. 112, 61 N. W. 82 (decree set aside for fraud); *Beem v. Kimberly*, 72 Wis. 343, 39 N. W. 542.

Where distribution has been made in accordance with decree rendered in probate court, that court has no jurisdiction to subject the property involved therein to a judgment subsequently rendered against administrator when decree of distribution has not been reversed, modified or set aside. *Prefontaine v. McMicken*, 16 Wash. 16, 47 Pac. 231.

Nature of Application To Set Aside.—"Application is one addressed to the equity of the court, and will not be granted without very special reasons, and such a statement of the alleged error as shall indicate the nature and sufficiency of the grounds." *Redmond v. Ely*, 2 Brad. Sur. (N. Y.) 175.

Long acquiescence in a decree for distribution will prevent the granting of distributee's application for the revocation of such decree. *Hoban's Appeal*, 102 Pa. 404.

81. *Lewis v. Woodrum*, 76 Kan. 384, 92 Pac. 306.

Amendment Nunc Pro Tunc.—An erroneous decree should be corrected on appeal and it cannot be amended *nunc pro tunc*. *Emerson v. Heard*, 81 Ala. 443, 1 So. 197.

82. **Ala.**—*Thomas v. Dumas*, 30 Ala. 83. **Me.**—*Bergeron v. Cote*, 98 Me. 415, 57 Atl. 584. **Vt.**—*Stone v. Peasley's Estate*, 28 Vt. 716.

Sufficiency of Notice.—Notice of motion to vacate order denying a petition for distribution is insufficient when served upon executors only without any posting of notice to acquire jurisdiction over all distributees. *In re Estate of Mitchell*. 126 Cal. 248, 58 Pac. 549.

83. **U. S.**—*Sullivan v. Andoe*, 6 Fed. 641. **Cal.**—*Bacon v. Bacon*, 150 Cal. 477, 89 Pac. 317. **Mich.**—*Ewing v. Lamphere*, 147 Mich. 659, 111 N. W. 187. **Wis.**—*Maldaner v. Beurhaus*, 108 Wis. 25, 84 N. W. 25.

Laches.—Equity will not relieve against order of distribution when petitioner failed to avail himself of his opportunity to be heard in probate court, unless there is a showing that he was prevented from being heard by the wrongful act of the prevailing party without any fault or negligence on his part. *Royce v. Hampton*, 16 Nev. 25.

Ratification.—Equity will afford no relief against fraud in distribution if distributee, after learning of fraud, continues to deal with property distributed to him in kind as his own. *Starrett v. Keating*, 61 Ill. App. 189.

Decree in equity making distribution cannot be altered or amended, except in matter of form, unless by consent, or upon a re-hearing granted, or upon a bill of review. *Ansley v. Robinson*, 16 Ala. 793.

tor or executor,⁸⁴ or by attachment for contempt.⁸⁵ Persons to whom distribution has been ordered may maintain an action at law against an executor or administrator to enforce payment of their distributive shares;⁸⁶ or an action may be brought against the sureties on his bond.⁸⁷

84. **Ala.**—*Thompson v. Perryman*, 45 Ala. 619, decree may be revived, if dormant on account of failure to issue execution. **Ga.**—*Cook v. Weaver*, 77 Ga. 9. **Ky.**—*White's Heirs v. White's Admrs.*, 3 Dana 374. **Miss.**—*Isom v. McGehee's Heirs*, 45 Miss. 712, although decree does not in terms award execution. **N. Y.**—*Peyser v. Wendt*, 2 Dem. Sur. 221; *Sherwood v. Judd*, 3 Bradf. Sur. 419. **N. C.**—*Ellison v. Andrews*, 34 N. C. 183. **Ore.**—*Rostel v. Morat*, 19 Ore. 181, 23 Pac. 900. **Pa.**—*McIntosh's Estate*, 158 Pa. 525, 27 Atl. 1042 (rule to show cause must first issue); *Wachter's Case*, 1 Walk. 267.

That execution can not issue, see *Bayley v. Bayley*, 71 N. J. Eq. 9, 63 Atl. 11. *Compare*, *Wyckoff v. O'Neil*, 71 N. J. Eq. 681, 63 Atl. 982.

Each legatee or distributee is entitled to a separate execution for his share. *Ellison v. Andrews*, 34 N. C. 188.

Execution cannot be awarded in favor of an infant distributee, without the intervention of his guardian. *Fagan's Admr. v. Fagan's Distributees*, 15 Ala. 335.

Enforcement of Order To Refund. When probate court modifies its order after distribution and distributees are ordered to restore excess distributed to them, resort may be had to equity to enforce decree, since the probate court does not possess the necessary power. *Aull v. St. Louis Trust Co.*, 149 Mo. 1, 50 S. W. 289.

Restraining Enforcement.—Administrator or executor may obtain a decree in a court of chancery enjoining the execution of a decree for distribution obtained by fraud (*Fairly v. Thompson*, 34 Miss. 101); but if administrator seeks to enjoin execution of decree on ground of payment to distributees before settlement, he must allege that such payments were not considered by the court in decreeing distribution (*Gaillard v. Thomas*, 61 Miss. 166).

85. **Cal.**—*St. Mary's Hospital v.*

Perry, 152 Cal. 338, 92 Pac. 864; *In re Clary*, 112 Cal. 292, 44 Pac. 569; *Ex parte Smith*, 53 Cal. 204. **Ga.**—*Cook v. Weaver*, 77 Ga. 9. **Ill.**—*Blake v. People*, 161 Ill. 74, 43 N. E. 590; *Randolph v. People*, 130 Ill. 533, 22 N. E. 615; *Haines v. People*, 97 Ill. 161; *Piggott v. Ramey*, 2 Ill. 145. **N. Y.**—*Matter of Snyder*, 103 N. Y. 178, 8 N. E. 479; *Matter of Holmes*, 79 App. Div. 267, 79 N. Y. Supp. 687, *affirmed*, 176 N. Y. 604, 68 N. E. 1118; *Joel v. Ritterman*, 5 Redf. Sur. 136.

In Oregon, a decree for payment of money in probate proceedings can not be enforced as for contempt. *Rostel v. Morat*, 19 Ore. 181, 23 Pac. 900.

Demand for the money due under order must be made before court can commit an executor or administrator for contempt in failing to obey order. *Blake v. People*, 161 Ill. 74, 43 N. E. 590; *Haines v. People*, 97 Ill. 161; *Von Kettler v. Johnson*, 57 Ill. 109. See, also, *Randolph v. People*, 40 Ill. App. 174.

86. **Cal.**—*St. Mary's Hospital v. Perry*, 152 Cal. 338, 92 Pac. 864; *Wheeler v. Bolton*, 54 Cal. 302. **N. J.**—*Bayley v. Bayley*, 71 N. J. Eq. 9, 63 Atl. 11. **N. Y.**—*Koenig v. Wagener*, 126 App. Div. 772, 111 N. Y. Supp. 116 (personal representative of distributee need not obtain leave of court before commencing action to enforce decree in his decedent's favor). **N. D.**—*Sjoli v. Hogenon*, 122 N. W. 1008.

87. **U. S.**—*Stovall v. Banks*, 10 Wall. 583, 19 L. ed. 1036. **Conn.**—*American Board of Commissioners for Foreign Missions Appeal from Probate*, 27 Conn. 344, *following Adams v. Spalding*, 12 Conn. 349. **Mass.**—*Leland v. Kingsbury*, 24 Pick. 315. **Neb.**—*Mortenson v. Berghthold*, 64 Neb. 208, 89 N. W. 742; *Wheeler v. Barker*, 51 Neb. 846, 71 N. W. 750. **N. J.**—*Bayley v. Bayley*, 71 N. J. Eq. 9, 63 Atl. 11. **N. C.**—*Settle v. Settle*, 141 N. C. 553, 54 S. E. 445. **N. D.**—*Sjoli v. Hogenon*, 122 N. W. 1008. **Okla.**—*Greer v. McNeal*, 11 Okla. 519, 69 Pac. 891.

4. Collateral Attack.—A decree of distribution made by the probate court is conclusive as to everything necessarily involved therein which is within the jurisdiction of the court and such decree cannot be attacked collaterally,⁸⁸ even though it may appear clearly that such decree was erroneous.⁸⁹

J. APPEAL.—An order for distribution is a final order and an appeal may be taken therefrom by any person aggrieved,⁹⁰ but the executor or administrator as such has no legal right which may be enlarged or diminished by the decree and therefore is not entitled

88. U. S.—*Stovall v. Banks*, 10 Wall. 553, 19 L. ed. 1036; *Goodrich v. Ferris*, 145 Fed. 844. **Ala.**—*Cousins v. Jackson*, 49 Ala. 236; *Watson v. Hutto*, 27 Ala. 513. **Cal.**—*Williams v. Marx*, 124 Cal. 22, 56 Pac. 603; *Cunha v. Hughes*, 122 Cal. 111, 54 Pac. 535, 68 Am. St. Rep. 27; *Jewell v. Pierce*, 120 Cal. 79, 52 Pac. 132; *Matter of Trescony*, 119 Cal. 568, 51 Pac. 951; *The William Hill Lumb. Co. v. Lawler*, 116 Cal. 359, 48 Pac. 323. **Conn.**—*State v. Blake*, 69 Conn. 64, 36 Atl. 1019; *Gates v. Treat*, 17 Conn. 388. **Kan.**—*Lewis v. Woodrum*, 76 Kan. 384, 92 Pac. 306; *Keith v. Guthrie*, 59 Kan. 200, 52 Pac. 435. **Md.**—*Blackburn v. Craufurd*, 22 Md. 447. **Mass.**—*Pierce v. Prescott*, 123 Mass. 140. **Minn.**—*Wellner v. Eckstein*, 105 Minn. 444, 117 N. W. 830; *Chadbourne v. Hartz*, 93 Minn. 233, 101 N. W. 68; *Bengtsson v. Johnson*, 75 Minn. 321, 78 N. W. 3 (construction placed on will conclusive); *Eddy v. Kelly*, 72 Minn. 32, 74 N. W. 1020. **Mo.**—*Tapley v. McPike*, 50 Mo. 589. **N. J.**—*Exton v. Zule*, 14 N. J. Eq. 501. **N. Y.**—*Brown v. Wheeler*, 53 App. Div. 6, 65 N. Y. Supp. 436. **Pa.**—*Burd's Exrs. v. McGregor's Admr.*, 2 Grant's Cas. 353. **S. C.**—*Hurt v. Hurt*, 6 Rich. Eq. 114. **S. D.**—*Redwater Land & Canal Co. v. Reed*, 128 N. W. 702. **Utah.**—*Kurtz v. Ogden Canyon Sanitarium Co.*, 37 Utah 313, 108 Pac. 14; *Barrette v. Whitney*, 36 Utah 574, 106 Pac. 522. **Vt.**—*Sparhawk v. Buell's Admr.*, 9 Vt. 41. **Wash.**—*In re Ostlund's Estate*, 57 Wash. 359, 106 Pac. 1116.

Where court had no jurisdiction over distributee because he was not notified of proceedings, distributee may impeach decree collaterally. *Blackburn v. Craufurd*, 22 Md. 447; *Baker v. Lumpee*, 91 Mo. App. 560.

Decree making partial distribution is conclusive only as to funds then distributed and does not determine that all subsequent distributions must be made upon the same theory. *Kline's Appeal*, 86 Pa. 363; *Stahl's Estate*, 25 Pa. Super. 402.

89. Ala.—*Calhoun v. Whittle*, 56 Ala. 138. **Cal.**—*Matter of Trescony*, 119 Cal. 568, 51 Pac. 951; *Crew v. Pratt*, 119 Cal. 139, 51 Pac. 38; *The William Hill Co. v. Lawler*, 116 Cal. 359, 48 Pac. 323. **Minn.**—*Wood v. Myrick*, 16 Minn. 494. **Neb.**—*Wheeler v. Barker*, 51 Neb. 846, 71 N. W. 750. **Wash.**—*In re Ostlund's Estate*, 57 Wash. 359, 106 Pac. 1116.

90. Ala.—*May's Heirs v. May's Admr.*, 28 Ala. 141; *McConico v. Cannon*, 25 Ala. 462 (administrator of distributee). **Cal.**—*Estate of Benner*, 155 Cal. 153, 99 Pac. 715 (heirs, devisees or legatees); *Bates v. Ryberg*, 40 Cal. 463. **Ill.**—*Strawn v. Jacksonville Academy*, 240 Ill. 111, 88 N. E. 460. **Minn.**—*In re Casey's Estate*, 111 Minn. 43, 126 N. W. 401; *Rong v. Haller*, 106 Minn. 454, 119 N. W. 405. **Mont.**—*In re Klein's Estate*, 35 Mont. 185, 88 Pac. 798; *In re Davis' Estate*, 27 Mont. 235, 70 Pac. 721. **Neb.**—*Merrick v. Kennedy*, 46 Neb. 264, 64 N. W. 989. **N. Y.**—*Matter of Coe*, 55 App. Div. 270, 66 N. Y. Supp. 784. **Pa.**—*Blaney's Estate*, 37 Pa. Super. Ct. 76. **Utah.**—*Barrette v. Whitney*, 36 Utah 574, 106 Pac. 522. **Vt.**—*Harris v. Harris*, 79 Vt. 22, 64 Atl. 75.

Assignee of distributee is directly affected by a decree of distribution and may appeal therefrom. *In re Stilpen*, 100 Me. 146, 60 Atl. 888.

Order denying the prayer of a petition for distribution is appealable. *Morton's Estate v. Morton*, 52 Neb. 420, 87 N. W. 182.

to appeal as a person aggrieved.⁹¹ No appeal lies from an order refusing to suspend or postpone a decree of final distribution.⁹²

91. **Cal.**—*In re Coursen's Estate*, 133 Cal. xix, 65 Pac. 965; *Merrifield v. Longmire*, 66 Cal. 180, 4 Pac. 1176; *Estate of Wright*, 49 Cal. 550; *Bates v. Ryberg*, 40 Cal. 463. **Colo.**—*Wilson v. Board of Regents*, 46 Colo. 100, 102 Pac. 1088. **La.**—*Succession of Marks*, 108 La. 685, 32 So. 955; *Compare, Succession of Allen*, 48 La. Ann. 1036, 20 So. 193. **Me.**—*In re Stilpen*, 100 Me. 146, 60 Atl. 888. **Mont.**—*In re Dewar's Estate*, 10 Mont. 422, 25 Pac. 1025. **Neb.**—*Merrick v. Kennedy*, 46 Neb. 264, 64 N. W. 989. **N. H.**—*Hills v. Baker*, 59 N. H. 514. **N. Y.**—*Mat- ter of Coe*, 55 App. Div. 270, 66 N. Y. Supp. 784. **Pa.**—*Gallagher's Appeal*, 89 Pa. 29; *Stineman's Appeal*, 34 Pa. 394; *Wallace's Estate*, 40 Pa. Super. 595; *Blaney's Estate*, 37 Pa. Super. 76; *God- win's Estate*, 22 Pa. Super. 469; *Fuhrman's Estate*, 21 Pa. Super. 27. **Vt.**—*In re Vincent's Estate*, 78 Atl. 714.

Contra.—**Ind.**—*Keener v. Grubb*, 44 Ind. App. 564, 89 N. E. 896; *Ruch v. Biery*, 110 Ind. 444, 11 N. E. 312. **R. I.** *Jeter v. Moore*, 17 R. I. 85, 20 Atl. 230. **Wash.**—*In re Sullivan's Estate*, 48 Wash. 631, 94 Pac. 483, 95 Pac. 71.

Executor may appeal when decree requires a payment beyond his legal liability. *Godwin's Estate*, 22 Pa. Super. 469.

An appeal from order of partial dis- tribution may be taken by a personal representative when there is involved

the question of the sufficiency of as- sets to pay legacies without loss to creditors. **Ala.**—*Harrison's Admrs. v. Meadors*, 41 Ala. 274. **Cal.**—*Estate of Murphy*, 145 Cal. 464, 78 Pac. 960; *Estate of Mitchell*, 121 Cal. 391, 53 Pac. 810; *In re Welch*, 106 Cal. 427, 39 Pac. 805; *Estate of Kelley*, 63 Cal. 106. **Mont.**—*In re Phillips' Estate*, 18 Mont. 311, 45 Pac. 222.

But see *Wilson v. Board of Regents*, 46 Colo. 100, 102 Pac. 1088, refusing to allow such appeal.

92. *In re Burdick*, 112 Cal. 387, 40 Pac. 35, 44 Pac. 734.

No appeal lies from an opinion of the court as to the rights of distribu- tees, unless there is an order of dis- tribution made. *Dyer v. Carr's Exr.*, 18 Mo. 246.

Review of Order Setting Aside Dis- charge.—The court's action in setting aside a conditional order for the dis- charge of administrator, in proceedings for accounting and distribution, is re- viewable on appeal but affords no ground for the issuance of a writ of certiorari. *State v. Superior Court of Walla Walla County*, 13 Wash. 25, 42 Pac. 630.

Certiorari.—Where orphan's court refuses to entertain a petition for a share in distribution of estate, the remedy is by certiorari to the circuit court and not by writ of error. *Fowler v. Trewhit*, 10 Ala. 622.

DECEIT. — See Fraud and Deceit.

DECISION. — See Courts; Judgment; Stare Decisis.

VOL. VI

DECLARATION AND COMPLAINT

By WILLIAM G. HASTINGS,
Dean of the College of Law, University of Nebraska; and

H. R. BRILL, Jr.,
Of the Minnesota Bar.

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Scope of Title.—This article contains merely a general treatment of the rules of pleading applicable to declarations at common law and to complaints and other equivalent pleadings under the codes. Declarations and complaints in particular actions and proceedings, and the necessity for alleging particular facts therein, will be found treated in the articles dealing specifically with such actions and proceedings. Reference should also be had to the separate articles dealing with particular rules of pleading, such as "Certainty in Pleading," "Conclusions of Law," "Duplicity," and the like.

I. DEFINITION, NATURE AND DISTINCTIONS.—Under the common law system of pleading the pleadings in an action at law commence with the declaration or count.¹ Under the codes the first pleading² on the part of the plaintiff is variously denominated the

1. Will's Gould Pl., §9.

2. **Ala.**—Code, 1907, §5327; *Betan-court v. Eberlin*, 71 Ala. 461. **Ark.** Kirby's Dig., §6091. **Cal.**—Code Civ. Proc., §425, construed in *In re Con-naway*, 178 U. S. 421, 20 Sup. Ct. 951, 44 L. ed. 1134. **Conn.**—Gen. St., 1902, §607. **Idaho.**—Rev. Codes, §4167; *Murphy v. Russell & Co.*, 8 Idaho 133, 67 Pac. 421. **Ind.**—Burns' Ann. St., 1908, §342. **Minn.**—Rev. Laws, 1905, §4126;

McMath v. Pearson, 26 Minn. 246, 2 N. W. 703. And see *Rey v. Simpson*, 22 How. (U. S.) 341, 16 L. ed. 260. **Mont.**—Rev. Code, 1907, §6531. **Nev.** Comp. Laws, §3133. **N. Y.**—Code Civ. Proc., §478. **N. C.**—Rev., 1905, §465. **N. D.**—Rev. Code, 1905, §6852. **Ore.** L. O. L., §66. **S. C.**—Code Civ. Proc., §162. **S. D.**—Code Civ. Proc., §118. **Utah.**—Comp. Laws, 1907, §2959. **Wash.** Rem. & Ball. Ann. Codes & St., §257.

complaint, or the petition,³ or the statement of claim.⁴

A declaration is the statement in logical form of the facts which constitute the plaintiff's cause of action.⁵ It is an amplification of the original writ with the additional circumstances of time and place.⁶ The terms "count" and "declaration" are sometimes used synonymously, but the former is now generally used to designate that part of the declaration in which the plaintiff sets forth a distinct cause of action.^{6a}

Complaint or Petition. — A few of the various definitions of the terms complaint⁷ and petition⁸ are given in the notes.

Wis.—St., 1898, §2645; *Harrigan v. Gilchrist*, 121 Wis. 127-273, 99 N. W. 909.

See also N. J. Laws, 1912, c. 231, schedule A, §35, p. 390.

It takes the place of both the declaration and of the petition or bill in equity. *New York & N. E. R. Co. v. Comstock*, 60 Conn. 200, 1 Atl. 511.

3. Ga.—Ga. Code, 1895, §4960. Ia. Code, §3557. Kan.—Gen. St., 1909, §5682. Ky.—Civ. Code, 1906, §89. Mo. Rev. St., 1909, §1794. Neb.—Comp. St., 1911, §6665. Ohio.—Gen. Code, 1910, §11,305. Okla.—Comp. Laws, 1909, §5626. Tex.—Sayle's Civ. St., arts. 1177, 1181. Wyo.—Comp. St., 1910, §4378.

The old form of a bill in equity has been abandoned. *Vogelsong v. St. Louis Wood Fibre Plaster Co.*, 147 Mo. App. 578, 126 S. W. 804.

4. The statement of claim authorized by the Act of 1887 is a substitute for a formal declaration. *Edison Electric Co. v. Thackara Mfg. Co.*, 167 Pa. 530, 31 Atl. 856; *Byrne v. Hayden*, 124 Pa. 170, 16 Atl. 750.

5. *Smith v. Fowle*, 12 Wend. (N. Y.) 9; *Dixon v. Sturgeon*, 6 Serg. & R. (Pa.) 25.

"The specification in methodical and legal form of the circumstances which constitute the plaintiff's cause of action." *Chitty's Pl.* 240, 231; *Campbell v. Walker* (Del.), 76 Atl. 475; *King v. Wilmington & N. C. E. R. Co.*, 1 Penn. (Del.), 452, 41 Atl. 975.

"The word declaration, as a word of art in the law, is generally used to signify the plea by which a plaintiff in a suit at law sets out his cause of action, as the word complaint is in the same sense the technical name of a bill in chancery." *United States v. Ambrose*, 108 U. S. 336, 2 Sup. Ct. 682, 27 L. ed. 746.

6. 3 Bl. Com. 293; *Will's Gould Pl.*,

71; *Bliss Code Pl.*, §2; *Duyekineck v. Clinton Mut. Ins. Co.*, 23 N. J. L. 279.

"An exposition of the plaintiff's original writ, wherein he expresses at large his cause of action or complaint, with the additional circumstances of time and place, when and where the injury was committed." *Cheetham v. Tillotson*, 5 Johns. (N. Y.) 430.

"A statement in logical form of the facts which constitute the plaintiff's cause of action." *Alabama Great Southern R. Co. v. Cardwell* (Ala.), 55 So. 185.

6a. "A count is sometimes considered as synonymous with a declaration, and this was its original signification in the law-French; but it is now most generally considered as a part of the declaration wherein the plaintiff sets forth a distinct cause of action." *Cheetham v. Tillotson*, 5 Johns. (N. Y.) 430; *Will's Gould Pl.*, 351.

7. A statement in writing of the cause of action. *Betancourt v. Eberlin*, 71 Ala. 461.

A plain and concise statement of the facts constituting the cause of action or suit. *Giant Powder Co. v. Oregon W. R. Co.*, 54 Ore. 325, 101 Pac. 209, 103 Pac. 501.

The complaint "is the first pleading in an action, containing a statement of a cause of action, with a demand for the appropriate relief to which the party may be entitled." *McMath v. Parsons*, 26 Minn. 246, 2 N. W. 792.

In *Garretson v. Hays Bros.*, 70 Iowa 19, 29 N. W. 786, a paper denominated "synopsis of petition" and not addressed to, or containing the name of, any court, and not intended to be filed as a petition by the person who drew it, was held not to be a petition and the action was dismissed.

8. A petition is a written document which the plaintiff addresses to

A complaint is to be distinguished from a suit or action.⁹

A cause of action has been defined to be the right to bring an action. Causes of action are to be distinguished from remedies.¹⁰

Component Parts.—The common law declaration consists of the title, the venue, the commencement, the statement of the cause of action, and the conclusion.¹¹

II. NECESSITY FOR DECLARATION OR EQUIVALENT PLEADING.—A declaration or its equivalent is essential to confer jurisdiction on the court.¹² It has, however, been held that, if a case is tried without a formal declaration or complaint having been filed, the plaintiff is to be taken to have relied on one suited to his case as

a competent judge, setting forth the cause of the action which he intends to bring against the defendant and praying to be permitted to cite that defendant before him in order that he may be ordered to do or to give a certain thing. La. Code Prac., §171.

9. *Giant Powder Co. v. Oregon Western R. Co.*, 54 Ore. 325, 101 Pac. 209, 103 Pac. 501.

“‘Cause of action’ includes every fact necessary for the plaintiff to prove to entitle him to succeed,—every fact that the defendant would have a right to traverse. It has been said to be the right to prosecute an action with effect (*Patterson v. Patterson*, 59 N. Y. 574). The terms ‘right of action’ and ‘cause of action’ are equivalent expressions (*Clark v. Heirs of Southard*, 16 Ohio St. 408). ‘By this phrase [cause of action] is understood the right to bring an action, which implies that there is some person in existence who can assert and also a person who can lawfully be sued.

... There is no cause of action till the claimant can legally sue (*Bouvier’s Dict.* title ‘Cause of Action’). ... If he have no legal right to sue, he has not merely a bad cause of action, but no cause of action’ (*Parker v. Enslow*, 102 Ill. 272). A cause of action accrues when facts exist which authorize one party to maintain an action against another (*Davis v. Munie*, 235 Ill. 620). It is not possible for one at the same time to have a cause of action and not to have a right to sue.” *Walters v. City of Ottawa*, 240 Ill. 259, 88 N. E. 651. See generally the title “Cause of Action.”

10. A cause of action arises on an invasion of a legal right without jus-

tification or sufficient excuse, and the injured party thereupon becomes entitled to some relief by the application of such remedies as the law affords. *Emory v. Hazard Powder Co.*, 22 S. C. 476.

11. *Smith v. Fowle*, 12 Wend. (N. Y.) 9.

In *Andrews’ Steph. Pl.* (2nd ed., pp. 153, 154) it is said that the declaration consists of either six or seven parts, according to the nature of the suit. They are the caption, the title of the case, the inducement, the charge, the injury and *ad damnum* clause, production of suit, and the signature.

Chitty gives the parts of a declaration as the title as to the court, the title as to the time when it is filed or delivered, the venue, the commencement, the body, and the conclusion. 1 Chitty Pl., 263.

12. *Colo.*—*Beckett v. Cuenin*, 15 Colo. 281, 25 Pac. 167. *Ga.*—*Hicks v. Marshall*, 67 Ga. 713. *Ia.*—*Jordan v. Brown*, 71 Iowa 421, 32 N. W. 450. See also *Morrow v. Weed*, 4 Iowa 77, 89.

The statutory proceeding to foreclose a mortgage is a suit or action, and plaintiff must petition the court, as in other suits or actions. *George v. Gardner*, 49 Ga. 441, 449.

Every demand in writing must be accompanied by a petition. La. Code Pr., §170.

“A judgment rendered without a statement of the cause of action, in some form recognized by law, whatever may be its force and effect, where it is rendered, is of no value beyond the jurisdiction of the court which rendered it.” *Young v. Rosenbaum*, 39 Cal. 646.

established by his testimony,¹³ and that the judgment is not thereby rendered invalid on collateral attack.¹⁴

By statute in some states plaintiff may recover judgment on certain classes of demands by motion in lieu of a formal action.¹⁵ The procedure so provided for may be adopted in the federal courts in those states,¹⁶ provided the requisite jurisdictional facts are shown.¹⁷

III. OBJECT AND PURPOSE OF DECLARATION OR EQUIVALENT PLEADING.—The purpose of both the common law declaration and of the complaint, or its equivalent under the codes and practice acts of the various states, is to apprise the defendant of the facts on which the plaintiff relies and of the proof he will be required to meet.¹⁸

13. *Davis v. Golston*, 53 N. C. 28.

14. Proceeding to judgment without requiring the filing of a complaint is a mere irregularity. *Betancourt v. Eberling*, 71 Ala. 461.

15. *Virginia*.—On certain classes of bonds, and where one is entitled to recover money by action on any contract. Code 1904, §§3210, 3211. For the practice in proceedings by motion see Code 1904, §§3207-3211; *Reed & McCormick v. Gold*, 102 Va. 37, 45 S. E. 868. For form of notice and affidavits see note to §3211.

Returning notice. *Hanks v. Lyons*, 92 Va. 30, 22 S. E. 813; *Hale v. Chamberlain*, 13 Gratt. (Va.) 658.

West Virginia.—On certain classes of bonds, and where one is entitled to recover money on any contract. Code 1906, §§3785, 3786. For practice under this section see Id. §§3781-3788. *White v. Sydenstricker*, 6 W. Va. 43.

Returning and filing of notice. *Anderson v. Prince*, 60 W. Va. 557, 55 S. E. 656; *Knox v. Horner*, 58 W. Va. 136, 51 S. E. 979.

The Proceeding Is An Action At Law. *West Fork Glass Co. v. Innes-Weld Glass Co.*, 178 Fed. 205, 101 C. C. A. 525; *Reed & McCormick v. Gold*, 102 Va. 37, 45 S. E. 868; *Gordon v. Funkhouser*, 100 Va. 675, 42 S. E. 677.

The purpose of the statute "is to provide a simple, informal, expeditious mode of recovering money due on contract, under which such a case may be matured for trial without professional aid." *Knox v. Horner*, 58 W. Va. 136, 51 S. E. 979.

The notice serves the double purpose of the writ and declaration ordinarily issued and filed in suits at common law. *West Fork Glass Co. v.*

Innes-Weld Glass Co., 178 Fed. 205, 101 C. C. A. 525; *Anderson v. Prince*, 60 W. Va. 557, 55 S. E. 656.

"The purpose of the notice is to acquaint the defendant of the grounds on which he is proceeded against, and must be so plain that he cannot mistake the object of the motion." *Anderson v. Prince*, 60 W. Va. 557, 55 S. E. 656; *Board of Education v. Parsons*, 22 W. Va. 308.

The notice will be treated with greater liberality than a declaration. *State v. Keadle*, 63 W. Va. 645, 60 S. E. 798; *Board of Education v. Parsons*, 22 W. Va. 308.

Though all the formalities usual in a common law action are not required, the averments necessary to show jurisdiction and to indicate with reasonable certainty the grounds on which a judgment is asked for are essential. *West Fork Glass Co. v. Innes-Weld Glass Co.*, 178 Fed. 205, 101 C. C. A. 525.

"It must indicate with reasonable certainty upon what obligation, demand or account judgment is sought." *Anderson v. Prince*, 60 W. Va. 557, 55 S. E. 656.

That matters of fact are recited under a *quod cum* or under a "whereas," and not by positive and direct averment does not render it bad. *State v. Keadle*, 63 W. Va. 645, 60 S. E. 798.

16. *West Fork Glass Co. v. Innes-Weld Glass Co.*, 178 Fed. 205, 101 C. C. A. 525.

17. The notice must show diversity of citizenship and that the jurisdictional amount is involved. *West Fork Glass Co. v. Innes-Weld Glass Co.*, 178 Fed. 205, 101 C. C. A. 525.

18. *Colo.*—*Soden v. Murphy*, 42 Colo.

IV. FORMAL REQUISITES IN GENERAL.—Except in certain inferior courts, the declaration or equivalent pleading must be in writing.¹⁹ It must, of course, be in the English language.²⁰

Numbering Paragraphs.—Most of the codes and practice acts require each cause of action to be separately stated and numbered.²¹ In some jurisdictions each material allegation must be distinctly numbered.²²

352, 94 Pac. 353. **Conn.**—*Lillibridge v. Barber*, 55 Conn. 366, 11 Atl. 850. **Mont.** *Schwindt v. Lane Potter Lumb. Co.*, 40 Mont. 537, 107 Pac. 818. **N. Y.** *Steuben County v. Wood*, 48 N. Y. Supp. 471. **N. D.**—*Weber v. Lewis*, 19 N. D. 473, 126 N. W. 105. **Ore.** *Knahtla v. Oregon S. L. R. Co.*, 21 Ore. 136, 27 Pac. 91. **Pa.**—*Murdoek v. Martin*, 132 Pa. 86, 18 Atl. 1114. **Tex.** *Missouri, K. & T. R. Co. v. Poole*, 133 S. W. 239; *Catlin v. Glover*, 4 Tex. 151. **Va.**—*Chesapeake & O. R. Co. v. Melton*, 110 Va. 728, 67 S. E. 346; *Chesapeake & O. R. Co. v. Hunter*, 109 Va. 341, 64 S. E. 44; *Newport News & O. P. R. & E. Co. v. Nicolopoulos*, 109 Va. 165, 63 S. E. 443; *Lynchburg Traction Co. v. Guill*, 107 Va. 86, 57 S. E. 644.

“The office of a declaration is, to state the essential facts on which the liability of the defendant in the action depends.” *Alabama v. Burr*, 115 U. S. 413, 6 Sup. Ct. 81, 29 L. ed. 435.

“The province of a declaration is to fully and specifically set out, in a methodical and logical form, the facts which constitute the plaintiff’s cause of action, in order that the defendant may be informed of what he is to meet, and also that he may intelligently prepare his defence.” *Stone v. Pendleton*, 21 R. I. 332, 43 Atl. 643.

“The object of the declaration is not to set out all the facts and circumstances which are to be disclosed in the evidence, but merely to give to the defendant such reasonable information of the ground of complaint as will enable him fairly to present his ground of defense.” *Chesapeake & O. R. Co. v. Hoffman*, 109 Va. 44, 63 S. E. 432.

“The natural and necessary function of a complaint is to so plainly state the facts constituting the cause of action as to appraise the party sought to be charged with what the pleader relies upon and intends to prove.” *Willison v. Northern Pac. R. Co.*, 111 Minn. 370, 127 N. W. 4.

To state in a plain and concise manner the cause of action upon which the plaintiff relies. *Hughes v. Wilcox*, 17 Misc. 32, 39 N. Y. Supp. 210.

19. *Beckett v. Cuenin*, 15 Colo. 281, 25 Pac. 167; *Sayle’s Civ. St. (Tex.)*, art. 1182.

In view of the statute requiring it to be signed. *People v. Superior Court*, 114 Cal. 466, 46 Pac. 383. And see *N. Y. Code Civ. Proc.*, §520; *Parrish v. Sun Pub. Assn.*, 6 App. Div. 585, 39 N. Y. Supp. 540.

In the absence of proof of the rules of law governing a foreign court, it will be presumed that a plaintiff in an action is required to present to the court his cause of action in writing. *Young v. Rosenbaum*, 39 Cal. 646.

“There is no law compelling parties to prepare and file pleadings if they are content to have their case presented and heard without written statements.” *Vider v. City of Chicago*, 60 Ill. App. 595. See also *Gwin v. Williams*, 27 Miss. 324.

In justices’ courts written pleadings are not required in many states. See the statutes of the various states, and the following cases: **Ark.**—*Morrison v. St. Louis & S. F. R. Co.*, 87 Ark. 424, 112 S. W. 975; *Mississippi Valley Const. Co. v. Chas. T. Abeles & Co.*, 87 Ark. 374, 112 S. W. 894; *Sparks v. Robinson*, 66 Ark. 460, 51 S. W. 460. **Ill.**—*Michels v. West*, 109 Ill. App. 418. **Minn.**—*Davidson v. Farrell*, 8 Minn. 258. **W. Va.**—*White v. Emblem*, 43 W. Va. 819.

20. **La.**—*Code Pr.*, §170. **N. H.** *Pub. St.*, 1901, c. 218, §1. **Vt.**—Except technical terms. *Pub. St.*, 1906, §1223.

21. See IX, B, 7, b, *infra*.

22. **Connecticut.**—*Gen. St.*, 1902, §614; *Craft Refrigerating Co. v. Quinpiac Brewing Co.*, 63 Conn. 551, 29 Atl. 76.

Georgia.—All petitions shall set forth the cause of action in orderly and distinct paragraphs, numbered consecutively. *Code*, 1895, §4961; *Atlantic*

In others it is held unnecessary to number the separate paragraphs of a single cause of action.²³

V. THE TITLE OR CAPTION.—A. GENERAL STATEMENT.
At Common Law.—At common law the caption designated the court in which the action was brought and the title gave the names of the parties and stated the nature of the action.²⁴

Under the Codes.—The codes and practice acts of most of the states provide that the complaint or petition shall contain the title²⁵ or style²⁶ of the action, including the names of the court²⁷ and the county where the action is brought²⁸ and the names of the parties.²⁹

The object of the title is to identify the pleading with the action and the court.³⁰

Title or Caption as Part of the Pleading.—Except when made so by statute,³¹ the caption or title is no part of the pleading³² unless referred to by appropriate allegations in the body thereof.³³

Defects in the Title.—The title is merely matter of form, and errors therein will not vitiate the pleading.³⁴

B. NAME AND DESCRIPTION OF THE COURT AND TERM.—Under the common law system of pleading the declaration is required to name

Coast Line R. Co. *v.* Taylor, 125 Ga. 454, 54 S. E. 622.

Iowa.—In a petition by equitable proceedings, each division shall be separated into paragraphs numbered as such, and each paragraph shall contain, as near as may be convenient, a complete and distinct statement. Code, §3559.

New Jersey.—The statement must be divided into paragraphs numbered consecutively, each containing, as nearly as may be, a separate allegation. Laws, 1912, c. 231, Schedule A, §17, p. 388.

New York.—Plaintiff will, on motion, be required to number the paragraphs of a complaint consisting of five pages. *Schultheis v. Fishman*, 62 Misc. 57, 115 N. Y. Supp. 102.

North Carolina.—Rev., 1905, §467; *Glenn v. Sumner*, 132 U. S. 152, 10 Sup. Ct. 41, 33 L. ed. 301.

23. But doing so does not render the petition bad on demurrer. *Minter v. Gose*, 13 Wyo. 178, 78 Pac. 948.

The numbering of paragraphs is not approved. *Toledo Gas-Light & Coke Co. v. Toledo*, 10 Ohio C. C. (N. S.) 490.

24. *Andrews Steph. Pl.* (2nd ed.), 153.

25. Cal.—Code Civ. Proc., §426. Colo.—Code, 1910, §55. Idaho.—Rev.

Codes, §4168. Ind.—Burns' Ann. St., 1908, §343. Ia.—Code, §3559. Minn. Rev. Laws, 1905, §4127. Mo.—Rev. St., 1909, §1909. Mont.—Rev. Code, §6532. N. Y.—Code Civ. Proc., §481. N. C.—Rev., 1905, §467. N. D.—Rev. Codes, 1905, §6852. Ore.—L. O. L., §67. S. C.—Code Civ. Proc., §163. S. D.—Code Civ. Proc., §119. Utah. Comp. Laws, 1907, §2960. Wash.—Rem. & Ball. Ann. Codes & St., §258. Wis. St., 1898, §2646.

"In the Court of Common Pleas of Huntington county, October term, A. D. 1863. Charles Crosby complains of John Ammerman, and says," etc., is a substantial compliance with the statute. *Ammerman v. Crosby*, 26 Ind. 451.

26. Ark. Kirby's Dig., §6091.

27. See V, B, *infra*.

28. See V, C, *infra*.

29. See V, D, *infra*.

30. *Adams v. Kelly*, 44 Ore. 66, 74 Pac. 399.

31. *Young v. Young*, 18 Minn. 90; *King v. Bell*, 13 Neb. 409, 14 N. W. 141.

The caption of the petition is to be considered in construing it. *McCloskey v. Strickland*, 7 Iowa 259.

32. *West Chicago Park Comrs. v. Schillinger*, 117 Ill. App. 525.

33. *Hawley Bros. Hardware Co. v. Brownstone*, 123 Cal. 643, 56 Pac. 468.

34. *Ewing v. Hatfield*, 17 Ind. 513.

the court in which the action is brought,³⁵ and a similar requirement as to the complaint or petition is found in the codes of most of the states.³⁶

Failure to name the court is not fatal,³⁷ and the omission may be supplied by amendment.³⁸

A petition addressed to one court confers no jurisdiction on another one,³⁹ but a mistake in this regard may be cured by amendment.⁴⁰

As a rule a misnomer cannot be taken advantage of after judgment.⁴¹

35. 1 Chitt. Pl., 263; Andrews' Steph. Pl., 153.

36. Ark.—The style of the court. Kirby's Dig., §6091. Cal.—Code Civ. Proc., §426. Colo.—Code, 1910, §55. Idaho.—Rev. Codes, §4168. Ind.—Burns' Ann. St., 1908, §343; Stevenson v. Stunkard, 44 Ind. App. 716, 90 N. E. 106. Ia.—Code, §3559; Jordan v. Brown, 71 Iowa 421, 32 N. W. 450; Garretson v. Hays Bros., 70 Iowa 19, 29 N. W. 786. Kan.—Gen. St., 1909, §5685. La.—The name or title of the court. Code Pr., §172. Minn.—Rev. Laws, 1905, §4127; Young v. Young, 18 Minn. 90. Mont.—Rev. Code, 1907, §6532. Neb.—Comp. St., 1911, §6666. Nev.—Comp. Laws, §3134. N. Y. Code Civ. Proc., §481. N. C.—Rev., 1905, §467. N. D.—Rev. Codes, 1905, §6852. Ohio.—Gen. Code, 1910, §11, 304. Okla.—Comp. Laws, 1909, §5627. Ore.—L. O. L., §67. S. C.—Code Civ. Proc., §163. S. D.—Code Civ. Proc., §119. Utah.—Comp. Laws, 1907, §2960. Wash.—Rem. & Ball. Ann. Codes & St., §258. Wis.—St., 1898, §2646. Wyo. Comp. St., 1910, §4379.

Where the petition described the court, "In the United States District Court, in and for the second judicial district of the Territory of Oklahoma," but the summons described it as "the district court of the Territory of Oklahoma, United States of America, for the Fifth county thereof," and was directed to and served by the sheriff of that county, and the territorial side of the court had jurisdiction and the federal side of the court did not, and the cause was treated as pending in the territorial court, it was held that it would be treated as pending in the territorial court. *Robinson v. Peru Plow & Wheel Co.*, 1 Okla. 140, 31 Pac. 988.

New Jersey.—Laws, 1912, c. 231, Schedule B, Form 3, p. 401.

37. *Hastie v. Burrage*, 69 Kan. 560, 77 Pac. 268.

Is not ground for demurrer where special demurrers have been abolished. *Dougherty v. Edwards*, 25 Ark. 84; *Jordan v. Hart*, 14 Ark. 184.

It is a defect of form (*Smith v. Flack*, 95 Ind. 116); not available on appeal (*Citizens Street R. Co. v. Shepherd*, 30 Ind. App. 193, 65 N. E. 767).

It is not prejudicial, or ground for setting the complaint aside, where it appears in the summons. *Benthuyssen v. Stevens*, 14 How. Pr. (N. Y.) 70; *Van Namee v. People*, 9 How. Pr. (N. Y.) 198.

The remedy is by motion, and the objection cannot be first raised on appeal. *McLeran v. Morgan*, 27 Ark. 148.

38. *Hastie v. Burrage*, 69 Kan. 560, 77 Pac. 268.

39. A petition addressed to the circuit court confers no jurisdiction on the district court. *Jordan v. Brown*, 71 Iowa 421, 32 N. W. 450; *Morgan v. Small*, 33 Iowa 118.

40. That the name of the court in an action in Nebraska is given as the "supreme court of the State of New York" is not good ground for the dissolution of an attachment in said action. The remedy is by motion to require an amendment. *Livingston v. Coe*, 4 Neb. 379.

41. That the declaration is addressed "to the city court of said county" instead of to "the city court of Atlanta." *Wolf v. Kennedy*, 93 Ga. 219, 18 S. E. 433.

On Habeas Corpus.—A misnomer of the court in the title of the complaint is not available on habeas corpus by one convicted of contempt for violating an injunction issued in the suit in which it was interposed, where the court was properly named on the cover of the complaint and in the summons,

It has been held not necessary to address the pleading to the judge or court in addition to naming the court in the title.⁴² That a petition or complaint is addressed to the judge rather than to the court,⁴³ inaccuracies in naming the court,⁴⁴ and a mistake in the number of the district,⁴⁵ have been held to be immaterial clerical errors.

Term.—In some states the term to which the case is made returnable must be specified.⁴⁶

C. DESIGNATION OF COUNTY.—The codes of most of the states provide that the name of the county in which the action is brought,⁴⁷ or in which it is to be tried,⁴⁸ shall be stated in the title. An omission

and the complaint was filed in the proper court. *Ex parte Fil Ki*, 79 Cal. 584, 21 Pac. 974.

On Writ of Review.—A judgment cannot be impeached on writ of review because the name of the court was incorrectly stated in the title, where there was a general appearance and no objection was made. *Adams v. Kelly*, 44 Ore. 66, 74 Pac. 399.

42. It is preferable to do so, but it is a matter of taste, and that it is not done is not ground for exception. *Hall v. Johnson* (Tex. Civ. App.), 40 S. W. 46.

43. That the petition is addressed "To the judge of the District Court of Polk County" is a mere formal defect and not ground for dismissal. *Smith v. Watson*, 28 Iowa 218.

44. That a petition is addressed to "The County Court at Law," rather than "The County Court of Dallas County at Law" is not a material error. *Smith v. Colquitt* (Tex. Civ. App.), 144 S. W. 690.

45. It is not ground for exception. *Clark v. Comford*, 45 La. Ann. 502, 12 So. 763.

46. Mo. Rev. St., 1909, §1794.

Failure to name the term is not ground for demurrer. *Jordan v. Hart*, 14 Ark. 184.

That the case is not made returnable to any term is not ground for dismissal, the law fixing the term. *Booth v. State*, 131 Ga. 750, 63 S. E. 502.

47. Cal.—Code Civ. Proc., §426. Colo.—Code, 1910, §55. Idaho.—Rev. Codes, §4168. Ind.—Burns' Ann. St., 1903, §343. Ia.—Code, §3559. Kan. Gen. St., 1909, §5685. Minn.—Rev. Laws, 1905, §4127. Mo.—Rev. St., 1909, §1794. Mont.—Rev. Code, 1907,

§6532. Neb.—Comp. St., 1911, §6666. Nev.—Comp. Laws, §3134. Ohio.—Gen. Code, 1910, §11,304. Okla.—Comp. Laws, 1909, §5627. Utah.—Comp. Laws, 1907, §2960. Wash.—Rem. & Ball. Ann. Codes & St., §258. Wyo.—Comp. St., 1910, §4379.

New Jersey.—Laws, 1912, c. 231, Schedule B, Form 3, p. 401.

48. N. C.—Rev., 1905, §467. N. D. Rev. Codes, 1905, §6852. S. C.—Code Civ. Proc., §163. S. D.—Code Civ. Proc., §119. Wis.—St., 1898, §2646.

In New York if the action is brought in the supreme court, the name of the county which the plaintiff designates as the place of trial must be given. Code Civ. Proc., §481; *Tolhurst v. Howard*, 94 App. Div. 439, 88 N. Y. Supp. 235; *McCasker v. Smith*, 20 Civ. Proc., 324, 14 N. Y. Supp. 615, *affirmed*, 133 N. Y. 672, 31 N. E. 622; *Rector v. Ridgwood Ice Co.*, 38 Hun 293, *affirmed*, 101 N. Y. 656.

The designation in the summons and complaint determines the county in which the action is commenced. *Benson v. Eastern Bldg. & Loan Assn.*, 67 App. Div. 319, 47 N. Y. Supp. 500.

Where the places named in the summons and complaint are different, the latter determines the venue of the action. *Goldstein v. Marx*, 73 App. Div. 545, 77 N. Y. Supp. 956; *Fisher v. Ogden*, 12 App. Div. 602, 43 N. Y. Supp. 111.

The subsequent service of a complaint naming a different place of trial from that stated in the summons changes the place of trial to the county named in the complaint and thereafter the action is deemed pending in the latter county, unless it appears that the insertion of the place of trial in the complaint was an inadvertence, and plaintiff promptly takes steps to

of the name may, as a general rule, be cured by amendment.⁴⁹

D. DESIGNATION AND DESCRIPTION OF PARTIES. — 1. **General Rules.** Under the common law system of pleading the names of the parties to the action must be given in the title or commencement of the declaration.⁵⁰

The codes and practice acts of the various states generally require the names of the parties to be given in the title of the action.⁵¹

Where the name of a party is given in the caption, it need not be repeated in the body of the pleading if sufficiently referred to to fully apprise defendant of whose complaint he is to answer.⁵² Failure to

correct the error before defendant has acted in reliance upon the change. *Tolhurst v. Howard*, 94 App. Div. 439, 88 N. Y. Supp. 235.

A mere inadvertence in naming a different place in the complaint will not change the place of trial provided plaintiff moves promptly to correct the error and does not permit defendant to act upon the presumption that the change was intentional. *Goldstein v. Marx*, 73 App. Div. 545, 77 N. Y. Supp. 956; *Fisher v. Ogden*, 12 App. Div. 602, 43 N. Y. Supp. 111.

May be amended in this regard after answer. *McCosker v. Smith*, 20 Civ. Proc. 324, 14 N. Y. Supp. 615, *affirmed*, 133 N. Y. 672, 31 N. E. 622.

Such amendment cannot operate to prejudice proceedings already had. *Rector v. Ridgwood Ice Co.*, 38 Hun 293, *affirmed*, 101 N. Y. 656.

49. *Hastie v. Burrage*, 69 Kan. 560, 77 Pac. 268.

50. 1 Chitt. Pl. 280; *Andrews v. Steph.* Pl., 153.

51. *Ariz.*—Rev. St., 1901, §1289. *Ark.*—Distinguishing them as plaintiffs and defendants. *Kirby's Dig.*, §6091. *Cal.*—Code Civ. Proc., §426. *Ga.*—The names of the parties against whom process is prayed. Code, 1895, §4960. *Idaho.*—Rev. Codes, §4168. *La.*—The names and places of residence of the parties. Code Pr., §172. *Mont.*—Code, 1907, §6532. *Ohio.*—Gen. Code, 1910, §11,304. *Tex.*—The names of the parties and their residence if known. *Sayle's Civ. St.*, art. 1191; *Yates v. Royston State Bank* (Tex. Civ. App.), 131 S. W. 255. *Utah.*—Comp. Laws, 1907, §2960. *Wyo.*—Comp. St., 1910, §4379.

New Jersey.—Laws, 1912, c. 231, Schedule B, Form 3, p. 401.

The Names of the Parties To the

Action, Plaintiff and Defendant.—*Colo.* Code, 1910, §55. *Ind.*—*Burns' Ann. St.*, 1908, §343. *Ia.*—Code, §3559. *Kan.* Gen. St., 1909, §5685. *Minn.*—Rev. Laws, 1905, §4127. *Mo.*—Rev. St., 1909, §1794. *Neb.*—Comp. St., 1911, §6666; *Stubendorf v. Sonnenschein*, 11 Neb. 235, 9 N. W. 91. *Nev.*—Comp. Laws, §3134. *N. Y.*—Code Civ. Proc., §481. *N. C.*—Rev., 1905, §467. *N. D.*—Rev. Codes, 1905, §6852. *Okla.*—Comp. Laws, 1909, §5627. *Ore.*—L. O. L., §67; *McDowell v. Parry*, 45 Ore. 99, 76 Pac. 1081. *S. C.*—Code Civ. Proc., §163. *S. D.*—Code Civ. Proc., §119. *Wash.* Rem. & Ball. Codes & St., §258. *Wis.* St., 1898, §2646.

"There is no principle more certainly and satisfactorily settled, than that in all actions the writ and declaration must both set forth, accurately, the Christian and surname of each plaintiff and each defendant, unless the party is a corporation, known to the law by an artificial name, and is authorized to sue and be sued in such corporate name." *Hays v. Lanier*, 3 Blackf. (Ind.) 322. Quoted with approval in *Pollock v. Dunning*, 54 Ind. 115.

It is insufficient to designate the plaintiffs as the 'heirs at law of M. C., deceased,' without giving their names. *Kerlee v. Corpening*, 97 N. C. 330, 2 S. E. 664.

52. *Ark.*—*McLeran v. Morgan*, 27 Ark. 148. *Ind.*—*Crosby v. Powers*, 137 Ind. 694, 37 N. E. 321; *Lowry v. Dutton*, 28 Ind. 473. *Tex.*—*Clark v. Haney*, 62 Tex. 511; *Hall v. Johnson* (Tex. Civ. App.), 40 S. W. 46.

"They need not thereafter be referred to in the several paragraphs of the complaint, except generally as plaintiffs or defendants, unless it should become necessary in an allegation to particularize some plaintiff or

give the names of the parties in the title may be supplied by naming them in the body of the complaint.⁵³ Where the caption names several defendants, a reference to the defendant in the singular in the body of the complaint may be regarded as a harmless clerical error.⁵⁴ If plaintiff sues on behalf of himself and others similarly situated, that fact must be shown.⁵⁵

Describing some of the plaintiffs in the caption as minors suing by their next friend has been held not to be a sufficient averment of minority.⁵⁶

The use of the feminine gender throughout the pleading in referring to plaintiff is sufficient to designate her as a female.⁵⁷ If it is material whether she is married or single, that fact must be shown.⁵⁸

Must Use True Name.—Under the codes the true names of the parties must be given, if known.⁵⁹ A party sued by a wrong name is bound by the judgment, however, unless he seasonably objects.⁶⁰ The codes of many states provide that when defendant's true name is unknown he may be designated by a fictitious one, and that his true name may then be substituted by amendment when discovered.⁶¹

defendant." *Chicago & E. R. Co. v. Thomas*, 147 Ind. 35, 46 N. E. 73.

May be described in the body of the pleading as plaintiff or defendant. *King v. Bell*, 13 Neb. 409, 14 N. W. 141; *Stubendorf v. Sonnenschein*, 11 Neb. 235, 9 N. W. 91.

They may be referred to as "the above named" or "the said" defendants. *First Nat. Bank v. Hattenbach*, 13 S. D. 365, 83 N. W. 421.

"It is not a fatal defect to omit the names of the parties in the body of the complaint, where they are set out in the title." *Scott v. Vulcan Iron Works Co. (Okla.)*, 122 Pac. 186.

53. **Ark.**—*Collins v. Lightle*, 50 Ark. 97, 6 S. W. 596. **Ind.**—*Ammerman v. Crosby*, 26 Ind. 451; *Ferguson v. Despo*, 8 Ind. App. 523, 34 N. E. 575. **Ky.** *Madisonville, H. & E. R. Co. v. Wiar*, 144 Ky. 206, 138 S. W. 255. **Mo.** *State v. Patton*, 42 Mo. 530.

It is a formal defect and not ground for dismissal where they are described in the body of the petition. *Smith v. Watson*, 28 Iowa 218.

54. Is not bad on demurrer for ambiguity. *Fay v. McKeever*, 59 Cal. 307.

The contrary has been held where the caption described the defendants as "B and B, partners, doing business under the firm name and style of I. B. & Co.," where the body of the complaint throughout in referring to the defendant used the singular num-

ber and neuter gender, showing that the pleader had in mind the co-partnership as the defendant and not the persons composing it, and there was no reference to the caption. *Hawley Bros. Hardware Co. v. Brownstone*, 123 Cal. 643, 56 Pac. 468.

55. *Thorndike v. Milwaukee Auditorium Co.*, 143 Wis. 1, 126 N. W. 881; *Cawker v. City of Milwaukee*, 133 Wis. 35, 113 N. W. 417.

56. *Funk v. Davis*, 103 Ind. 281, 2 N. E. 739.

57. *Cosand v. Lee*, 11 Ind. App. 511, 38 N. E. 1099.

58. The prefix "Mrs." leaves it doubtful whether she is married or single, using the word "single" in a sense broad enough to include a divorced person. *Wrightsville & T. R. Co. v. Vaughan*, 9 Ga. App. 371, 71 S. E. 691.

59. The fictions of the action of ejectment at common law have been abolished, and the names of the real claimants and defendants must be given in the pleadings. *Hardy v. Johnson*, 1 Wall. (U. S.) 371, 17 L. ed. 502.

60. Unless he pleads the misnomer in abatement. *Board of Comrs. v. Huffman*, 134 Ind. 1, 31 N. E. 570; *Bloomfield R. Co. v. Burress*, 82 Ind. 83.

61. **Ariz.**—Rev. St., 1901, §1290. **Miss.**—Code, 1906, §731. **Wash.**—Rem. & Ball. Ann. Codes & St., §306.

Assumed or Trade Name.— Either a natural or an artificial person may maintain or defend a suit in an assumed or trade name under which he is transacting business.⁶²

Use of Initials.— In some states it is permissible to use the initials, instead of the full Christian name, of a party,⁶³ but the general holding is to the contrary.⁶⁴ The use of the initials is sometimes permitted in actions on written instruments which have been signed in that manner,⁶⁵ or where defendant's Christian name is unknown.⁶⁶

2. Persons Suing or Sued in a Representative Capacity.— The capacity in which the parties sue or are sued must be shown,⁶⁷ and will

May do so only where he is ignorant of his true name, and the proceedings must be amended when it is discovered. *Simon v. Underwood*, 61 Misc. 369, 115 N. Y. Supp. 65.

Where a defendant sued under a fictitious name appears and answers, a judgment rendered against him is not void on collateral attack because the complaint is not amended by inserting his true name. *Campbell v. Adams*, 50 Cal. 203.

62. *Charles v. Valdosta Foundry & Mach. Co.*, 4 Ga. App. 733, 62 S. E. 493.

The defendant is entitled to be sued by a real party plaintiff, and may contest the fact that he is so sued by a plea in abatement, but the objection is waived by a general demurrer or motion to dismiss. *Charles v. Valdosta Foundry & Mach. Co.*, 4 Ga. App. 733, 62 S. E. 493.

A party suing in a trade or business name cannot thereafter deny in his real name the validity of the judgment or its binding effect upon him. *Clark v. Wyche*, 126 Ga. 24, 54 S. E. 909; *Charles v. Valdosta Foundry & Mach. Co.*, 4 Ga. App. 733, 62 S. E. 493. See also the title "Parties."

63. *Ariz.*—*Olney v. Bishop*, 13 Ariz. 336, 114 Pac. 559. *Ga.*—*Minchew v. Mahunta Lumb. Co.*, 5 Ga. App. 154, 62 S. E. 716. *Tex.*—*Clark v. Haney*, 62 Tex. 511.

64. *Ill.*—*Geiger v. Kaestner*, 148 Ill. App. 529. *Ind.*—*Bascom v. Toner*, 5 Ind. App. 229, 31 N. E. 856. *Mich.*—*Fisher v. Northrup*, 79 Mich. 287, 44 N. W. 610. *Neb.*—*Patrick v. Norfolk Lumb. Co.*, 81 Neb. 267, 115 N. W. 780.

In Equity.—*Monroe Cattle Co. v. Becker*, 147 U. S. 47, 13 Sup. Ct. 217, 37 L. ed. 72.

The remedy in case only the initials are used is by motion to require an amendment, and if not so taken advantage of, the objection is waived. *Walgamood v. Randolph*, 22 Neb. 493, 35 N. W. 217.

Is not reached by objection to evidence. *Patrick v. Norfolk Lumb. Co.*, 81 Neb. 267, 115 N. W. 780.

Is waived unless properly presented to the trial court. *Patrick v. Norfolk Lumb. Co.*, 81 Neb. 267, 115 N. W. 780.

65. *U. S.*—*Bigelow v. Chatterton*, 51 Fed. 614, 2 C. C. A. 402. *Miss.*—Code, 1906, §732. *Tex.*—*Brown v. Hunter*, 38 Tex. 626.

66. The complaint must so allege. *Kellam v. Toms*, 38 Wis. 592, 601.

67. Must be shown in the body of the complaint. *Reed v. Heglie*, 19 N. D. 801, 124 N. W. 1127.

"A party suing for the benefit of an estate he represents, must show that fact by direct and positive allegations in his petition, or he will not be entitled to an appeal without giving an appeal bond." *Guest v. Phillips*, 34 Tex. 176.

Where the statement of the names of the parties in the margin is made by the code a part of the complaint, a complaint describing plaintiff in the margin as "administrator of G., deceased," and reciting that the note sued on is the property of plaintiff's intestate, sufficiently shows that plaintiff, as administrator of G., claims the amount due upon the note as assets of the latter's estate. *Graham v. Gunn*, 45 Ala. 577.

A complaint which describes plaintiff in the title as supervisor and commences "The complaint of the plaintiff above named as supervisor aforesaid shows," etc., sufficiently shows that

be determined by the substantive allegations of the pleading rather than by its title.⁶⁸ That the title does not show the representative character in which plaintiff sues does not make the action one in his individual capacity, where his representative capacity clearly appears in the body of the complaint.⁶⁹ The words "administrator" or "executor,"⁷⁰ "guardian,"⁷¹ "receiver,"⁷² "trustee,"⁷³ or the like, following the plaintiff's or the defendant's name in the caption or title will be regarded as merely *descriptio personae*, and are not alone sufficient to make the action one by or against him in his representative capacity. The contrary is true where the word "as" is used between the name of the plaintiff and the words of description,⁷⁴ or where the averments in the body of the complaint show that the cause of action devolves upon him in his representative capacity,⁷⁵ or is against the estate which he represents.⁷⁶

he sues in that capacity. *Smith v. Levinus*, 8 N. Y. 472.

One suing as surviving partner need not describe himself as such in the title to the cause. *Murphy v. Cochran*, 146 Iowa 443, 123 N. W. 349.

One suing as trustee of an express trust must so allege. *Perry v. Swaner*, 150 N. C. 141, 63 S. E. 611.

68. *Ala.* — *Tate v. Shackelford's Admr.*, 24 *Ala.* 510, 60 *Am. Dec.* 488. *Ind.* — *Ditton v. Hart*, 93 N. E. 961. *Vt.* — *Rich v. Sowles*, 64 *Vt.* 408, 23 *Atl.* 723. *W. Va.* — *Scott v. Newell*, 69 *W. Va.* 118, 70 S. E. 1092.

"In order to determine whether the defendants are sued in their representative capacity, the title, allegations and demand are to be considered as a whole." *Williamson v. Stevens*, 82 N. Y. Supp. 1047. Quoted with approval in *Standard Audit Co. v. Robotham*, 62 *Misc.* 466, 115 N. Y. Supp. 1521.

69. *O'Hara v. Williamstown Cemetery Assn.*, 133 *Ky.* 828, 119 S. W. 234; *Quinn's Admr. v. Newport News & M. V. Co.*, 15 *Ky. L. Rep.* 74, 22 S. W. 223.

70. *Lucas v. Pittman*, 94 *Ala.* 616, 10 *So.* 603; *Tate v. Shackelford's Admr.*, 24 *Ala.* 510; *Merritt v. Seaman*, 6 N. Y. 168.

Where the complaint puts in issue the title of the plaintiff individually. *Agee v. Williams*, 27 *Ala.* 644.

When the complaint shows a cause of action in favor of the plaintiff individually, the descriptive words may be rejected, leaving the action to stand as one in his individual capacity. *Litchfield v. Flint*, 104 N. Y. 543, 11 N. E. 58.

Where a cause of action is stated against defendant personally. *Rich v. Sowles*, 64 *Vt.* 408, 23 *Atl.* 723.

71. In an action on a note payable to plaintiff as guardian. *Bradley v. Graves*, 46 *Ala.* 277.

72. *Vesele v. Grant St. Electric R. Co.*, 16 *Wash.* 602, 48 *Pac.* 249.

73. *Marion Bond Co. v. Mexican Coffee & Rubber Co.*, 160 *Ind.* 558, 65 N. E. 748; *King v. Bryant (R. I.)*, 75 *Atl.* 630.

A declaration describing the defendants as "Trustees" etc., but containing no averments to show that they are sued in their official capacity is a declaration against them personally. *Scott v. Newell*, 69 *W. Va.* 118, 70 S. E. 1092.

74. *Lucas v. Pittman*, 94 *Ala.* 616, 10 *So.* 603. See *Vesele v. Grant St. Electric R. Co.*, 16 *Wash.* 602, 48 *Pac.* 249.

75. In such case the body of the complaint must govern the caption. *Lucas v. Pittman*, 94 *Ala.* 616, 10 *So.* 603; *Watson v. Collins' Admr.*, 37 *Ala.* 587.

Where it is plain from the averments of the complaint that the cause of action, if any, devolves upon plaintiff in his representative capacity, the omission of the word "as" between his name and the words describing him as executor in the title, does not make the action one in his individual capacity. *Beers v. Shannon*, 73 N. Y. 292; *Stilwell v. Carpenter*, 62 N. Y. 639, 2 *Abb. N. C.* 238; *Willeys v. Haines*, 96 *App. Div.* 5, 88 N. Y. Supp. 1018.

76. *Rich v. Sowles*, 64 *Vt.* 408, 23 *Atl.* 723.

3. Naming Beneficiaries.—Where an action is brought for the benefit of another, the name of the latter need not be given,⁷⁷ nor is it necessary to state that the action is for the use of a third person named in the petition when such is the case,⁷⁸ though it is not improper to do so.⁷⁹ It has, however, been held that where an action is brought by a trustee, the pleading should disclose the name of the *cestui que trust*.⁸⁰

4. Corporations.—In an action by or against a corporation its corporate existence and character must be shown.⁸¹ In some states a specific allegation of incorporation is unnecessary,⁸² while in others a

77. *People v. Jamison*, 157 Ill. App. 546.

78. **U. S.**—*United States v. Abeel*, 174 Fed. 12. **Ariz.**—*United States v. Griswold*, 8 Ariz. 453, 76 Pac. 596. **Ill.**—*Northrop v. McGee*, 20 Ill. App. 108. **W. Va.**—*Bentley v. Standard Fire Ins. Co.*, 40 W. Va. 729, 23 S. E. 584.

Its purpose is to guard the interest of the use against the adverse action of a nominal plaintiff, and it has no force to make the issue different from what it would otherwise have been. *United States v. Abeel*, 174 Fed. 12, 98 C. C. A. 50; *Boston E. R. Co. v. Grace & Hyde Co.*, 112 Fed. 279, 50 C. C. A. 239.

The words "for the use of" are unnecessary for any purpose other than to protect the interest of the use against the nominal plaintiff. *United States v. Griswold*, 8 Ariz. 453, 76 Pac. 596; *Tedrick v. Wells*, 152 Ill. 214, 38 N. E. 625; *Hobson v. McCambridge*, 130 Ill. 367, 22 N. E. 823.

The declaration of use is no part of the pleading. *United States v. Abeel*, 174 Fed. 12, 98 C. C. A. 50; *Boston E. R. Co. v. Grace & Hyde Co.*, 112 Fed. 279, 50 C. C. A. 239; *Bentley v. Standard Fire Ins. Co.*, 40 W. Va. 729, 23 S. E. 584.

Insertion of the name of a usee may be disregarded as surplusage. **U. S.** *United States v. Abeel*, 174 Fed. 12, 98 C. C. A. 50; *Boston E. R. Co. v. Grace & Hyde Co.*, 112 Fed. 279, 50 C. C. A. 239. **Ill.**—*Northrop v. McGee*, 20 Ill. App. 108. **Ind.**—*State v. Johnson*, 52 Ind. 197. **Mo.**—*Beattie v. Lett*, 28 Mo. 596.

At common law a suit on an official bond running to the state or the government was usually brought "for the use of" or "at the relation of" the injured person. *United States v. Griswold*, 8 Ariz. 453, 76 Pac. 596.

79. *Belton v. Gibbon*, 12 N. J. L. 76.

It is better to do so. *Bentley v. Standard Fire Ins. Co.*, 40 W. Va. 729, 23 S. E. 584.

80. *Marion Bond Co. v. Mexican Coffee & Rubber Co.*, 160 Ind. 558, 65 N. E. 748. See also the title "**Trusts.**"

81. A declaration describing defendant as "the village of M., a municipal corporation of the State of Michigan," is a sufficient allegation of its corporate existence and character. *Clark v. Village of North Muskegon*, 88 Mich. 308, 50 N. W. 254.

In *Saunders v. Sioux City Nursery*, 6 Utah 431, 24 Pac. 532, the complaint was held to sufficiently show defendant's corporate capacity, where defendant was described in the caption as "The S. Co., a corporation under the laws of the State of Iowa, defendant," and was referred to in the body of the complaint as the defendant.

See also the title "**Corporations.**"

82. The name of the company implies its corporate existence. *Odd Fellows Bldg Assn. v. Hogan*, 28 Ark. 261.

Where the action is brought against a defendant in a name implying a corporation, the complaint need not expressly allege that it is a corporation. *Lake Erie & W. R. Co. v. Griffin*, 8 Ind. App. 47, 35 N. E. 396.

The words "Valdosta Foundry and Machine Company" import a corporation, and where the petition so designated the plaintiff it was held that a special demurrer on the ground that there was no party plaintiff was properly overruled. *Charles v. Valdosta Foundry & Mach. Co.*, 4 Ga. App. 733, 62 S. E. 493.

It is not necessary to aver that plaintiff is a corporation, duly constituted and authorized by law to sue in its corporate name. If its legal ex-

contrary doctrine prevails.⁸³ It is not necessary to give the names of the corporate officers unless they are material to the cause of action.⁸⁴

5. Associations and Partnerships.—Actions by and against unincorporated associations and partnerships must be brought in the names of the individuals composing the same.⁸⁵ It has been held unnecessary to state either in the caption or in the body of the pleading that they are partners.⁸⁶ In any event a failure to do so in the caption is immaterial where the fact of the partnership is fully set out in the body of the pleading.⁸⁷ That the individuals composing the firm are not named in the title is immaterial where they are named in the body of the pleading.⁸⁸ Where parties are designated by name as defendants in the title, an additional description of them as partners will not restrict the action to one against the firm.⁸⁹ The caption may be considered in connection with the allegations in the body of the pleading as to the persons constituting the members of the defendant firm.⁹⁰

istence is questioned, it can only be done by plea. *Mississippi, O. & R. Co. v. Gaster*, 20 Ark. 455.

In an action by or against a corporation it may be designated by its corporate name without an averment of its corporate capacity, and if such capacity is disputed it must be by answer and not by demurrer. *New Bern Banking & Trust Co. v. Duffy* (N. C.), 72 S. E. 96; *Stanly v. Richmond & D. R. Co.*, 89 N. C. 331.

83. If plaintiff is a corporation, that fact must be alleged, and it must also be stated whether it is a domestic or foreign corporation, and, if the latter, the law under which it is incorporated. *Code Civ. Proc.*, §1776. *Kaulbach v. Knickerbocker Trust Co.*, 139 App. Div. 566, 124 N. Y. Supp. 286.

A private domestic corporation plaintiff must allege that it is a corporation. *Holloway v. Memphis, El P. & P. R. Co.*, 23 Tex. 465.

The same is true in the case of a foreign corporation. *Bank v. Simon-ton*, 2 Tex. 531.

Must show the state where a foreign corporation was incorporated and the powers conferred on it. *Devoss v. Gray*, 22 Ohio St. 159.

Failure to allege that defendant insurance company is a corporation is waived where it asserts the issuance of a policy in its answer. *Sengfelder v. Mutual Life Ins. Co.*, 5 Wash. 121, 31 Pac. 428.

84. *Yates v. Royston State Bank* (Tex. Civ. App.), 131 S. W. 255.

85. *Will's Gould Pl.*, 241, 242.

A complaint in the firm name only is demurrable. *Pollock v. Dunning*, 54 Ind. 115; *Hays v. Lanier*, 3 Blackf. (Ind.) 322.

A default judgment based on a petition which fails to set out the names of the individuals composing the plaintiff co-partnership will be reversed. *Burden v. J. C. Cross & Co.*, 33 Tex. 685.

Waiver.—The objection that the suit is brought in the firm name only is waived by pleading to the merits. *Robinson v. Magarity*, 28 Ill. 423; *West Chicago Park Comrs. v. Schillinger*, 117 Ill. App. 525.

See also the title "Partnership."

86. In an action on a firm obligation. *First Nat. Bank v. Hattenbach*, 13 S. D. 365, 83 N. W. 421.

It is sufficient to allege merely that defendants made the note in suit. *Bumpass & Hicks v. Taggart*, 26 Ark. 398; *Swinney v. Burnside & Co.*, 17 Ark. 38.

87. *Van Brunt & Davis Co. v. Harigan*, 8 S. D. 96, 65 N. W. 421.

Is not ground for demurrer. *First Nat. Bank v. Hattenbach*, 13 S. D. 365, 83 N. W. 421.

88. *West Chicago Park Comrs. v. Schillinger*, 117 Ill. App. 525.

89. *King v. Bell*, 13 Neb. 409, 14 N. W. 141.

90. *McCloskey v. Strickland*, 7 Iowa 259.

E. NAME OF PLEADING. — The codes of some states require the name of the pleading to be given in the caption.⁹¹ A failure to comply with such a provision is not fatal, and may be cured by amendment.⁹²

F. FORM OF ACTION. — Under the common law system of pleading the title or commencement of the declaration must state the form or nature of the action.⁹³ The codes of a few states require a designation of the action as one at law or in equity as the case may be.⁹⁴ Failure to comply with such a provision has been held to be a mere formal defect and not ground for dismissal.⁹⁵

VI. COMMENCEMENT. — At common law the commencement consisted of a statement of the names of the parties to the action and the character or right in which they were made parties, the mode in which the defendant was brought into court, and a brief recital of the form of the action.⁹⁶ Under the codes and practice acts no formal commencement, aside from the title, is required.⁹⁷

VII. FORMS OF ACTIONS. — A. AT COMMON LAW. — At common law the distinctions between the various forms of action must be observed,⁹⁸ and the declaration must be in proper form as well as sufficient in substance.⁹⁹ Distinction between forms of action is still recognized in some states,¹ but common law rules have been more or less

91. Kan.—The word "petition." Gen. St., 1909, §5685. N. J.—Laws, 1912, c. 231, Schedule B, Form 3, p. 401. Ohio.—Gen. Code, 1910, §11,304. Okla.—Comp. Laws, 1909, §5627. Wyo. Petition. Comp. St., 1910, §4379.

92. *Sullivan v. Jones*, 117 Ind. 327, 20 N. E. 242; *Butcher v. Bank of Brownsville*, 2 Kan. 70, 83 Am. Dec. 446.

93. 1 Chit. Pl., 280; *Andrews' Steph. Pl.*, 153.

In Massachusetts the declaration in a personal action is required to state to which division of personal actions, as enumerated in the statute, it belongs, viz: contract, tort, or replevin. Rev. Laws, 1902, c. 173, §6, p. 1550.

94. *Kirby's Ark. Dig.*, §6091; Ia. Code, §3559.

95. *Smith v. Watson*, 28 Iowa 218.

96. 1 Chit. Pl., 280; *Smith v. Fowle*, 12 Wend. (N. Y.) 9. Mr. Stephen includes these matters in his definition of the title of the case. *Andrews' Steph. Pl.* (2nd ed.), 153.

97. Pub. Gen. Laws, art. 75, §84; *Wilms v. White*, 26 Md. 380.

98. *Royce, Allen & Co. v. Oakes*, 20 R. I. 418, 39 Atl. 753.

"It is true, the distinction between the various forms of action may be merely formal and purely technical,

but still such distinctions have been fully established and recognized by the common law from the earliest period of its history. Those distinctions are too firmly established to be disregarded, and we must administer the law as we find it, and leave it to another department of the government to make changes when required." *Creel v. Kirkham*, 47 Ill. 344.

99. *Will's Gould Pl.*, 192.

1. Alabama.—The statute has not destroyed the distinction between the forms of action as they existed at the time it went into effect. *Munter v. Rogers*, 50 Ala. 283; *Beavers v. Hardie & Co.*, 48 Ala. 95; *Creel v. Kirkham*, 47 Ill. 344.

District of Columbia.—Common-law rule 26 of the supreme court providing that prolixity and unnecessary verbiage shall be avoided does not abolish the common-law forms of action. *Miller v. Ambrose*, 35 App. Cas. 75.

New Jersey.—That an action is in contract instead of in debt is ground for demurrer. *Lott v. Leventhal*, 80 N. J. L. 216, 76 Atl. 328.

See the Introduction to this work; and the title "Choice and Election of Remedies," and the title of various specific actions, as, for example, "Case."

modified by statute.² In declaring upon them it is incumbent on the pleader to set out all the essential elements of such causes of action.³

In Texas the distinction in the forms of action as known to the common law has never existed.⁴

2. Maine.—The distinction between actions of trespass and trespass on the case is abolished. A declaration in either form is good. Rev. St., 1903, c. 84, §26.

Massachusetts.—The common counts shall not be used unitedly, but any one of them may be used if the natural import of its terms correctly describes the cause of action. Rev. Laws, 1902, c. 173, §6; Massachusetts Mut. Life Ins. Co. v. Green, 185 Mass. 306, 70 N. E. 202.

A count on an account annexed may be used in an action on contract if one or more items are claimed any of which would be correctly described by any one of the common counts according to the natural import of its terms. Mass. Rev. Laws, 1902, c. 173, §6.

The practice act abolishes the distinction between actions of assumpsit, covenant and debt. Warren v. Ferdinand, 9 Allen (Mass.) 357.

Michigan.—"A plain and clear statement of the facts constituting the wrong is sufficient, and it is of little matter, in actions of trespass on the case, what the action is named or called." Anteliff v. June, 81 Mich. 477, 45 N. W. 1019.

Pennsylvania.—So far as relates to procedure, the distinctions heretofore existing between actions *ex contractu* are abolished, and all demands heretofore recoverable in debt, assumpsit or covenant shall hereafter be sued and recovered in one form of action to be called an action of assumpsit. Act May 25, 1887, §1 (P. L. 271), 3 Purdon's Dig., p. 3608.

May maintain an action of assumpsit on the bond of the committee of a lunatic, though formerly the proper action would have been one of debt. Com. v. Patterson, 13 Pa. Super. 136.

Any demand which could have been recovered in either of the actions named in said section may be recovered in an action of assumpsit under the statute. Jones v. Gordon, 124 Pa. 263, 16 Atl. 862.

The act should be liberally inter-

preted. Jones v. Gordon, 124 Pa. 263, 16 Atl. 862.

So far as relates to procedure, the distinctions heretofore existing between actions *ex delicto* are abolished, and all damages heretofore recoverable in trespass, trover or trespass on the case shall hereafter be sued for and recovered in one form of action, to be called an action of trespass. Act May 25, 1887, §1 (P. L. 271), 3 Purdon's Dig., p. 3610.

Though plaintiff's statement sets forth his claim as in trespass, he is entitled to judgment if the facts establish his right to recover either in trespass or case. Miller v. Allentown & B. R. Transp. Co., 181 Pa. 622, 37 Atl. 824; Duffield v. Rosenzweig, 144 Pa. 520, 23 Atl. 4.

Trespass is the proper remedy for the wrongful use or occupancy of plaintiff's land. Allwein v. Brown, 29 Pa. Super. 331.

Rhode Island.—All pleadings which contain the essential averments, according to the rules of the common law or the practice of this state, shall be held good, notwithstanding the omission of immaterial matter of the prescribed forms; and the court may at any time permit either of the parties to amend any defects in the process or pleadings, with or without terms, in the discretion of the court, or in pursuance of general rules. Gen. Laws, 1909, c. 285, §4, p. 1004.

No summons, writ, declaration, return, process, judgment, or other proceeding in civil causes in any court, shall be abated, arrested, quashed, or reversed, for any defect, or want of form, but the court shall proceed and give judgment according as the right of the cause and matter, in law shall appear unto it, without regarding any imperfections, defects, or want of form in such writ, declaration, or other pleadings, return, process, judgment or proceedings whatsoever. Gen. Laws, 1909, c. 285, §3, p. 1003.

3. Miller v. Ambrose, 35 App. Cas. (D. C.) 75.

4. Towner v. Sayre, 4 Tex. 28.

In the federal courts the distinction between actions at law and suits in equity is still preserved.⁵

B. UNDER THE CODES.—1. **General Statement of the Code Provisions.**—The codes generally abolish the distinctions between actions at law and suits in equity,⁶ and the distinction between the forms of such actions and suits,⁷ and provide that there shall be but one form

5. *Armstrong Cork Co. v. Merchants' Refrigerating Co.*, 184 Fed. 199, 106 C. C. A. 93, and cases cited.

6. *Bliss Code Pl.*, §§4-6. *Ariz. Rev. St.*, 1901, §1289. *Colo.*—Code, 1910, §1; *Blatchley v. Coles*, 6 Colo. 82; *Tarabino v. Nicholi*, 5 Colo. App. 515, 39 Pac. 362. *Ga.*—Bills in equity are abolished. Code, 1895, §1931; *De Lacy v. Hurst*, 83 Ga. 223, 9 S. E. 1052. *Idaho.*—Const., art. 5, §1; *Coleman v. Jagers*, 12 Idaho 125, 85 Pac. 894; *Anderson v. War Eagle Consol. Min. Co.*, 8 Idaho 789, 72 Pac. 671; *Staples v. Rossi*, 7 Idaho 618, 65 Pac. 67; *Idaho & Ore. Land Imp. Co. v. Bradbury*, 132 U. S. 599, 10 Sup. Ct. 177, 33 L. ed. 433. *Ind.*—Burns' Ann. St., 1908, §249; *Adams v. Shewalter*, 139 Ind. 178, 38 N. E. 607; *Blair v. Smith*, 114 Ind. 114, 15 N. E. 817. *Kan.*—Gen. St., 1909, §5603; *Deering v. Boyle*, 8 Kan. 525. *Minn.*—Rev. Laws, 1905, §4052; *Gilbert v. Boak Fish Co.*, 86 Minn. 365, 90 N. W. 767; *Bell v. Mendenhall*, 71 Minn. 331, 73 N. W. 1086. *Neb.*—Comp. St., 1911, §6572; *Turner v. Althaus*, 6 Neb. 54-85; *Wilcox v. Saunders*, 4 Neb. 569; *Cropsey v. Wiggernhorn*, 3 Neb. 108. *N. M.* *Kingston v. Walters*, 14 N. M. 368, 93 Pac. 700. *N. Y.*—Code Civ. Proc., §3339; *Phillips v. Gorham*, 17 N. Y. 270. *N. C.*—Rev., 1905, §354. *N. D.* *Rev. Codes*, 1905, §6767. *Ohio.*—*Culver v. Rodgers*, 33 Ohio St. 537. *Okla.* *Comp. Laws*, 1909, §5542. *S. C.*—*Southern Porcelain Mfg. Co. v. Thew*, 5 S. C. 5. *S. D.*—Code Civ. Proc., §36; *Macomb v. Lake County*, 13 S. D. 103, 82 N. W. 417; *Sykes v. First Nat. Bank*, 2 S. D. 242, 49 N. W. 1058. *Tex.* *Sayle's Civ. St.*, art. 1191. *Utah.*—Law and equity may be administered in the same action. Const., art. 8, §19; *Volker-Seoweroft Lumb. Co. v. Vance*, 36 Utah 348, 103 Pac. 970; *Houtz v. Gisborn*, 1 Utah 173. *Wash.*—*Brown v. Baldwin*, 46 Wash. 106, 89 Pac. 483; *Browder v. Phinney*, 30 Wash. 74, 70 Pac. 264; *Washington Iron Works Co. v. Jensen*, 3 Wash. 584, 28 Pac. 1019.

Wis.—St., 1898, §2600; *Deery v. McIntock*, 31 Wis. 195. *Wyo.*—Comp. St., 1910, §4286; *Field v. Leiter*, 16 Wyo. 1, 90 Pac. 378, 92 Pac. 622; *Ingersoll v. Davis*, 14 Wyo. 120, 82 Pac. 867.

See also New York, etc. Co. v. Saratoga Gas, etc. Co., 88 Hun (N. Y.) 569.

The legislature had authority to blend law and equity cases into one form of action by the abolition of the distinction formerly existing between them and authorizing their joinder in the same petition. *Turner v. Althaus*, 6 Neb. 54-85; *Wilcox v. Saunders*, 4 Neb. 569.

The right to legislate in this regard has been left by congress to the legislative bodies of the various territories. *Davis v. Bilsland*, 18 Wall. (U. S.) 659, 21 L. ed. 969; *Hornbuckle v. Toombs*, 18 Wall. (U. S.) 648, 21 L. ed. 966.

It is not error to permit a trial amendment of the prayer so as to ask for an accounting and general relief instead of a money judgment. *Walsh v. McKeen*, 75 Cal. 519, 17 Pac. 673.

The rules which prevented the enforcement of a decree in equity by a proceeding at law are inapplicable under the code. *Rowe v. Blake*, 99 Cal. 167, 33 Pac. 864.

It is error to compel plaintiff to elect whether he will proceed at law or in equity. *Brawley v. Smith*, 8 Kan. App. 411, 54 Pac. 804.

"Now in an action at law, matter which was formerly of equitable cognizance solely, may be set up and given in evidence." *Mandeville v. Reynolds*, 68 N. Y. 528.

7. *Ark.*—*Kirby's Dig.*, §6085; *Crowder v. Fardyce Lumb. Co.*, 93 Ark. 392, 125 S. W. 417. *Cal.*—*Rogers v. Duhart*, 97 Cal. 500, 32 Pac. 570; *Jones v. Steamship Cortes*, 17 Cal. 487; *Hardy v. Johnson*, 1 Wall. (U. S.) 371, 17 L. ed. 502. *Colo.*—Code, 1910, §1. *Leitensdorfer v. King*, 7 Colo. 436, 4 Pac. 37. *Conn.*—*Newton v. New York & N. E. R. Co.*, 56 Conn. 21, 12 Atl. 644. *Ga.*—All distinctions of actions into

of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs,* which shall be denomi-

real, personal and united are abolished. Code, 1895, §1931. **Idaho.**—Const., art. 5, §1; *Coleman v. Jaggars*, 12 Idaho 125, 85 Pac. 894; *Anderson v. War Eagle Consol. Min. Co.*, 8 Idaho 789, 72 Pac. 671. **Ind.**—Burns' Ann. St., 1908, §341. **Ia.**—Code, §§3426, 3557; *Searles v. Northwestern Mut. Life Ins. Co.*, 148 Iowa 65, 126 N. W. 801; *Rawson v. Guiberson*, 6 Iowa 507; *Baltzell v. Nosler*, 1 Iowa 588; *Heichew v. Hamilton*, 3 G. Gr. 596. **Kan.**—Gen. St., 1909, §5603; *Carbondale Inv. Co. v. Burdick*, 67 Kan. 329; *Bernhard v. City of Wyandotte*, 33 Kan. 465, 6 Pac. 617; *Deering v. Boyle*, 8 Kan. 525. **Md.** *Lapp v. Stanton*, 81 Atl. 675. **Minn.** *Rev. Laws*, 1905, §4052. **Miss.**—*Lamkin v. Nye*, 43 Miss. 241. **Neb.**—Comp. St., 1911, §6572; *Cropsey v. Wiggenshorn*, 3 Neb. 108. **N. J.**—At law. *Laws*, 1912, c. 231, §3, p. 378. **N. Y.**—Code Civ. Proc., §3339; *Phillips v. Gorham*, 17 N. Y. 270; *New York Security & Trust Co. v. Saratoga Gas & E. L. Co.*, 88 Hun 569. **N. C.**—Rev., 1905, §354. **N. D.**—Rev. Codes, 1905, §6767. **Ohio.**—*Culver v. Rodgers*, 33 Ohio St. 537; *Jones v. Timmons*, 21 Ohio St. 596. **Okla.**—Comp. Laws, 1909, §5542; *Eggleston v. Williams*, 120 Pac. 944. **Ore.**—The distinction between forms of action at law are abolished. *L. O. L.*, §1. **S. C.**—*Scaife v. Thomson*, 15 S. C. 337; *Warren v. Lagrone*, 12 S. C. 45; *Southern Porcelain Mfg. Co. v. Thew*, 5 S. C. 5. **S. D.** *Code Civ. Proc.*, §36. **Utah.**—*Johnston v. Meagher*, 14 Utah 426, 47 Pac. 801. **Wis.**—St., 1898, §2600; *Deery v. McClintock*, 31 Wis. 195. **Wyo.**—Comp. St., 1910, §4286; *Field v. Leiter*, 16 Wyo. 1, 90 Pac. 378, 92 Pac. 622; *Ingersoll v. Davis*, 14 Wyo. 120, 82 Pac. 867.

It is not necessary to so model the petition as to differentiate whether the action be trespass or on the case. *Western & A. R. Co. v. Tate*, 129 Ga. 526, 59 S. E. 266.

Trespass and case may be joined. *Chrisman v. Carney*, 33 Ark. 316.

The objection that a count commences in debt and concludes in covenant is not valid under the code. *Gibbs v. Dickson*, 33 Ark. 107.

"The statute makes no distinction

in matters of form between actions of contract and those of tort, and relief is administered without reference to the technical and artificial rules of the common law upon this subject." *Jones v. Steamship Cortes*, 17 Cal. 487.

Forms of action are cast aside, and every action is now, in effect, a special action on the case. *Rogers v. Duhart*, 97 Cal. 500, 32 Pac. 570.

The purpose was to abolish the common law rules of pleading which had for their object the preservation of the various forms of action, and the distinctive allegations employed in each class. *Caldwell v. Myers*, 2 S. D. 506, 51 N. W. 210.

"The repeal of a statute giving a right to bring a particular form of action in a specified case, cannot prevent a party from seeking any relief he may show himself entitled to, either upon legal or equitable principles, by an action under the code." *Scaife v. Thomson*, 15 S. C. 337.

8. Cal.—Code Civ. Proc., §307; *Marsteller v. Leavitt*, 130 Cal. 149, 62 Pac. 384; *Barbour v. Flick*, 126 Cal. 628, 59 Pac. 122; *Hurlburt v. Spaulding Saw Co.*, 93 Cal. 55, 28 Pac. 795; *Spect v. Spect*, 88 Cal. 437, 26 Pac. 203; *Wiggins v. McDonald*, 18 Cal. 126; *Jones v. Steamship Cortes*, 17 Cal. 487; *Payne & Dewey v. Treadwell*, 16 Cal. 220. **Colo.**—Code, 1910, §1; *Grimes v. Greenblatt*, 47 Colo. 495, 107 Pac. 1111; *Tarabino v. Nicholi*, 5 Colo. App. 545, 39 Pac. 362. **Conn.** *Gen. St.*, 1902, §607. **Idaho.**—Const., art. 5, §1; *Rev. Codes*, §4020; *Coleman v. Jaggars*, 12 Idaho 125, 85 Pac. 894; *Rauh v. Oliver*, 10 Idaho 3, 77 Pac. 20; *Anderson v. War Eagle Consol. Min. Co.*, 8 Idaho 789, 72 Pac. 671; *Idaho & Ore. Land Co. v. Bradbury*, 132 U. S. 509, 10 Sup. Ct. 177, 33 L. ed. 433. **Ind.**—Burns' Ann. St., 1908, §249; *Adams v. Shewalter*, 139 Ind. 178, 38 N. E. 607; *Doherty v. Holliday*, 137 Ind. 282, 32 N. E. 315, 36 N. E. 907; *Blair v. Smith*, 114 Ind. 114, 15 N. E. 817. **Kan.**—Gen. St., 1909, §5603; *Deering v. Boyle*, 8 Kan. 525. **Ky.**—Civ. Code, 1906, §4. **Minn.**—Rev. Laws, 1905, §4052; *Bell v. Mendenhall*, 71 Minn. 331, 73 N. W. 1086. **Mo.** *Rev. St.*, 1909, §1727; *Johnson Brink-*

nated a civil action.⁹ It is also frequently provided that the forms of pleadings and the rules by which the sufficiency of pleadings are to be determined are those prescribed by the code,¹⁰ and that no action

man Co. v. Central Bank, 116 Mo. 558, 22 S. W. 813; Central American Steamship Co. v. Mobile & O. R. Co., 144 Mo. App. 43, 128 S. W. 822; Simpson v. Bantley, 142 Mo. App. 490, 126 S. W. 770. **Mont.**—State v. Owsley, 17 Mont. 94. **Neb.**—Comp. St., 1911, §6572; Hopkins v. Washington County, 56 Neb. 596, 77 N. W. 53; Wilcox v. Saunders, 4 Neb. 569; Cropsey v. Wiggenhorn, 3 Neb. 108. **Nev.**—Comp. Laws, §3096. **N. M.**—Comp. Laws, 1897, §2685; Kingston v. Walters, 14 N. M. 368, 93 Pac. 700. **N. Y.**—Code Civ. Proc., §3339; Phillips v. Gorham, 17 N. Y. 270. **N. C.**—Rev., 1905, §354. **N. D.**—Rev. Codes, §6767. **Ohio.**—Gen. Code, 1910, §11238; Culver v. Rodgers, 33 Ohio St. 537. **Okla.**—Comp. Laws, 1909, §5542. **Ore.**—But one form of action at law. L. O. L., §1. **S. C.**—Code Civ. Proc., §89; Scaife v. Thomson, 15 S. C. 337; Southern Porcelain Mfg. Co. v. Thew, 5 S. C. 5. **S. D.**—Code Civ. Proc., §36; Caldwell v. Meyers, 2 S. D. 506, 51 N. W. 210. **Utah.**—Const., art. 8, §19; Comp. Laws, 1907, §2852; Volker-Scoweroft Lumb. Co. v. Vanee, 36 Utah 348, 103 Pac. 970; Johnston v. Meaghr, 14 Utah 426, 47 Pac. 861. **Wash.**—Rem. & Ball. Ann. Codes & St., §153; Barto v. Seattle & I. R. Co., 28 Wash. 179, 68 Pac. 442; Dickerson v. City of Spokane, 26 Wash. 292, 66 Pac. 381; Washington Iron Works Co. v. Jensen, 3 Wash. 584, 28 Pac. 1019. **Wis.**—St., 1898, §2600. **Wyo.**—Comp. St., 1910, §4286; Field v. Leiter, 16 Wyo. 1, 90 Pac. 378, 92 Pac. 622; Ingersoll v. Davis, 14 Wyo. 120, 82 Pac. 867.

In the courts of common law. **N. J.** Laws, 1912, c. 231, §3, p. 378.

9. **Colo.**—Code, 1910, §1. **Idaho.** Const., art. 5, §1; Coleman v. Jagers, 12 Idaho 125, 85 Pac. 894; Anderson v. War Eagle Consol. Min. Co., 8 Idaho 789, 72 Pac. 671. **Ind.**—Burns' Ann. St., 1908, §249. **Kan.**—Gen. St., 1909, §5603; Deering v. Boyle, 8 Kan. 525. **Minn.**—Rev. Laws, 1905, §4052. **Mo.** Rev. St., 1909, §1727. **Neb.**—Comp. St., 1911, §6572; Hopkins v. Washington County, 56 Neb. 596, 77 N. W. 53; Cropsey v. Wiggenhorn, 3 Neb. 108. **N. C.**—Rev., 1905, §354. **N. D.** Rev. Codes, 1905, §6767. **Ohio.**—Gen.

Code, 1910, §11238. **Okla.**—Comp. Laws, 1909, §5542. **S. C.**—Code Civ. Proc., §89; Southern Porcelain Mfg. Co. v. Thew, 5 S. C. 5. **S. D.**—Code Civ. Proc., §36; Caldwell v. Myers, 2 S. D. 506, 51 N. W. 210. **Wash.**—Rem. & Ball. Ann. Codes & St., §153; Barto v. Seattle & I. R. Co., 28 Wash. 179, 68 Pac. 442; Washington Iron Works Co. v. Jensen, 3 Wash. 584, 28 Pac. 1019. **Wis.**—St., 1898, §2600. **Wyo.** Comp. St., 1910, §4286.

This provision is mandatory, and must be complied with. *Brown v. Baldwin*, 46 Wash. 106, 89 Pac. 483.

"The civil action of the code is a substitute for all such judicial proceedings as, prior thereto, were known either as actions at law or suits in equity." It does not include mandamus proceedings. *Chinn v. Trustees*, 32 Ohio St., 230; *State v. Smiley*, 14 Ohio C. C. 660. But see *State v. Crites*, 48 Ohio St. 142, 26 N. E. 1052; *State v. Comrs.*, 15 Ohio C. C. 40.

"If a right is sought to be enforced or protected, or a wrong redressed or prevented, but one 'form' is given, and that is styled a 'civil action.'" *Conyngham v. Smith*, 16 Iowa 471. Quoted in *Holloway v. Griffith*, 32 Iowa 409.

There is now no action of trespass *quare clausum fregit*, nor of trespass *de bonis asportatis*, nor of trover, but only one form of action called a civil action, under which form all actions must be prosecuted. *McGonigle v. Atchison*, 33 Kan. 726, 7 Pac. 550.

An action to foreclose a mortgage is a "civil action" within the meaning of the statute of limitations. *Ingersoll v. Davis*, 14 Wyo. 120, 82 Pac. 867.

An action to compel partition is a civil action. *Field v. Leiter*, 16 Wyo. 1, 90 Pac. 378, 92 Pac. 622.

New Jersey.—An action at law. Laws 1912, c. 231, §3, p. 378.

10. **Ark.**—Kirby's Dig., §6085. **Cal.** Code Civ. Proc., §421. **Ia.**—Code §3557; *Rawson v. Guiberson*, 6 Iowa 507. **Kan.**—Gen. St., 1909, §5683. **Ky.** Civ. Code, 1906, §88. **Minn.**—Rev. Laws, 1905, §4126. **Mo.**—Rev. St., 1909, §1793. **Neb.**—Comp. St., 1911,

will abate for want of form if sufficient matter of substance is set forth to enable the court to proceed upon the merits of the cause.¹¹

In some states suits in equity are still kept distinct from actions at law.¹²

In Iowa the code provides that proceedings in civil actions may be of two kinds, either ordinary or equitable.¹³

2. Effect of Code Provisions.—Under the codes forms¹⁴ and fic-

\$6664. Nev.—Comp. Laws, §3132. N. D.—Rev. Codes, 1905, §6851. Ore.—L. O. L., §64. S. C.—Code Civ. Proc., §161. S. D.—Code Civ. Proc., §117. Utah.—Comp. Laws, 1907, §2957. Wash.—Rem. & Ball. Ann. Codes & St., §255; Washington Iron Works Co. v. Jensen, 3 Wash. 584, 28 Pac. 1019; Distler v. Babney, 3 Wash. 200, 28 Pac. 335. Wyo.—Comp. St., 1910, §4376.

The sufficiency of the complaint in an action commenced before, but tried after, the adoption of the code is to be determined by the rules prescribed by the code. Warren v. Lagrone, 12 S. C. 45.

The form of complaint in an action to recover delinquent taxes is governed by the Code of Civil Procedure rather than the provisions of the Political Code relating to the recovery of such taxes. People v. Central Pac. R. Co., 83 Cal. 393, 23 Pac. 303.

11. Va. Code, §3246; W. Va. Code, 1899, §9.

Mississippi.—If the declaration contains sufficient matter of substance for the court to proceed on the merits of the case, it shall be sufficient; and it shall not be an objection to maintaining any action that the form thereof should have been different. Code, 1906, §729; Coopwood v. McCandless, 54 So. 1007; Evans v. Miller, 58 Miss. 120.

"This court now looks to the merits of the case as stated by the declaration rather than the form in which it is stated. If a declaration states a good cause of action, no matter what may be its form, or the name given it by the party filing it, this court will ignore all but the fact of whether or not it states a cause of action." Coopwood v. McCandless (Miss.), 54 So. 1007.

12. New Jersey.—Laws, 1912, c. 231, §3, p. 378.

Oregon.—L. O. L., §389; Le Clare v. Thibault, 41 Ore. 601, 69 Pac. 552; Ming Yue v. Coos Bay R. Co., 24 Ore.

392, 33 Pac. 641; Burrage v. Bonanza G. & Q. Min. Co., 12 Ore. 169, 6 Pac. 766; Beacannon v. Liebe, 11 Ore. 443, 5 Pac. 273.

Whether the proceeding is an action at law or a suit in equity is to be determined from the facts pleaded and the relief sought, and not from what it may be called by the pleader. That a proceeding is denominated an "action" or an "action at law" does not make it one where upon the facts stated it is a suit in equity. Thompson v. Hibbs, 45 Ore. 141, 76 Pac. 778; Beach v. Guaranty Sav. Ass'n., 44 Ore. 530, 76 Pac. 16.

Where the complaint in a suit in equity fails to state a cause for equitable relief, the suit will be dismissed though a cause of action at law is stated. Ming Yue v. Coos Bay R. Co., 24 Ore. 392, 33 Pac. 641.

13. Code, §§3426, 3557; Searles v. Northwestern Mut. Life Ins. Co., 148 Iowa 65, 126 N. W. 801.

14. State v. Owsley, 17 Mont. 94, 42 Pac. 105.

All technical forms of actions as of pleadings are abolished, and it is only necessary that the petition show a substantial cause of action, by a fair and natural construction of the language in which the facts are stated, upon which the action is founded. Heichew v. Hamilton, 3 G. Gr. (Ia.) 596.

It is immaterial whether the language used belongs to the form of one action or another, or to no form of action, the material question being whether the facts stated show that plaintiff is entitled to any remedy, legal or equitable. Kuhn v. McAllister, 1. Utah 273.

Plaintiff may simply state the facts upon which he claims relief, and if they are sufficient to authorize relief, his complaint cannot be challenged as not in any particular form. Graham v. Graham, 119 N. Y. Supp. 1013.

tions¹⁵ in pleading are abolished, and merely formal allegations are no longer necessary.¹⁶ The substance of the pleading rather than its form is the controlling consideration,¹⁷ and it is sufficient if it contains a plain statement of the facts necessary to constitute a cause of action.¹⁸

"Every action is properly brought in this state, regardless of its *form* or *name*, which sets forth, plainly, fully and distinctly, the plaintiff's cause of action." *McNabb v. Lockhart & Thomas*, 18 Ga. 495.

"The very object of the new system of pleading was to enable the court to give judgment according to the facts stated and proved, without reference to the form used, or to the legal conclusion adopted by the pleader." *Wright v. Hooker*, 10 N. Y. 51. Quoted with approval in *Conaughty v. Nichols*, 42 N. Y. 83.

"The code was not intended to exact a more formal complaint than was required at common law, but instead to abolish the forms, technicalities and fictions of that practice." *Goodman v. Alexander*, 165 N. Y. 289, 59 N. E. 145.

None of the technical allegations peculiar to the common law action of ejectment are necessary in an action to recover the possession of real property under the code. *Payne & Dewey v. Treadwell*, 16 Cal. 220.

15. *Ia.*—Code, §3557; *Holloway v. Griffith*, 32 Iowa 409; *Rawson v. Guiberson*, 6 Iowa 507. *N. Y.*—*Gould v. Cayuga County Nat. Bank*, 86 N. Y. 75. *Okla.*—Comp. Laws, 1909, §5656.

The facts are required to be stated as they exist. *Payne & Dewey v. Treadwell*, 16 Cal. 220.

"Presumptions are not to be pleaded as facts, but the facts themselves must be stated." *Distler v. Dabney*, 3 Wash. 200, 28 Pac. 335.

Even if fictional averments are to some extent permitted under the code, they are never required. Promise to repay money advanced at defendant's request. *Ball v. Beaumont*, 59 Neb. 631, 81 N. W. 858.

16. *State v. Owsley*, 17 Mont. 94, 42 Pac. 105.

17. *Lapp v. Stanton* (Md.), 81 Atl. 675.

The form is not important, but it is sufficient if the allegations show distinctly a cause of action in the plain-

tiff. *Hammond v. North Eastern R. Co.*, 6 S. C. 130.

That a pleading is not drawn in accordance with the established forms and precedents is immaterial if it states all the essentials of a valid cause of action. *Dougherty v. Edwards*, 25 Ark. 84.

Some diversity of form is permissible provided the substance is there. *Theiling v. Marshall*, 124 N. Y. Supp. 1066.

"The court will look to the substantial rights of the parties for the purpose of determining the remedy to which they are entitled, irrespective of the form of the complaint under which the remedy is sought." *Spect v. Spect*, 88 Cal. 437, 26 Pac. 203.

18. *Ark.*—*Crowder v. Fordyce Lumb. Co.*, 93 Ark. 392, 125 S. W. 417. *Cal.*—*Jones v. Steamship Cortes*, 17 Cal. 487. *Ia.*—*Holloway v. Griffith*, 32 Iowa 409. *Md.*—Pub. Gen. Laws, art. 75, §3; *Lapp v. Stanton*, 81 Atl. 675; *Caledonian Ins. Co. v. Traub*, 80 Md. 214; *Chesapeake & P. Tel. Co. v. Mackenzie*, 74 Md. 36; *Ruby v. State*, 55 Md. 484; *Crichton v. Smith*, 34 Md. 46.

The inquiry on demurrer is whether, regardless of the technical common law rules as to the forms of pleading, the allegations constitute a plain statement of the cause of action. "If they adequately describe the nature of the plaintiff's demand and inform the defendant of the particular acts for which he is sought to be held liable, the objection to their sufficiency must be overruled." *Lapp v. Stanton* (Md.), 81 Atl. 675.

"A party is now to state the facts on which he relies to sustain a recovery, and if issue be taken thereon, he will be entitled to just such a judgment as the facts established will by the rules of law warrant, without regard to the form or name of his action." *Eldridge v. Adams*, 54 Barb. (N. Y.) 417.

"The technicalities of pleading have been dispensed with and the plaintiff need only state his cause of action in

It is not necessary to name the cause of action,¹⁹ nor is the name given to it material in determining the sufficiency of the pleading.²⁰ If a cause of action is in fact stated the pleading will be sustained though the plaintiff has misconceived the nature of his remedial right.²¹

Under the codes the same rules of pleading apply in all cases, whether at law or in equity.²² Both legal and equitable causes of action may

ordinary and concise language, whether it be in *assumpsit*, trespass or ejectment, without regard to the ancient forms of pleading, and the plaintiff can be sent out of court only when upon his facts he is entitled to no relief either at law or in equity." *Rauh v. Oliver*, 10 Idaho 3, 77 Pac. 20. Followed in *Bates v. Capital State Bank*, 18 Idaho 429, 110 Pac. 277.

The question to be determined is whether the complaint states, in ordinary and concise language, facts sufficient to constitute a cause of action, "and not whether it is sufficient to show trespass *quare clausum*, trespass *vi et armis*, or any other technical form of action, *ex delicto* or *ex contractu*." *Rogers v. Duhart*, 97 Cal. 500, 32 Pac. 570.

"The common law rule is, that if plaintiff declare in trespass *quare clausum*, where the action should be *case*, he will be nonsuited at the trial; but under our system, if the facts alleged and proved are such as would have entitled the plaintiff to relief under any of the recognized forms of action at common law, they are sufficient as the basis of relief, whatever it may be." *Rogers v. Duhart*, 97 Cal. 500, 32 Pac. 570.

When the facts giving rise to the action are set forth in plain and concise language the complaint is judged by the facts pleaded and not by any technical rule of the common law. *Fransioli v. Thompson*, 55 Wash. 259, 104 Pac. 278.

19. *Gray v. Linton*, 38 Colo. 175, 88 Pac. 749.

He is not required to state the nature of the cause of action, but the court will do so from his statement of the facts. *Central American Steamship Co. v. Mobile & O. R. Co.*, 144 Mo. App. 43, 128 S. W. 822.

Plaintiff need not label his action as one in tort or on contract. *Arnold v. Atchison, T. & S. T. R. Co.*, 81 Kan. 400, 105 Pac. 541; *Cockrell v. Henderson*, 81 Kan. 335, 105 Pac. 443; *Akin v. Davis*, 11 Kan. 580.

20. *Cal.*—*Faulkner v. First Nat. Bank*, 130 Cal. 258, 62 Pac. 463. *Hayden v. Collins*, 1 Cal. App. 259. *Mich.* *Autcliff v. June*, 81 Mich. 477, 45 N. W. 1019. *Miss.*—*Coopwood v. McCandless*, 54 So. 1007. *Wash.*—*Watson v. Glover*, 21 Wash. 677, 67 Pac. 516.

It is immaterial whether an action is called one of negligence or nuisance, where the relief would be the same. *Martin v. City of St. Joseph*, 136 Mo. App. 316, 117 S. W. 94.

Where the facts alleged constitute both false imprisonment and malicious prosecution, it is immaterial which the action is called. *Grimes v. Greenblatt*, 47 Colo. 495, 107 Pac. 1111.

"It is not at all material whether the pleading is called a bill in equity, as, no matter what the form of the action or prayer of the complaint, if the facts alleged show that the plaintiff is entitled to any substantial relief, the pleading is good as against a general demurrer." *Lovering v. Webb* Pub. Co., 106 Minn. 62, 118 N. W. 61.

21. *N. M.*—*Kingston v. Walters*, 14 N. M. 368, 93 Pac. 700. *N. Y.*—*Emery v. Pease*, 20 N. Y. 62. *Wash.*—*Watson v. Glover*, 21 Wash. 677, 59 Pac. 516; *Damon v. Leaque*, 14 Wash. 253, 44 Pac. 261.

22. *Bowen v. Aubrey*, 22 Cal. 566.

"In setting forth the facts of a case, which, under the old practice, would have been properly brought in a court of equity, they are generally stated in a mode similar to the statements in a bill in chancery, and to this there can be no objection so long as the principle of the code, which requires the facts to be stated in ordinary and concise language, is not violated. When the pleader goes beyond this, and attempts to introduce peculiar formal allegations, many of which were mere fictions, found in the old forms of declarations in common law actions, or bills in equity, his pleading is liable to the objection of irrelevancy, and the objectionable matter should be stricken out on motion." *Bowen v. Aubrey*, 22 Cal. 566.

be joined in a single suit,²³ and the court may administer either legal or equitable relief, or both, as the facts alleged warrant.²⁴ So, too, statutes relating to the manner of bringing the defendant into court, regulating the procedure therein, fixing limitations upon the right to maintain actions, and the like, are generally held to apply regardless of whether the action is legal or equitable in character.²⁵ The plaintiff will not be sent out of court if on the facts stated he is entitled to any relief, either at law or in equity.²⁶ It has, however, been held

23. **Cal.**—*Moore v. Massini*, 32 Cal. 590. **Conn.**—Gen. St., §613; *Dresser v. Hartford Life Ins. Co.*, 80 Conn. 681, 70 Atl. 39. **Ga.**—*Virginia-Carolina Chem. Co. v. Provident Sav. Assur. Soc.*, 126 Ga. 50, 54 S. E. 929. **N. M.**—*Kingston v. Walters*, 14 N. M. 368, 93 Pac. 700. **N. Y.**—*Sternberger v. McGovern*, 56 N. Y. 12.

The complaint must contain all the necessary facts constituting both grounds for relief. *Volker-Seowcroft Lumb. Co. v. Vance*, 36 Utah 348, 103 Pac. 970.

See also the title "Joinder of Causes of Action."

24. **U. S.**—*Idaho & Ore. Land Imp. Co. v. Bradbury*, 132 U. S. 509, 10 Sup. Ct. 177, 33 L. ed. 433; *Ely v. New Mexico & A. R. Co.*, 129 U. S. 291, 9 Sup. Ct. 293, 32 L. ed. 688; *Davis v. Bilsland*, 18 Wall. 659, 21 L. ed. 969; *Hornbuckle v. Toombs*, 18 Wall. 648, 21 L. ed. 966. **Colo.**—*Adams v. Clark*, 36 Colo. 65, 85 Pac. 642. **Minn.**—*Bell v. Mendenhall*, 71 Minn. 331; *Erickson v. Fisher*, 51 Minn. 300. **Neb.**—*Hopkins v. Washington County*, 56 Neb. 596, 17 N. W. 53. **N. M.**—*Kingston v. Walters*, 14 N. M. 368, 93 Pac. 700.

Equitable relief will be granted whenever the facts well pleaded demand it. *Blair v. Smith*, 114 Ind. 114, 15 N. E. 817.

One of the purposes of this provision was to give litigants full and complete relief in a single action, where formerly several would have been necessary. *Coleman v. Jaggers*, 12 Idaho 125, 85 Pac. 894; *Gilbert v. Boak Fish Co.*, 86 Minn. 365, 90 N. W. 767.

See also the title "Joinder of Causes of Action."

25. Where they do not conflict with some fundamental right. *Overlock v. Shinn*, 28 Wash. 205, 68 Pac. 436.

The code provisions as to pleading

are equally applicable in equity cases. *Shepard v. Ford*, 10 Iowa 502.

"Civil action" relates to civil proceedings as distinguished from criminal, and does not exclude proceedings in equity. *Kramer v. Rebman*, 9 Iowa 114.

26. **Cal.**—*Watson v. Sutro*, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64; *White v. Lyons*, 42 Cal. 279; *Hayden v. Collins*, 1 Cal. App. 259, 81 Pac. 1120. **Idaho.**—*Bates v. Capital State Bank*, 18 Idaho 429, 118 Pac. 277; *Rauh v. Oliver*, 10 Idaho 3, 77 Pac. 20. **Minn.**—*Bell v. Mendenhall*, 71 Minn. 331, 73 N. W. 1086. **N. M.**—*Kingston v. Walters*, 14 N. M. 368, 93 Pac. 700. **Wash.**—*Dunlap v. Rauch*, 24 Wash. 620, 64 Pac. 807.

In determining whether an action will lie, the courts are to have no regard to the old distinction between legal and equitable remedies, and an action will not fail because of a mistake as to the form of the remedy. *Emery v. Pease*, 20 N. Y. 62.

The statute abolishes the old distinctions between legal actions and equitable procedure, so far as the manner of bringing the actions is concerned, and substitutes for all other forms of complaint a plain and concise statement of the facts constituting the cause of action, which must be the same whether the relief sought is legal or equitable in its nature. The intention was to provide for the trial and determination of all rights, whether denominated legal or equitable, in one action. *Brown v. Baldwin*, 46 Wash. 106, 89 Pac. 483; *Browder v. Phinney*, 30 Wash. 74, 70 Pac. 264.

"Legal and equitable relief are administered in the same forum, and according to the same general plan. A party cannot be sent out of court merely because his facts do not en-

that, where the statute prohibits the granting of any relief in excess of that demanded if no answer is interposed, a complaint demanding only legal redress cannot, under such circumstances, be sustained as one for equitable relief,²⁷ and *vice versa*.²⁸

Change Extends to Matters of Form Only.—The change effected by the codes extends to matters of form only.²⁹ They do not affect the principles by which the different forms of action are governed or the rules of law which determine what constitutes a cause of action,³⁰ nor change the substantial allegations necessary to constitute a cause of action,³¹

title him to relief *at law*, or merely because he is not entitled to relief *in equity*, as the case may be. He can be sent out of court only when, upon his facts, he is entitled to *no relief*, either at law or in equity." *Grain v. Aldrich*, 38 Cal. 514. Quoted with approval in *Walsh v. McKeen*, 75 Cal. 519, 17 Pac. 673; *Dickerson v. City of Spokane*, 26 Wash. 292, 66 Pac. 381.

"A party who presents a complaint showing his right to the relief asked is not to be denied that relief because he might have sought it under a different form of action." *Merriman v. Walton*, 105 Cal. 403, 38 Pac. 641.

27. *Cody v. First Nat. Bank*, 63 App. Div. 199, 71 N. Y. Supp. 277.

28. Where plaintiff has chosen to rely solely upon a supposed equitable remedy, he is not entitled upon demurrer to have his complaint sustained on the ground that a cause of action for money damages can be spelled out. *Kelly v. Downing*, 42 N. Y. 71; *Dingwall v. Chapman*, 116 N. Y. Supp. 520; *Black v. Vanderbilt*, 74 N. Y. Supp. 1095; *Swart v. Boughton*, 35 Hun (N. Y.) 281.

29. *Bliss Code Pl.*, §6. **Ark.**—*Ball v. Fulton County*, 31 Ark. 379. **Cal.** *De Witt v. Hays*, 2 Cal. 463. **Colo.** *Exchange Bank v. Ford*, 7 Colo. 314, 3 Pac. 449. **Ind.**—*Emerick v. Miller*, 159 Ind. 317, 64 N. E. 78. **Ky.**—*Richmond & Lexington Tpk. Road Co. v. Rogers*, 7 Bush 532; *Hill v. Barret*, 14 B. Mon. 83. **Okla.**—*Eggleston v. Williams*, 120 Pac. 944. **S. D.**—*Macomb v. Lake County*, 13 S. D. 103, 82 N. W. 417; *Sykes v. First Nat. Bank*, 2 S. D. 242, 49 N. W. 1058. **Utah.**—*Zeile v. Moritz*, 1 Utah 283.

The substance still survives. *Weber v. Rothechild*, 15 Ore. 385, 15 Pac. 650; *Harrigan v. Gilchrist*, 121 Wis. 127, 273, 99 N. W. 909.

The statute "assumes to change

merely the forms of action, but not to affect their substantial characteristics." *Southern Porcelain Mfg. Co. v. Thew*, 5 S. C. 5.

"The substantial differences which control and determine the rights of parties are still in force." *Wamsley v. Atlas Steamship Co.*, 168 N. Y. 533, 61 N. E. 896.

30. *Spect v. Spect*, 88 Cal. 437, 26 Pac. 203; *Sampson v. Shaeffer*, 3 Cal. 196.

Does not affect the rules of law as to the rights of the parties. *Matlock v. Todd*, 25 Ind. 128.

Does not change the law which determines what facts constitute a cause of action. *Richmond & Lexington Tpk. Road Co. v. Rogers*, 7 Bush (Ky.) 532.

"The statute does not pretend to, nor does it any sense, abridge the inherent power of the courts, nor affect the rights of parties, or the remedies formerly given for a violation of those rights, further than to change, in some instances, the means by which the remedy may be obtained." *Emerick v. Miller*, 159 Ind. 317, 64 N. E. 28.

"The principles by which the different forms of action were governed still remain, and now, as much as formerly, control in determining the rights of the parties." *Eldridge v. Adams*, 54 Barb. (N. Y.) 417.

The distinctions in the form of actions *ex contractu* and *ex delicto* are abolished, but the principles of law governing remain unchanged. *Lubert v. Chauviteau*, 3 Cal. 458.

The Ohio code provides that the requirement that there shall be but one form of action known as a civil action does not affect any substantive right or liability, legal or equitable. *Gen. Code*, 1910, §11,238.

31. **Ark.**—*Warner v. Capps*, 37 Ark.

32. **Cal.**—*Sampson v. Shaeffer*, 3 Cal. 196. **Ky.**—*Louisville & Portland Canal*

nor the essential principles of the common law rules of pleading,³² nor authorize a recovery upon a state of facts which did not constitute

Co. v. Murphy, 9 Bush 522; Stivers v. Baker, 10 Ky. L. Rep. 525, 9 S. W. 491. Mo.—Citizens' Bank v. Tiger Tail Mill & Land Co., 152 Mo. 145, 53 S. W. 902. Utah.—Zeile v. Moritz, 1 Utah 283.

"The practice act abolishes the distinction between actions of assumpsit, covenant and debt, but requires the plaintiff to set forth the substantive facts necessary to constitute the cause of action." Warren v. Ferdinand, 9 Allen (Mass.) 357.

"Whether under the common law or under the code form of pleading, the pleader is required to state every fact necessary to enable the plaintiff to recover, and make every material averment required to make a good declaration under the common law form of pleading." Ball v. Fulton County, 31 Ark. 379.

"The code makes no change in the law which determines what facts constitute a cause of action, except that by reducing all forms of action to the single one by petition, it changes the question whether plaintiff's statement of his cause shows facts constituting a cause of action in trespass, or assumpsit, or other particular form, into the more general question, whether it shows facts which constitute a cause of action at all, that is, whether the facts stated are sufficient to show a right in the plaintiff, an injury to that right by the defendant, and consequent damage. What facts do in this sense, constitute a cause of action, is determined by the general rules or principles of law respecting rights and wrongs, and by a long course of adjudication and practice, applying those rules to particular actions, under the long established rule of pleading that the declaration must state the facts which constitute the plaintiff's cause of action. In adopting this fundamental rule of pleading the Code must be considered as adopting also the prevailing and authoritative exposition of it as understood at the time, except so far as the Code itself, either expressly, or by necessary implication, requires facts to be stated which need not before have been stated, or dispenses with the statement of facts formerly deemed

necessary." Hill v. Barrett, 14 B. Mon. (Ky.) 83.

A complaint for the conversion of property must still contain all the material allegations which were necessary in an action of trover at common law. Sigel-Campion Live Stock Com. Co. v. Holly, 44 Colo. 580, 101 Pac. 68.

32. Does not destroy the substance of pleading. Corbin v. Oldham's Admx., 1 Ky. L. Rep. (abstract) 327.

All the rules and principles formerly governing pleadings and trials at common law are not abolished. Rawson v. Guiberson, 6 Iowa 507.

"The rules of pleading at common law have not been abrogated by the code of civil procedure. The essential principles still remain, and have only been modified as to technicalities and matters of form. The object of pleading, both in the old and new system, is to produce proper issues of law or fact, so that justice may be administered between parties litigant with regularity and certainty." Parsley & Co. v. Nicholson, 65 N. C. 207.

"The object of the code was to abolish the different forms of action, and the technical and artificial modes of pleading used at common law, but not to dispense with the certainty, regularity and uniformity which are essential in every system adopted for the administration of justice." Oates v. Gray, 66 N. C. 442.

"Looseness in pleading and inadequacy of allegation are as much condemned by the present code of procedure as they were under the former strict and exacting system of the common law. It is form and fiction that have been abolished, but the essential principles of good pleading have been retained." Eddleman v. Lentz (N. C.), 72 S. E. 1011.

"While we have no forms of action here, yet when the averments of facts in a complaint show the case to be one for which a particular form of action would have been a proper one at common law, then the general principles of pleading and practice apply to it which apply to the special form of common law action." Faulkner v. First Nat. Bank, 130 Cal. 258, 62 Pac. 463.

a cause of action in some form before the codes were adopted.³³ Nor do they abolish the distinctions between the different actions at law themselves,³⁴ nor abolish the common law causes of action,³⁵ nor abrogate any of the various remedies previously existing,³⁶ nor require

33. *Ball v. Fulton County*, 31 Ark. 379; *Hill v. Barrett*, 14 B. Mon. (Ky.) 83.

"The abolition of the distinction between actions at law and suits in equity does not entitle a party to recover in a case where, before such abolition, he could not have recovered either at law or in equity." *Woodford v. Leavenworth*, 14 Ind. 311.

"An action under the Code of Procedure only lies where the subject-matter of such action furnished ground previous to the adoption of the Code for the maintenance of either an action at law or a bill in equity, or where the object of the action is to attain that which, previous to the Code, was attainable by means of the writ of *scire facias*, of *quo warranto*, or by information in the nature of *quo warranto*, or where an action is brought by the Attorney General against a corporation" on some of the grounds enumerated in the statute. *Southern Porcelain Mfg. Co. v. Thew*, 5 S. C. 5.

34. *Bliss Code Pl.*, §6; *DeWitt v. Hays*, 2 Cal. 443.

"The courts are compelled to and do recognize certain natural inherent distinctions between the different classes of actions which the statutes do not seem to contemplate." *Overlock v. Shinn*, 28 Wash. 205, 68 Pac. 436.

The distinctive nature of actions remains. *Stirling v. Garritee*, 18 Md. 468.

It does not determine what rights shall be enforced and what wrongs shall be redressed by a civil action. *Southern Porcelain Mfg. Co. v. Thew*, 5 S. C. 5.

Ex delicto and ex contractu. *Goss v. Board of Comrs.*, 4 Colo. 463. See also *Bullinger v. Marshall*, 70 N. C. 520.

The distinction between actions *ex delicto* and *ex contractu* is not merely technical or formal, but is a substantial one (*Anderson v. Case*, 28 Wis. 505), and is still as essential as it ever was (*Pierce v. Carey*, 37 Wis. 232).

"Though the old rules of pleading have been much relaxed by codes of procedure and practice acts, yet the

substance of the old pleadings is still required, and it is as necessary under our system to maintain in the pleadings the distinction between actions arising from torts and those growing out of contracts, as it was at common law, for this reason if no other; that the court may know whether a counterclaim is or may be properly pleaded or not." *Knickerbocker Min. Co. v. Hall*, 3 Nev. 194.

"The precise nature of the cause of action must be determined before the rules of law applicable thereto can be ascertained and applied." *Carbondale Inv. Co. v. Burdick*, 67 Kan. 329, 72 Pac. 781.

35. *Eggleston v. Williams* (Okla.), 120 Pac. 944; *Johnston v. Meagher*, 14 Utah 426, 47 Pac. 861.

"The code has made no material changes in the primary rights of the parties, or in the causes of actions, nor has it given any new redress for wrongs perpetrated. It has only changed the mode by which such redress is reached and applied. The rights and remedies (using the term 'remedy' in the sense of 'redress') are still the same." *Sullivan & Co. v. Sullivan*, 20 S. C. 509.

"The same facts that constituted a cause of action under the common law practice constitute such cause of action still." *Backus v. Clark*, 1 Kan. 303.

36. *Wilcox v. Saunders*, 4 Neb. 569.

Equitable rights and remedies have not been abrogated, and "in cases where the complaint states such facts as entitle the complainant to equitable relief, the court will look for guidance to the equity principles and doctrines." *Doherty v. Holliday*, 137 Ind. 282, 32 N. E. 315, 36 N. E. 907.

All remedies, both at law and in equity, have been preserved, but the method of procedure by which jurisdiction shall be exercised and the remedies pursued has been entirely changed. *New York Security & Trust Co. v. Saratoga Gas & E. L. Co.*, 83 Hun 569; *Kollock v. Scribner*, 98 Wis. 104, 73 N. W. 776.

that every cause of action shall be set forth in the same manner.³⁷

Distinction Between Law and Equity Remains.—The fundamental distinction between legal and equitable rights and remedies still remains,³⁸ and a party seeking equitable relief must still allege facts warranting the interposition of a court of equity.³⁹ So, too, the court is not de-

37. *Cropsey v. Wiggernhorn*, 3 Neb. 108; *Zeile v. Moritz*, 1 Utah 283.

38. Bliss Code Pl., §§7, 10, and the following cases: **Cal.**—See *Sharon v. Sharon*, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709. **Colo.**—*Elder v. Schumacher*, 18 Colo. 433, 33 Pac. 175; *Exchange Bank v. Ford*, 7 Colo. 314, 3 Pac. 449. **Idaho.**—*Dewey v. Schreiber Imp. Co.*, 12 Idaho 280, 85 Pac. 921; *Anderson v. War Eagle Consol. Min. Co.*, 8 Idaho 789, 72 Pac. 671. **Ind.**—*Emerick v. Miller*, 159 Ind. 317, 64 N. E. 28. **Ia.** *Searles v. Northwestern Mut. Life Ins. Co.*, 148 Iowa 65, 126 N. W. 801; *Shepard v. Ford*, 10 Iowa 502. **Neb.**—*Hopkins v. Washington County*, 56 Neb. 596, 77 N. W. 53; *Wileox v. Saunders*, 4 Neb. 569; *Cropsey v. Wiggernhorn*, 3 Neb. 108. **N. Y.**—*Reubens v. Joel*, 13 N. Y. 488. **Ohio.**—*Williams v. Englebrecht*, 37 Ohio St. 383; *Dixon v. Caldwell*, 15 Ohio St. 412. **S. C.**—*Chapman v. Lipscomb*, 18 S. C. 222. **S. D.**—*Maccomb v. Lake County*, 13 S. D. 103, 82 N. W. 417; *Sykes v. First Nat. Bank*, 2 S. D. 242, 49 N. W. 1058. **Utah.** *Kahn v. Old Telegraph Mining Co.*, 2 Utah 174; *Zeile v. Moritz*, 1 Utah 283. **Wash.**—*Overlock v. Shinn*, 28 Wash. 205, 68 Pac. 436. **Wis.**—*Harrigan v. Gilchrist*, 121 Wis. 127, 273, 99 N. W. 909; *Deery v. McClintock*, 31 Wis. 195; *Bonesteel v. Bonesteel*, 28 Wis. 245. **Wyo.**—*Field v. Leiter*, 16 Wyo. 1, 90 Pac. 378, 92 Pac. 622.

"Cases legal and equitable have not been consolidated, and though there is no difference between the form of a bill in chancery, and a common law declaration, under our system, where all relief is sought in the same way from the same tribunal; the distinction between law and equity is as naked and broad as ever." *De Witt v. Hays*, 2 Cal. 463.

The distinction cannot be constitutionally abolished, and the code does not conflict with the constitution in this regard. *Claussen v. Lafrenz*, 4 G. Gr. (Ia.) 224.

"It is idle to say that the distinction between legal and equitable ac-

tions has been wiped out by the modern practice. It is true that all actions must be commenced in the same way; that in every form of action the facts constituting the cause of action must be truly stated; that actions in pleadings have been abolished, and that both kinds of actions are triable in the same courts. But the distinction between legal and equitable actions is as fundamental as that between actions *ex contractu* and *ex delicto*, and no legislative fiat can wipe it out." *Gould v. Cayuga County Nat. Bank*, 86 N. Y. 75, citing *Reubens v. Joel*, 13 N. Y. 488; *Goulet v. Assler*, 22 N. Y. 225.

"The names of actions no longer exist, but we retain in fact the action at law and the suit in equity." *Stevens v. Mayor, etc., of City of New York*, 84 N. Y. 296.

39. He must still state an equitable cause of action. *Exchange Bank v. Ford*, 7 Colo. 314, 3 Pac. 449.

He must plead the essential elements necessary to the granting of such relief. *Meek v. Hurst*, 223 Mo. 688, 122 S. W. 1022.

"He must show a proper case for the interference of a court of chancery, and one in which he has no adequate or complete relief at law." *De Witt v. Hays*, 2 Cal. 463.

Though "legal and equitable relief may be had in the same action, as the nature and cause of the action may require; nevertheless, in order that equitable relief may be had, equitable pleadings must be interposed; hence a partial assignment of a legal demand will not be sustained in our courts, unless the facts showing the equitable right or interest upon which the partial assignment is based are *alleged* as well as *proved*." *Home Ins. Co. v. Atchison, T. & S. F. R. Co.*, 19 Colo. 46, 34 Pac. 281.

An injunction or the appointment of a receiver cannot be obtained where it could not have been before. *Virginia-Carolina Chemical Co. v. Provident Sav. Life Assn.*, 126 Ga. 50, 54 S. E. 929;

prived of the right to try an equity case without the intervention of a jury.⁴⁰

3. Use of Common Law Forms in Code States.—In most code states resort may still be had to the common law forms of pleading, where the form adopted is appropriate, and in the use of it the material facts constituting the cause of action are specifically stated.⁴¹ Thus, complaints in the common law form of the common counts in *assumpsit*,⁴² and *trespass*,⁴³ have been held sufficient under the codes, though a contrary rule prevails in some jurisdictions.⁴⁴

Branan v. Baxter, 122 Ga. 222, 50 S. E. 45; *Stilwell v. Savannah Grocery Co.*, 88 Ga. 100, 13 S. E. 963.

40. *Mackenzie v. Flannery*, 90 Ga. 590, 16 S. E. 710.

41. *Warner v. Capps*, 37 Ark. 32.

That the statement follows the general form of a declaration under the old practice does not make it bad, where it gives the exact dates, amounts and particulars of the contract sued on, and contains no irrelevant or impertinent matter. *Smith, Kline & French Co. v. Smith*, 166 Pa. 563, 31 Atl. 343.

Where plaintiff resorts to the old system of pleading instead of conforming to the code, the sufficiency of the complaint must be tested by the rules of the old system. *Williams v. Brunson*, 41 Wis. 418.

In Maryland plaintiff may use the common law or statutory forms at his election. Pub. Gen. Laws, art. 75, §24 (107), p. 1653.

In Tennessee the statute provides that parties may plead in accordance with the rules laid down by the code or according to the laws relating to pleading which were in force and existing prior to and at the time of its adoption. Shannon's Code, §4638. See *McLean v. Houston*, 2 Heisk. 37; *Noel v. McCrory*, 7 Coldw. 623.

42. See *Bliss Code Pl.*, §§156, 157, 157a, and the following cases: *Ark.* *Ball v. Fulton County*, 31 Ark. 379. *Cal.*—*Brown v. Board of Education*, 103 Cal. 531, 37 Pac. 503; *Hunt v. San Francisco*, 11 Cal. 250, 258. *Colo.* *Henry Inv. Co. v. Semonian*, 40 Colo. 269, 90 Pac. 682; *Wilcox v. Jamieson*, 20 Colo. 158, 36 Pac. 902; *Campbell v. Shiland*, 14 Colo. 491, 23 Pac. 324; *Gale v. James*, 11 Colo. 540, 19 Pac. 446; *Leitensdorfer v. King*, 7 Colo. 436, 4 Pac. 37. *Conn.*—Gen. St., 1902, §627. *Hoggson & Pettis Mfg. Co. v. Sears*, 77

Conn. 587, 60 Atl. 133; *Kelsey v. Punderford*, 76 Conn. 271, 56 Atl. 579; *Goodrich v. Alfred*, 72 Conn. 260, 43 Atl. 1041; *Irving v. Shelter*, 71 Conn. 434, 42 Atl. 258. *Ind.*—*Jenney Electric Co. v. Branham*, 145 Ind. 314, 41 N. E. 448; *Scott v. Congdon*, 106 Ind. 268, 6 N. E. 625; *Oliver v. Gorham*, 85 Ind. 598; *Curran v. Curran*, 40 Ind. 473; *Wulschner-Stewart Music Co. v. Helft*, 45 Ind. App. 428, 90 N. E. 1033; *Southern Ry. Co. v. Hazlewood*, 45 Ind. App. 478, 90 N. E. 18, 88 N. E. 636. *Minn.* *Solomon v. Vinson*, 31 Minn. 205, 17 N. W. 340. But a complaint attempting to plead in the form of *indebitatus assumpsit* for goods sold is insufficient where it fails to allege that the goods were sold by the plaintiff. *Pioneer Fuel Co. v. Hager*, 57 Minn. 76, 58 N. W. 828. *N. Y.*—*Hatch v. Leonard*, 165 N. Y. 435, 59 N. E. 270; *Goodman v. Alexander*, 165 N. Y. 289, 59 N. E. 145; *Worthington v. Worthington*, 91 N. Y. Supp. 443; *Doherty v. Shields*, 86 Hun 303. *N. C.*—*Burton v. Rosemary Mfg. Co.*, 132 N. C. 17, 43 S. E. 480; *Jones v. Mial*, 82 N. C. 252. *N. D.* As against a general demurrer. *Weber v. Lewis*, 19 N. D. 473, 126 N. W. 105. *Okla.*—See *Fox v. Easter*, 10 Okla. 527, 62 Pac. 283. *S. D.*—See *Busta v. Wardall*, 3 S. D. 141, 52 N. W. 418. *Utah.* *Kilpatrick-Koch Dry Goods Co. v. Box*, 13 Utah 494, 45 Pac. 629. *Wis.* *Williams v. Brunson*, 41 Wis. 418; *Grammis v. Hooker*, 29 Wis. 65.

43. *Warner v. Capps*, 37 Ark. 32.

44. Common count not allowed. *Hammer v. Downing*, 39 Ore. 504, 64 Pac. 651, 65 Pac. 17, 990, 67 Pac. 30.

The practice of adding a "common count" is not contemplated by the code. *Penn Mut. Life Ins. Co. v. Conoughy*, 54 Neb. 123, 74 N. W. 422.

"The common counts have no place to fill in pleading, and they require no answer or affidavit of defense."

VIII. MUST CONFORM TO PROCESS.—The declaration or equivalent pleading must agree with or pursue the complaint made in the writ.⁴⁵

IX. STATEMENT OF THE CAUSE OF ACTION.—A. **WHAT MUST BE ALLEGED.**—1. **General Rules.**—All facts alleged in the declaration or complaint consist either of the gist or substance of the complaint, or of matter of inducement, or of matter of aggravation.⁴⁶

The gist of the complaint is the essential ground or principle subject matter of it, or that without which no legal cause of complaint can appear.⁴⁷

Matter of inducement is that which is merely introductory to the essential ground or substance of the complaint, or in some respect explanatory of it, or of the manner in which it originated or took place.⁴⁸

Matter of aggravation is that which, in actions for injuries, is intended to show the circumstances of enormity under which the principal wrong complained of was committed.⁴⁹

Penn Nat. Bank v. Kopitzsch Soap Co., 161 Pa. 134, 28 Atl. 1077.

45. 1 Chit. Pl., 244, *et seq*; Will's Gould Pl., 379; Andrews Steph. Pl., 99; Beardsley v. Southmayd, 14 N. J. L. 534; Tuttle v. Cutting, 14 How. Pr. (N. Y.) 395.

A variance between the writ and the declaration is properly taken advantage of by plea in abatement. Wilson v. Shannon, 6 Ark. 196; Stone v. Bennett, 4 Ark. 71.

A variance cannot be taken advantage of after pleading the general issue. McKenna v. Fisk, 1 How. (U. S.) 241.

If the complaint does not conform, in regard to the nature of the action, with the summons, the former, and not the latter, is irregular. Shafer v. Humphrey, 15 How. Pr. (N. Y.) 564; Boington v. Lapham, 14 How. Pr. (N. Y.) 360; Ridder v. Whitlock, 12 How. Pr. (N. Y.) 208.

Where the complaint is served with the summons, the complaint will not be dismissed because of a variance between it and the summons as to the cause of action stated. Bradley v. Mueller, 22 S. D. 534, 118 N. W. 1035; Berry v. Gingaman, 1 S. D. 525, 47 N. W. 825.

In Rhode Island a declaration in trespass founded on a writ sounding in case is permitted by Court & Prae. Act, 1905, §246. Wells v. Knight, 32 R. I. 432, 80 Atl. 16; Adams v. Lorraine Mfg. Co., 29 R. I. 333, 71 Atl. 180.

See also the title "Departure."

46. Will's Gould Pl., 198.

47. Will's Gould Pl., 198, 361, and the following cases: Ga.—Frazier v. Georgia R. & B. Co., 101 Ga. 70, 28 S. E. 684. Ill.—*In re* Murphy, 109 Ill. 31; First Nat. Bank v. Burkett, 101 Ill. 391. Tex.—Bledsoe v. Wells, 22 Tex. 650; Mason v. Kleberg, 4 Tex. 85. Vt. Tarbell v. Tarbell, 60 Vt. 486, 15 Atl. 104.

The gravamen is the grievance complained of. Macurda v. Lewiston Journal Co., 104 Me. 554, 72 Atl. 490.

48. Will's Gould Pl., 198, and the following cases: Idaho.—Matthews v. Coate, 17 Idaho 624, 106 Pac. 990. Ill. Chicago Union Traction Co. v. Jerka, 227 Ill. 95, 81 N. E. 7; Eckels v. Henning, 139 Ill. App. 660; Consolidated Coal Co. v. Peers, 97 Ill. App. 188. Mich.—Watson v. Watson, 49 Mich. 540, 14 N. W. 489. Mo.—Armello v. Whitman, 127 Mo. App. 698, 106 S. W. 1113. Ore.—Dornsife v. Ralston, 55 Ore. 254, 97 Pac. 713, 106 Pac. 13. Tex.—Pfeiffer v. Wilke (Tex. Civ. App.), 107 S. W. 361.

It is in the nature of a preamble, stating the circumstances under which the contract was made or to which the consideration has reference. Its office is explanatory, and does not, in general, require exact certainty. 1 Chit. Pl., 290, 291; City of Kenosha v. Lamson, 9 Wall. (U. S.) 477, 19 L. ed. 725. 49. Will's Gould Pl., 199. See Watson v. Watson, 49 Mich. 540, 14 N. W. 489.

Facts Essential to the Right of Action.—Under the common law system of pleading the declaration must allege every fact which is essential to the plaintiff's right of action,⁵⁰ and this is equally true of the complaint, petition, or equivalent pleading under the codes and practice acts of the various states,⁵¹ including also the petition in

50. Will's Gould Pl., 355; 1 Chit. Pl., 244, and the following cases: *Del.* Campbell v. Walker, 76 Atl. 475; King v. Wilmington & N. C. E. R. Co., 1 Penne. 452. *Ill.*—Walters v. City of Ottawa, 240 Ill. 259, 88 N. E. 651; Willig v. City of Chicago Heights, 149 Ill. App. 8. *Ind.*—Lake Erie & W. R. Co. v. Holland, 162 Ind. 406, 69 N. E. 138. *Vt.*—Tarbell v. Tarbell, 60 Vt. 486.

The pleading is insufficient if it fails to state any fact the traverse of which would defeat the action. Willig v. City of Chicago Heights, 149 Ill. App. 8.

It is sufficient to allege everything necessary to show a complete cause of action, in such manner as a cause of action necessarily results therefrom and that it can be fairly met or answered by plea. Beardsley v. Southmayd, 14 N. J. L. 534.

51. *Fla.*—Capital City Bank v. Hilson, 59 Fla. 215, 51 So. 853; United States Fidelity & Guaranty Co. v. District Grand Lodge, etc., 58 Fla. 373, 50 So. 952; Woodbury v. Tampa Water Works Co., 57 Fla. 243, 49 So. 556; Hoopes v. Crane, 56 Fla. 395, 47 So. 992; Bennett v. Herring, 1 Fla. 434. *Idaho.*—McLean v. City of Lewiston, 8 Idaho 472, 69 Pac. 478. *Kan.*—Backus v. Clark, 1 Kan. 303. *Ky.*—Corbin v. Oldham's Admx., 1 Ky. L. Rep. (abstract) 327. *Me.*—Ferguson v. National Shoemakers, 79 Atl. 469. *Md.*—Pub. Gen. Laws, art. 75, §2; Pearce v. Watkins, 68 Md. 534, 13 Atl. 376. *Mass.*—Read v. Smith, 1 Allen 519; Hollis v. Richardson, 13 Gray 392. *Mo.*—Lackawanna Coal & Iron Co. v. Long, 231 Mo. 605, 133 S. W. 35; Mallinekrodt Chemical Works v. Nemnich, 169 Mo. 383, 69 S. W. 355; Kennavde v. Pacific R. Co., 45 Mo. 255. *N. Y.*—National Citizens' Bank v. Toplitz, 178 N. Y. 464, 71 N. E. 1. *Ohio.*—Brinkerhoff v. Smith, 57 Ohio St. 610, 49 N. E. 1025. *Ore.*—Hayden v. Steadman, 3 Ore. 550. *Pa.*—Young v. Geiske, 209 Pa. 515, 58 Atl. 887; Wunderlich v. Sadler, 189 Pa. 469, 42 Atl. 109; Newbold v. Pennock, 154 Pa. 591, 26 Atl. 606; Ferguson v.

Anglo-American Tel. Co., 151 Pa. 211, 25 Atl. 40; Bill Posting Sign Co. v. Jermon, 27 Pa. Super. 171; Fisher v. Paff, 11 Pa. Super. 401; Krug v. Snyder, 32 Pa. Co. Ct. 33. *Va.*—Eaton v. Moore, 111 Va. 400, 69 S. E. 326; Chesapeake & O. R. Co. v. Melton, 110 Va. 728, 67 S. E. 346; Cook & Son Min. Co. v. Thompson, 110 Va. 369, 66 S. E. 79; Chesapeake & O. R. Co. v. Hunter, 109 Va. 341, 64 S. E. 44.

Where there is an omission to state a material fact necessary to show a cause of action, the presumption is that it does not exist. Burlington & M. R. R. Co. v. Lancaster County, 4 Neb. 293.

A complaint should not be sustained where it is impossible to pick out distinct statements of fact which, taken together, are sufficient to entitle the plaintiff to some relief. Phillips v. Sonora Copper Co., 90 App. Div. 140, 86 N. Y. Supp. 200.

The statement of claim under the act of 1887 must contain "all the ingredients of a complete cause of action, averred in clear, express and unequivocal language, so that if the defendant is unable to controvert or deny one or more of the material averments of claim, a judgment in default of an affidavit or sufficient affidavit of defense may be entered and liquidated." Byrne v. Hayden, 124 Pa. 170, 16 Atl. 750; Winkleblake v. Van Dyke, 161 Pa. 5, 28 Atl. 937.

"A declaration should, by direct allegations, or by fair inference from its direct allegations contain all the essentials of a cause of action." Sylvester v. Lichenstein, 61 Fla. 441, 55 So. 282; Williams v. Pringle, 61 Fla. 485, 54 So. 452; Leynes v. Tampa Foundry & Mach. Co., 56 Fla. 488, 47 So. 918; German American Lumber Co. v. Brock, 55 Fla. 577, 46 So. 740.

"The rule requiring the facts relied upon by plaintiff to entitle him to a recovery to be stated in the complaint contains the fundamental and most important principle of the reformed system of pleading. It is not technical,

Texas,⁵² it being held that a complaint under the code should contain the substance of a declaration under the old system.⁵³ The codes and practice acts of most of the states specifically provide that the complaint or equivalent pleading shall contain a plain and concise statement of the facts constituting the plaintiff's cause of action.⁵⁴

Must Allege Facts Necessary To Be Proved.—The declaration or equivalent pleading should allege every fact necessary to be affirmatively proved in order to establish the cause of action relied on,⁵⁵ and sufficient facts to entitle the plaintiff to judgment if proved⁵⁶ as alleged,

but substantial; not a useless requirement, but necessary to advise the opposite party and the court of the true nature and object of the suit; and the courts are not at liberty to disregard the statute or supply a statement for the purpose of aiding a pleading otherwise radically defective." *Farmers' High Line Canal & Reservoir Co. v. Southworth*, 13 Colo. 111, 21 Pac. 1028.

52. Every material issuable fact must be alleged in order to admit the necessary evidence in support of it. *Pacific Express Co. v. Darnell Bros.*, 62 Tex. 639.

In trespass to try title plaintiff cannot have special equitable relief without pleading the facts on which the right to such relief depends. *Cavin v. Hill*, 83 Tex. 73, 18 S. W. 323; *Hoffman v. Buchanan*, 57 Tex. Civ. App. 368, 123 S. W. 168.

It is sufficient if the petition states facts from which the court or jury may find that negligence existed. *Rowland v. Murphy*, 66 Tex. 534, 1 S. W. 658.

"A party cannot, by changing the form of his action, evade the necessity for pleading and proving a fact essential to his right of recovery." *Hoffman v. Buchanan*, 57 Tex. Civ. App. 368, 123 S. W. 168.

53. *Goodman v. Alexander*, 165 N. Y. 289, 59 N. E. 145; *Zabriski v. Smith*, 13 N. Y. 322.

Only the forms of special pleading are abolished. Its substance remains, and whatever of essence it was necessary to set forth in a common-law declaration must still be set forth. *Emmens v. Gebhart*, 7 Pa. Co. Ct. 522.

The statement must "set forth with completeness the ground on which the plaintiff seeks to recover. All the elements of a complete cause of action must be clearly set forth. Formality is not required, but substance cannot

be dispensed with." *Plunkett v. Hamnett*, 36 Pa. Super. 590.

54. See IX, B, 1, *infra*.

55. *Cal.*—*Allen v. Home Ins. Co.*, 133 Cal. 29, 65 Pac. 138; *Green v. Palmer*, 15 Cal. 411. *Kan.*—*Garten v. Trowbridge*, 80 Kan. 720, 104 Pac. 1067. *Mich.*—*Clark v. Village of North Muskegon*, 88 Mich. 308, 50 N. W. 254. *N. Y.*—*Lent v. New York & M. R. Co.*, 130 N. Y. 504, 29 N. E. 988. *Okla.*—*Eggleston v. Williams*, 120 Pac. 944. *Pa.*—*Laubach v. Meyers*, 147 Pa. 447, 23 Atl. 765.

"A complaint good at common law or under the code must contain a clear statement of all the facts necessary for the plaintiff to prove in the first instance, under an answer of general denial, to show that he is entitled to judgment." *Lake Erie & W. R. Co. v. Holland*, 162 Ind. 406, 69 N. E. 138.

56. *Gonsoulard v. Rosomano*, 176 Fed. 481, 100 C. C. A. 97; *Kienle v. Fred Gretscht Realty Co.*, 117 N. Y. Supp. 500; *Booz v. Cleveland School Furniture Co.*, 45 App. Div. 593, 61 N. Y. Supp. 407; *Hasbrouck v. New Paltz, H. & P. T. Co.*, 90 N. Y. Supp. 977.

The complaint is sufficient where, if the averments were proven at the trial, the court would have power to grant the relief asked for therein and embraced within the issues. *Herlihy v. Blokus*, 131 N. Y. Supp. 623.

"A declaration containing the necessary averments, so that judgment according to law and the very right of the cause may be given thereon is sufficient" on demurrer. *Union Stopper Co. v. McGara*, 66 W. Va. 403, 66 S. E. 698; *Davidson v. Pittsburg, etc., R. Co.*, 41 W. Va. 407, 23 S. E. 593.

"To entitle a plaintiff to judgment for want of an affidavit of defense, or for want of a sufficient affidavit of de-

though it is not necessary to aver every matter which may be proved at the trial.⁵⁷

Must Show a Right, and a Duty and Its Breach.—The pleading must show a title, that is, a right of action, in the plaintiff,⁵⁸ in the character in which he sues,⁵⁹ and at the time of the commencement of the suit,⁶⁰

fense, the statement of his demand . . . must be self sustaining, that is to say, it must set forth, in clear and concise terms, a good cause of action, by which is meant, such averments of fact as, if not controverted, would entitle him to a verdict for the amount of his claim. . . . All the essential ingredients of a complete cause of action must affirmatively appear in the statement and exhibits which are made a part thereof." *Chestnut St. Nat. Bank v. Ellis*, 161 Pa. 241, 28 Atl. 1082; quoted with approval in *Acme Mfg. Co. v. Reed*, 181 Pa. 382, 37 Atl. 552.

See to the same effect, *Pease v. Adicks*, 174 Pa. 543, 34 Atl. 201; *Krug v. Snyder*, 32 Pa. Co. Ct. 33.

In tort actions the declaration must state sufficient facts to enable the court to say upon demurrer whether, if such facts are proved, the plaintiff would be entitled to recover. *Chesapeake & O. R. Co. v. Melton*, 110 Va. 728, 67 S. E. 346; *Cook & Son Min. Co. v. Thompson*, 110 Va. 369, 66 S. E. 79; *Chesapeake & O. R. Co. v. Hunter*, 109 Va. 341, 64 S. E. 44; *Newport News & O. P. R. & E. Co. v. Nicolopoulos*, 109 Va. 165, 63 S. E. 443; *Chesapeake & O. R. Co. v. Hoffman*, 109 Va. 44, 63 S. E. 432; *Hortenstein v. Virginia-Carolina R. Co.*, 102 Va. 914, 47 S. E. 996.

57. *Atlantic Fire Ins. Co. v. Sanders*, 36 N. H. 232; *Stone v. Pendleton*, 21 R. I. 332, 43 Atl. 643.

Though plaintiff must set out the whole of the contract relied on, it cannot be said that there is a variance because the written contract offered in evidence contains words not pleaded where such words do not alter the effect of the words pleaded. *Carpenter v. Vulcanite Portland Cement Co.*, 211 Pa. 551, 61 Atl. 75.

58. *Will's Gould Pl.*, 358, and the following cases: *Ind.*—*Busenbark v. Crawfordsville*, 9 Ind. App. 578, 37 N. E. 278. *La.*—*Lynch v. American Brewing Co.*, 127 La. 848, 54 So. 123; *Mercantile F. & M. Ins. Co. v. Cumberland*

T. & T. Co., 126 La. 621, 52 So. 851. *N. Y.*—*Buffalo Catholic Inst. v. Bitter*, 87 N. Y. 250. *S. C.*—*Nance v. Georgia, C. & N. R. Co.*, 35 S. C. 307, 14 S. E. 629; *Chalmers v. Glenn*, 18 S. C. 469. *Va.*—*Eaton v. Moore*, 111 Va. 400, 69 S. E. 326.

A count based on a contract is demurrable where it does not appear that plaintiff was a party to the contract or that it was made for his benefit. *Leon v. Kerrison*, 47 Fla. 178, 36 So. 173.

An allegation that a destroyed will bequeathed all of testator's property to the plaintiff sufficiently shows his right to bring an action to establish and probate said will. *Gfroerer v. Gfroerer*, 173 Ind. 424, 90 N. E. 606.

Title To the Thing Sued For.—*Keith v. Pratt*, 5 Ark. 661.

Both at common law and under the codes, if any right or authority over real or personal property is set up, some title to such property must be alleged. *Warner v. Capps*, 37 Ark. 32.

The complaint in an action on a note payable to another than the plaintiff must show ownership in plaintiff by assignment or otherwise. *Browder v. Gaston v. Wellborn*, 30 Ala. 677.

The title of an equitable plaintiff need not be shown, nor his interest indicated otherwise than by making the suit to his use. *American Mfg. Co. v. S. Morgan Smith Co.*, 25 Pa. Super. 176.

59. One suing in a representative capacity must allege facts showing his authority to do so. *Beal v. Batte*, 31 Tex. 371.

"A complaint in an action by an administrator as such which does not show a cause of action existing in favor of his intestate against the defendant is bad." *Wetmore v. Porter*, 92 N. Y. 76.

See also, *V. D. 2, supra*.

60. *Will's Gould Pl.*, 359; *Afferbach v. McGovern*, 79 Cal. 268, 21 Pac. 837; *Melvin v. Melvin*, 8 Cal. App. 684, 97 Pac. 696.

and a duty owing by the defendant to the plaintiff and its breach,⁶¹ and an injury to the plaintiff resulting therefrom.⁶²

Where There Are Several Parties.—As a general rule the complaint

61. **Ala.**—*Charlie's Transfer Co. v. Malone*, 159 Ala. 325, 48 So. 705; *Sloss-Sheffield Steel & Iron Co. v. Sampson*, 158 Ala. 590, 48 So. 493; *Mayor, etc., of Huntsville v. Ewing*, 116 Ala. 576, 22 So. 984. **Ill.**—*Mackey v. Northern Milling Co.*, 210 Ill. 115, 71 N. E. 448, *affirming* 99 Ill. App. 57; *Ayers v. City of Chicago*, 111 Ill. 406; *Pullman Co. v. Woodfolk*, 121 Ill. App. 321. **Ind.**—*Pittsburgh, C. & St. L. R. Co. v. Wood* (Ind. App.), 84 N. E. 1009, 88 N. E. 709.

Plaintiff "must allege in his complaint all the facts showing his right, and also those showing its invasion by the defendant, and the facts thus alleged must in law upon their face, on the one side entitle him to the right which he claims, and on the other amount to an invasion by the defendant." *Chalmers v. Glenn*, 18 S. C. 469. Quoted with approval in *Nance v. Georgia, C. & N. R. Co.*, 35 S. C. 307, 14 S. E. 629.

An invasion of plaintiff's right by defendant. *Chalmers v. Glenn*, 18 S. C. 469.

Must allege facts from which the law will raise the duty, from failure in which the injury occurs. *Schueler v. Mueller*, 193 Ill. 402, 61 N. E. 1044; *Ayers v. Chicago*, 111 Ill. 406; *Bahr v. National Safe Deposit Co.*, 137 Ill. App. 397.

It is sufficient to show a legal obligation on defendant, and to aver that he has failed to perform it. *Patterson v. Jones*, 13 Ark. 69.

Manner of Alleging Duty and Breach. In an action to recover damages for an injury resulting from a neglect to perform a duty imposed by the common law or by a public statute, it is not necessary to allege the manner in which such duty was imposed, but it is sufficient to state such facts as, under the general law, of which the courts will take judicial notice, entitle him to the redress he seeks. *Town of Griswold v. Gallup*, 22 Conn. 208.

It is not necessary to expressly allege that an accident occurred by reason of defendant's failure to perform a duty imposed on him by a statute, but it is sufficient to set out facts

from which such duty arises, and a failure to perform it. *Weller v. Lehigh & H. R. R. Co.* (N. J.), 79 Atl. 259.

"When the gravamen of the action is the alleged nonfeasance or misfeasance of another, as a general rule it is sufficient if the complaint aver the facts out of which the duty to act springs, and the defendant negligently failed to do or perform. It is not necessary to define the *quo modo*, or to specify the particular acts of diligence he should have employed in the performance of such duty." *Southern R. Co. v. Burgess*, 143 Ala. 364, 42 So. 35, and cases cited.

See also, *Ensley R. Co. v. Chewning*, 93 Ala. 24; *Leach v. Busch*, 57 Ala. 145; and the title "Negligence."

"A statement of facts which create a statutory obligation, or give rise to a common law duty, cannot be substituted or dispensed with, by a mere allegation that the obligation or duty exists." *Baltimore & O. R. Co. v. Wilson*, 31 Ohio St. 555.

In a negligence case, where the duty does not necessarily result from the relation of the parties as alleged, the circumstances from which the duty arises should be alleged. *Woodbury v. Tampa Water Works Co.*, 57 Fla. 243, 49 So. 556.

In an action on a contract, plaintiff must aver the breach for which a recovery is sought. *Zeller v. Wunder*, 36 Pa. Super. 1.

A count on an account is demurrable where it fails to allege any fact showing that the account is due by the defendant. *Smythe v. Dothan Foundry & Mach. Co.*, 166 Ala. 253, 52 So. 398.

62. Must connect defendant's negligence with plaintiff's injury. *City of Logansport v. Kihm*, 159 Ind. 68, 64 N. E. 595.

Where the damages sustained by plaintiff constitute no part of his cause of action, but are a mere incident to the violation of his right, they need not be alleged in the body of the complaint, but it is sufficient to claim in the demand for relief. *Levi v. Legg*, 23 S. C. 282.

See also the title "Damages."

must state a good cause of action as to all who join in it,⁶³ and against all those who are joined as defendants.⁶⁴

Only those matters which are material to the cause of action,⁶⁵ and which the law requires to be proved,⁶⁶ need be alleged, except to negative a possible performance of the obligation which is the basis of the action, or to negative an inference from an act which is in itself indifferent.⁶⁷ It is sufficient if proof of the facts alleged would necessarily establish the essential ingredients of the cause of action.⁶⁸

Service of Process. — It is unnecessary for the complaint to show that the defendants have been served with process.⁶⁹

63. Otherwise a demurrer for want of facts will be sustained. *Keupper v. Eggiman* (Ind.), 97 N. E. 161; *Frankel v. Garrard*, 160 Ind. 209, 66 N. E. 687; *McIntosh v. Zaring*, 150 Ind. 301, 49 N. E. 164; *Brunson v. Henry*, 140 Ind. 455, 39 N. E. 256; *Lake Erie & W. R. Co. v. Priest*, 131 Ind. 413, 31 N. E. 77; *Wells & Nellegar Co. v. Short* (Ind. App.), 97 N. E. 183.

All the plaintiffs must be jointly interested in the recovery to be had under each count. *Southern R. Co. v. Blunt & Ward*, 165 Fed. 258.

That the plaintiff's interest is not characterized in terms as joint is immaterial on demurrer where it is obviously so. *Trueb v. New York Asbestos Mfg. Co.*, 38 N. Y. Supp. 604.

An allegation that "the plaintiffs are, and for several years past have been, the owners" of certain land sufficiently shows a joint ownership. *Roe v. Lincoln County*, 56 Wis. 66, 13 N. W. 887.

If any one of defendants who jointly demur, however, is found to have a legal wrong done to plaintiff clearly alleged against him, the joint demurrer is bad. *Dunn v. Gibson*, 9 Neb. 513.

64. "If the plaintiff has a joint cause of action against several defendants, he should state with reasonable particularity the facts relied upon against each to sustain a joint recovery against all, so that the court may know, and each of the defendants be apprised of, the facts relied upon to create the joint liability." *Reinartson v. Chicago G. W. R. Co.*, 174 Fed. 707.

65. *Canfield v. Tobias*, 21 Cal. 349; *Green v. Palmer*, 15 Cal. 411; *McNees v. Missouri Pac. R. Co.*, 22 Mo. App. 224.

Only such as are necessary to sustain the action, and no more. 1 Chitt. Pl.,

248; Md. Pub. Gen. Laws, art. 75, §32; *Pearce v. Watkins*, 68 Md. 534, 13 Atl. 376; *Beardsley v. Southmayd*, 14 N. J. L. 534.

Should not allege immaterial matters which, if traversed, would not lead to a substantial issue. *Crump v. Mims*, 64 N. C. 767.

66. Cal.—*Henke v. Eureka Endowment Assn.*, 100 Cal. 429, 34 Pac. 1089; *Payne & Dewey v. Treadwell*, 16 Cal. 220; *Green v. Palmer*, 15 Cal. 411. Ind.—*Pittsburgh, C., C. & St. L. R. Co. v. Brown*, 44 Ind. 409. Kan.—*Fowler Pack. Co. v. Enzenperger*, 77 Kan. 406, 94 Pac. 995. Mass.—Rev. Laws, 1902, c. 173, §6, p. 1550; *Brettun v. Anthony*, 103 Mass. 37; *Murdock v. Caldwell*, 8 Allen 309; *Read v. Smith*, 1 Allen 519. N. J.—*Veller v. Lehigh & H. R. R. Co.*, 79 Atl. 259.

67. *Payne & Dewey v. Treadwell*, 16 Cal. 220; *Green v. Palmer*, 15 Cal. 411.

68. *Wall v. Toomey*, 52 Conn. 35.

"It is sufficient if the complaint contain, in ordinary and concise language and reasonable certainty, allegations of such constitutive facts as will entitle the plaintiff to prove and maintain his case, and give the defendant opportunity to meet and controvert the alleged facts relied upon by the plaintiff." *Farnsworth v. Holderman*, 3 Utah 381, 4 Pac. 337.

Averments which point out the nature of the pleader's claim are sufficient, if under them he would be entitled to give evidence to establish his cause of action. *Coatsworth v. Lehigh Valley R. Co.*, 156 N. Y. 451, 51 N. E. 301; *affirming* 24 App. Div. 273, 48 N. Y. Supp. 511; *Rochester R. Co. v. Robinson*, 133 N. Y. 242, 30 N. E. 1008.

69. *McConnell v. Worns*, 102 Ala. 587, 14 So. 849.

Matter which would come more properly from the other side need not be alleged.⁷⁰

2. Jurisdictional Facts.—Where the court in which the action is brought is of limited or special jurisdiction, all necessary jurisdictional facts must be averred,⁷¹ but the contrary is true in courts of general jurisdiction.⁷² By statute in some states it is specifically provided that it shall not be necessary to aver that the cause of action arose or that the matter is within the jurisdiction of the court.⁷³

3. Venue.—Under the common law system of pleading a venue must be laid to every material traversable fact.⁷⁴ The rule has been

70. 1 Chitt. Pl., 225; *Louisville & Portland Canal Co. v. Murphy*, 9 Bush. (Ky.) 522; *Redman v. Aetna Ins. Co.*, 49 Wis. 431, 4 N. W. 591.

Matters peculiarly within defendant's knowledge need not be pleaded. *Ind.*—*Knickerbocker Ice Co. v. Gray*, 171 Ind. 395, 84 N. E. 341; *Louisville & N. E. Co. v. Crunk*, 119 Ind. 542, 21 N. E. 31; *Indiana Bicycle Co. v. Willis*, 18 Ind. App. 525, 48 N. E. 646. *Pa.*—*Murdock v. Martin*, 132 Pa. 86, 18 Atl. 1114. **S. D.**—*Hudson v. Archer*, 4 S. D. 128, 55 N. W. 1099.

71. **U. S.**—*Hill v. Walker*, 167 Fed. 241, 92 C. C. A. 633. **Ga.**—*White v. Atlanta, B. & A. R. Co.*, 5 Ga. App. 308, 63 S. E. 234. **N. Y.**—*Gilbert v. York*, 111 N. Y. 544, 19 N. E. 268; *Henneke v. Schmidt*, 121 App. Div. 516, 106 N. Y. Supp. 138. **Tex.**—*McDaniel v. Staples* (Tex. Civ. App.), 113 S. W. 596.

Citizenship.—*Roberts v. Lewis*, 144 U. S. 653, 12 Sup. Ct. 781, 36 L. ed. 579; *Continental L. Ins. Co. v. Rhoades*, 119 U. S. 237, 7 Sup. Ct. 193, 30 L. ed. 380; *Grace v. American Cent. Ins. Co.*, 109 U. S. 278, 3 Sup. Ct. 207, 27 L. ed. 932; *Robertson v. Cease*, 97 U. S. 646, 24 L. ed. 1057.

In Divorce Suits.—*Parrish v. Parrish*, 52 Ore. 160, 96 Pac. 1066; *Haymond v. Haymond*, 74 Tex. 414, 12 S. W. 90.

See also the title "Jurisdiction."

72. It is not necessary that the jurisdiction of the New York municipal court affirmatively appear in complaint. *Pratt v. Pennsylvania R. Co.*, 66 Misc. 183, 121 N. Y. Supp. 357; *Meuthen v. Eyelis*, 33 Misc. 98, 67 N. Y. Supp. 246.

73. **Va. Code**, §3244; **W. Va. Code**, 1906, §3853.

74. *Will's Gould Pl.*, 263; *Andrew's Steph. Pl.*, 373, and the following cases: **Ark.**—*Stone v. Bennett*, 4 Ark.

71. **Conn.**—*Sage v. Hawley*, 16 Conn.

106. **Ill.**—*St. Louis, J. & C. R. Co. v. Thomas*, 47 Ill. 116. **Md.**—*County Comrs. v. Wise*, 71 Md. 43, 18 Atl. 31; *Crook v. Pitcher*, 61 Md. 510. **N. J.**—*Reed v. Wilson*, 41 N. J. L. 29. **Pa.**—*American Mfg. Co. v. S. Morgan Smith Co.*, 25 Pa. Super. 176.

"The object of stating the place in the declaration is twofold, viz.: 1. To obtain convenient certainty in pleading. 2. To ascertain the *venue*, or place where the trial shall be had. Ordinarily the double end is attained by alleging that the cause of action arose at some place within the county where the *venue* is laid." *Duyekinck v. Clinton Mot. Ins. Co.*, 23 N. J. L. 279.

"The statement of *venue* in a declaration is intended to indicate the place or county in which the facts constituting the cause of action are alleged to have occurred, and in which the case is to be tried." *County Comrs. v. Gibson*, 36 Md. 229.

In transitory actions it is only necessary to give a place of trial. In such case a *venue* is good without stating where the act complained of was in fact committed, with a *silicet* of the county in which the action is brought. *McKenna v. Fisk*, 1 How. (U. S.) 241, 11 L. ed. 117.

In transitory actions, "The *venue* for trial is a legal fiction, devised for the furtherance of justice, and cannot be traversed." *McKenna v. Fisk*, 1 How. (U. S.) 241, 11 L. ed. 117.

An allegation that defendant undertook to transport certain goods "from Lizella, Bibb county, to Atlanta" sufficiently shows that the contract was entered into in Bibb county, and sufficiently shows the *venue* in an action on said contract brought in that county. *Macon & B. R. Co. v. Walton*, 127 Ga. 294, 56 S. E. 419.

Videlicet.—"If the action be local, and the place be truly stated, or if the

greatly modified by the statutes of the various states relating to the place where actions may be brought,⁷⁵ and it is generally no longer necessary in transitory actions.⁷⁶ Where required, the statement of the county in which the action is brought in the margin,⁷⁷ or in the title,⁷⁸ is ordinarily sufficient. If the proper venue is laid in the body of the pleading, the county in the margin may be rejected as surplusage.⁷⁹ A failure to lay a venue is ground for special demurrer.⁸⁰ Since it is matter of form, it cannot be taken advantage of on general demurrer,⁸¹

action be transitory, and there be no need of stating where the cause of action actually arose, the introduction of the *videlicet* is neither necessary nor useful. But when, in a transitory action, it becomes necessary or expedient, as matter of description or otherwise, to state where the contract was made, or the cause of action actually arose, and the place thus stated is out of the county in which the venue is laid, then it is necessary to lay the venue under a *videlicet*. The *videlicet* was in fact introduced in the declaration, in stating the place, for the purpose of avoiding a difficulty, which was otherwise supposed to exist under the ancient law, that the jury to try the cause must be summoned from the vicinage or venue laid in the declaration." *Duyckinek v. Clinton Mut. Ins. Co.*, 23 N. J. L. 279.

Effect of Removal of Action.—The venue should be laid in the county in which the action is brought, though the action is afterwards removed to another county. *County Comrs. v. Gibson*, 36 Md. 220.

75. *Clay Fire & Marine Ins. Co. v. Huron Salt & Lumb. Mfg. Co.*, 31 Mich. 346.

In transitory actions the venue is matter of form only, and want of venue does not go to the jurisdiction. *Gay v. Homer*, 13 Pick. (Mass.) 535; *Briggs v. Nantucket Bank*, 5 Mass. 94; *Massuco v. Tamassi*, 80 Vt. 186, 67 Atl. 551.

It may be changed by amendment after the general issue has been pleaded, since it is mere matter of form. *Gay v. Homer*, 13 Pick. (Mass.) 535.

76. **Ia.**—Code, §3614; *Kelley v. Cosgrove*, 83 Iowa 229, 48 N. W. 979; *Gustafson v. Wind*, 62 Iowa 281, 17 N. W. 523. **Me.**—*Blackstone Nat. Bank v. Lane*, 80 Me. 165, 13 Atl. 683. **Pa.**—*American Mfg. Co. v. Morgan Smith Co.*, 25 Pa. Super. 176. **Va.**—Code, 1904, §3243; *Young v. Hart*, 101 Va.

480, 44 S. E. 703; *Norfolk & W. R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226. **W. Va.**—Code, 1906, §3852; *Mankin v. Jones*, 63 W. Va. 373, 60 S. E. 248.

It is probably unnecessary in a transitory action, which may, under the statute, be prosecuted in any county. *Pullen v. Chase*, 4 Ark. 210.

77. *Swinney v. Burnside & Co.*, 17 Ark. 33; *Pullen v. Chase*, 4 Ark. 210. In the margin or commencement. *Benton v. Brown*, 1 Mo. 393.

If correctly stated in the margin, it is immaterial that it is incorrectly stated in the body of the pleading. *McKay v. Lane*, 5 Fla. 268.

It is sufficient to give the county. *Beardsley v. Southmayd*, 14 N. J. L. 534.

In Mississippi the code provides that the name of the county shall be stated in the margin of the declaration, and it shall not be necessary to state any venue in the body of the declaration or in any subsequent pleading, nor to set forth in any manner the place in which an act is alleged to have been done, unless from the nature of the case the place be material or traversable. Code, 1906, §730.

78. *Hall v. Johnson* (Tex. Civ. App.), 40 S. W. 46.

It is sufficient if it is stated in the title and thereafter referred to. *St. Louis, J. & C. R. Co. v. Thomas*, 47 Ill. 116.

79. *County Comrs. v. Wise*, 71 Md. 43, 18 Atl. 31.

80. **Ark.**—*Pullen v. Chase*, 4 Ark. 210. **Md.**—*County Comrs. v. Wise* 71 Md. 43, 18 Atl. 31. **Mass.**—*Gay v. Homer*, 13 Pick. 535; *Briggs v. Nantucket Bank*, 5 Mass. 94.

81. *Stone v. Bennett*, 4 Ark. 71; *Gay v. Homer*, 13 Pick. (Mass.) 535; *Briggs v. Nantucket Bank*, 5 Mass. 94.

It is only matter in abatement, or cause for special demurrer. *Pullen v. Chase*, 4 Ark. 210.

Since it is matter of form only, it

and is not ground for setting aside a judgment by default.⁸²

The codes of most of the states provide that the name of the county in which the action is brought or in which it is to be tried shall be stated in the title.⁸³

4. **Time.**—Under the common law system of pleading, in personal actions, the time of every traversable fact must be stated,⁸⁴ and this is equally true though it is not material to prove the time as laid.⁸⁵ Under the codes and practice acts it is essential only when material to the cause of action.⁸⁶

5. **Quantity, Quality and Value.**—Under the rules of common law pleading, where a material sum or quantity is mentioned, the amount thereof must be specified.⁸⁷

is not ground for general demurrer, and is within the statutory provision that no pleading shall be deemed insufficient for any defect which could formerly be objected to only by special demurrer. *Reed v. Wilson*, 41 N. J. L. 29.

82. *American Mfg. Co. v. Morgan Smith Co.*, 25 Pa. Super. 176.

83. See *V. C.*, *supra*.

See further the title "**Venue.**"

84. *Will's Gould Pl.*, 244, *et seq.*, and the following cases: *Ala.*—*Sloss-Sheffield Iron & Steel Co. v. Sampson*, 158 Ala. 590, 48 So. 493. *Conn.*—*Sage v. Hawley*, 16 Conn. 106. *Ga.*—*City Council v. Marks*, 124 Ga. 365, 52 S. E. 539; *Warren v. Powell*, 122 Ga. 4, 49 S. E. 730; *Busby v. Marshall*, 3 Ga. App. 764, 60 S. E. 376; *Hicks v. Hamilton*, 3 Ga. App. 112, 59 S. E. 331; *Mandeville Mills v. Dale*, 2 Ga. App. 607, 58 S. E. 1060. *N. J.*—*Haven v. Shaw*, 23 N. J. L. 309.

Must give the day, month and year when each traversable fact occurred. *Gordon v. Journal Pub. Co.*, 81 Vt. 237, 69 Atl. 742.

An allegation that the defendants "heretofore" did the acts complained of is insufficient. *Andrews v. Thayer*, 40 Conn. 156.

That the date of a policy of insurance sued on is left blank does not render the complaint demurrable, where it appears from papers in the possession of the defendant, and the complaint otherwise sufficiently shows that the contract sued on covered the time of the loss. *Hartford Fire Ins. Co. v. King*, 106 Ala. 519, 17 So. 707.

Time must be laid after the cause of action accrues. *Renner v. Bank of Columbia*, 9 Wheat. (U. S.) 581, 6 L. ed. 166.

The era need not be given. *Beardsley v. Southmayd*, 14 N. J. L. 534.

The use of the word "about" renders the allegation of time indefinite and uncertain and insufficient. *Cole v. Babcock*, 78 Me. 41, 2 Atl. 545; *Gordon v. Journal Pub. Co.*, 81 Vt. 237, 69 Atl. 742.

Remedy.—Failure to allege it must be taken advantage of by demurrer, and is not ground of nonsuit. *Atlantic Fire Ins. Co. v. Sanders*, 36 N. H. 252.

In Texas a petition which fails to state the date of the injuries complained of, or to give some reason why the plaintiff cannot state it, is subject to special demurrer. *Trinity & B. V. R. Co. v. Sanders* (Tex. Civ. App.), 120 S. W. 272.

85. *Me.*—*Cole v. Babcock*, 78 Me. 41, 2 Atl. 545; *Platt v. Jones*, 59 Me. 242. *N. J.*—*Haven v. Shaw*, 23 N. J. L. 309. *Vt.*—*Gordon v. Journal Pub. Co.*, 81 Vt. 237, 69 Atl. 742.

86. *Bliss Code Pl.*, §§282, 283, and the following cases: *Conn.*—*Plumb v. Griffin*, 74 Conn. 132, 50 Atl. 1. *Ia.* *Code*, §3613; *Arrison v. Supreme Council of M. T.*, 129 Iowa 303, 105 N. W. 580. *Kan.*—*Backus v. Clark*, 1 Kan. 303.

Allegations of time are not material unless a matter of description. *Louisville Banking Co. v. Com.*, 142 Ky. 690, 134 S. W. 1142.

When time is not material, it is matter of form only, and failure to allege it is not reached by demurrer. *Denny v. Northwestern Christian University*, 16 Ind. 220.

87. *Sage v. Hawley*, 16 Conn. 106. Ordinarily quantity, quality and value should be stated. *Andrews Steph. Pl.*, §163; *Seaboard Air Line Ry. v. Rentz*, 60 Fla. 449, 54 So. 20.

6. Consideration.—In actions on contract consideration should be alleged,⁸⁸ except where the law implies one.⁸⁹

7. Conditions Precedent and Subsequent.—The declaration, complaint, or equivalent pleading must allege performance of all conditions precedent to the right of the plaintiff to maintain the action⁹⁰

88. Bliss Code Pl., §§268, 269, and the following cases: *Mass.*—*Jones v. Dow*, 137 Mass. 119. *N. Y.*—*National Citizens' Bank v. Toplitz*, 178 N. Y. 464, 71 N. E. 1; *Prindle v. Caruthers*, 15 N. Y. 425; *Spear v. Downing*, 34 Barb. 522. *Ore.*—*Hayden v. Steadman*, 3 Ore. 550.

It is not necessary to use the word "consideration." *Ramsey v. Johnson*, 7 Wyo. 392, 52 Pac. 1084.

It is not necessary to allege a consideration which is merely nominal, where the legal effect of the contract is given. *Struthers v. Drexel*, 122 U. S. 487, 7 Sup. Ct. 1293, 30 L. ed. 1216.

89. Bliss Code Pl., §§268, 269; *National Citizens' Bank v. Toplitz*, 178 N. Y. 464, 71 N. E. 1.

It is not necessary in an action on a written contract, in view of the provision of Civ. Code, §1614, that a written instrument is presumptive evidence of consideration. *Henke v. Eureka Endowment Assn.*, 100 Cal. 429, 34 Pac. 1089.

See also the title "Contracts."

90. Wills' Gould Pl., 361, and the following cases: *U. S.*—*Wilfong v. Ontario Land Co.*, 171 Fed. 51, 96 C. C. A. 293; *Denver & R. G. Co. v. Wagner*, 167 Fed. 75, 92 C. C. A. 527; *Stratton v. Essex County Park Com.*, 164 Fed. 901; *Stern v. La. Compagnie Gen. Trans.*, 110 Fed. 996. *Cal.*—*Gummer v. Mairs*, 140 Cal. 535, 74 Pac. 26; *Breedlove v. Norwich Union Fire Ins. Co.*, 124 Cal. 164, 56 Pac. 770. *Fla.*—*Milligan v. Keyser*, 52 Fla. 331, 42 So. 367; *Tillis v. Liverpool & London & Globe Ins. Co.*, 46 Fla. 268, 35 So. 171. *Ga.*—*Murphy v. Lawrence*, 2 Ga. 257. *Ind.*—*Korbly v. Loomis*, 172 Ind. 352, 88 N. E. 698; *Mondamin Meadows Dairy Co. v. Brudi*, 72 N. E. 643; *Ohio Farmers' Ins. Co. v. Vogel* (Ind. App.), 73 N. E. 612. *Mass.*—*Rev. Laws*, 1902, c. 173, §6; *National Contracting Co. v. Com.*, 183 Mass. 89, 66 N. E. 639; *Hall v. Bumstead*, 20 Pick. 2. *N. J.*—*Earle v. Fidelity & Deposit Co.*, 68 Atl. 1078; *Watkins v. Kirby*, 74 N. J. L. 34, 64 Atl. 979. *N. Y.*

Lent v. New York & M. R. Co., 130 N. Y. 504, 29 N. E. 988; *Porter v. Kingsbury*, 71 N. Y. 588, *affirming* 5 Hun 597; *Howland v. Edmonds*, 24 N. Y. 307; *Graham v. Scripture*, 26 How. Pr. 501; *Clemens v. American Fire Ins. Co.*, 70 App. Div. 435, 75 N. Y. Supp. 484. *Ohio.*—*Home Ins. Co. v. Lindsey*, 26 Ohio St. 348. *Ore.*—*Manaudas v. Heilner*, 29 Ore. 222, 45 Pac. 758. *Pa.*—*Zeller v. Wunder*, 36 Pa. Super. 1. *Wis.*—*Redman v. Aetna Ins. Co.*, 49 Wis. 431, 4 N. W. 591.

Compliance with the statute requiring plumbers to obtain a license before doing business. *Milton Schnaier & Co. v. Grigsby*, 117 N. Y. Supp. 455.

"Where the right of plaintiff to recover depends upon conditions stated in the same section of the statute which gives the right of action, then the petition must allege the performance of those conditions or requirements." *Mathieson v. St. Louis & S. F. R. Co.*, 219 Mo. 542, 118 S. W. 9.

Where the obligation of a party to a contract is to pay only upon the happening of a contingency, its occurrence must be alleged. *Briggs v. Ruthenford*, 94 Minn. 23, 101 N. W. 954; *Root v. Childs*, 68 Minn. 142, 70 N. W. 1087; *Wilson v. Clarke*, 20 Minn. 367.

The complaint in an action against the indorser of a note must aver or excuse suit against the maker as required by the statute. *Mobile Sav. Bank v. McDonnell*, 83 Ala. 595, 4 So. 346.

Compliance by foreign corporation plaintiff with statutory conditions precedent to the right to do business and sue in the state. *Valley Lumb. & Mfg. Co. v. Nickerson*, 13 Idaho 682, 93 Pac. 24; *Valley Lumb. & Mfg. Co. v. Driessel*, 13 Idaho 662, 93 Pac. 765; *Wood & Selick v. Ball*, 190 N. Y. 217, 83 N. E. 21, *affirming* 100 N. Y. Supp. 119; *United Building Material Co. v. Odell*, 67 Misc. 584, 123 N. Y. Supp. 313; *American Case & Register Co. v. Griswold*, 68 Misc. 379, 125 N. Y. Supp. 4; *Chicago Crayon Co. v. Slattery*, 123 N. Y. Supp. 987.

such as demand made,⁹¹ or notice given,⁹² or an excuse for non-performance,⁹³ but the contrary is true as to provisos or conditions subsequent.⁹⁴

See also the title "Corporations."

The procuring of an architect's certificate required by a building contract, or an excuse for not procuring it. *Weeks v. O'Brien*, 141 N. Y. 199, 36 N. E. 185.

Presentation and rejection of a claim against a decedent's estate. *Hentsch v. Porter*, 10 Cal. 555.

Presentation to, and disallowance by, the county court of a claim against the county. *Hohman v. County of Comal*, 34 Tex. 36.

91. *Bank of the United States v. Smith*, 11 Wheat. (U. S.), 171, 6 L. ed. 443.

Where a demand was essential to put defendant in default. *Terre Haute & I. R. Co. v. State*, 159 Ind. 438, 65 N. E. 401.

92. *Goff v. Janeway*, 26 Ky. L. Rep. 525, 1126, 82 S. W. 267; *St. Louis & S. F. R. Co. v. Phillips*, 17 Okla. 264, 87 Pac. 470.

When actual notice of any fact to the defendant, or special request is, either by the terms or the nature of the contract, the condition of his liability, it is of the gist of the action and must be specially alleged. *Tarbell v. Tarbell*, 60 Vt. 486, 15 Atl. 104.

When the matter is to be considered as lying more properly in the knowledge of the plaintiff than that of the defendant, but otherwise it need not be. *Carlisle v. Cahawba & M. R. Co.*, 4 Ala. 70, citing 1 Chit. Pl. 360.

Statutory Notice.—Ill.—*Walters v. City of Ottawa*, 240 Ill. 259, 88 N. E. 651; *Willig v. City of Chicago Heights*, 149 Ill. App. 8. Ia.—*Pardey v. Town of Mechanicsville*, 101 Iowa 266, 70 N. W. 189. Me.—*Low v. Inhabitants of Windham*, 75 Me. 113. Mo.—*Mathieson v. St. Louis & S. F. R. Co.*, 219 Mo. 542, 118 S. W. 9. Neb.—*City of Lincoln v. Grant*, 38 Neb. 369, 56 N. W. 995. N. Y.—*Reining v. City of Buffalo*, 102 N. Y. 308, 6 N. E. 792. Wis.—*Dorsey v. City of Racine*, 60 Wis. 292, 18 N. W. 928; *Wentworth v. Town of Summit*, 60 Wis. 281, 19 N. W. 97; *Susenguth v. Town of Rantoul*, 48 Wis. 334, 4 N. W. 328.

93. **Waiver or Excuse For Nonperformance.**—Need not allege perform-

ance of the contract sued on or readiness to perform, where it is shown that defendant refused to perform and repudiated the contract. *Jennings v. Sheritz*, 45 Ind. App. 129, 88 N. E. 729; *Foster v. Leininger*, 33 Ind. App. 669, 72 N. E. 164.

Must plead performance or waiver, and where he pleads performance he cannot show waiver. *Long Creek Bldg. Ass'n v. State Ins. Co.*, 29 Ore. 569, 46 Pac. 366.

Where he alleges performance, he must prove it. If he relies on an excuse for nonperformance he must allege facts constituting it. *Stern v. McKee*, 70 App. Div. 142, 75 N. Y. Supp. 157.

Cannot aver performance in the declaration and waiver in the replication. *Stratton v. Essex County Park Com.*, 164 Fed. 901.

Need not allege waiver of conditions precedent, but if defendant sets up a breach, waiver may then be alleged in the reply. An allegation of performance will be held to relate only to conditions not waived. *Levy v. Peabody Ins. Co.*, 10 W. Va. 569.

The objection that it does not cannot be first raised on appeal. *Wilfong v. Ontario Land Co.*, 171 Fed. 51, 96 C. C. A. 293.

94. **Wills' Gould Pl.**, 363, and the following cases: Cal.—*Allen v. Home Ins. Co.*, 133 Cal. 29, 65 Pac. 138; *Blasingame v. Home Ins. Co.*, 75 Cal. 633, 17 Pac. 925. Conn.—*Lounsbury v. Protection Ins. Co.*, 8 Conn. 458, 466. Ga.—*Murphy v. Lawrence*, 2 Ga. 257. Ia.—*Jones v. United States Mut. Acc. Assn.*, 92 Iowa 652, 61 N. W. 485; *Sutherland v. Standard Life & Acc. Assn.*, 87 Iowa 505, 54 N. W. 453. Mass.—*Freeman v. Travelers' Ins. Co.*, 144 Mass. 572, 12 N. E. 372; *Pierce v. Charter Oak Ins. Co.*, 138 Mass. 151; *Forbes v. American Mut. Life Ins. Co.*, 15 Gray 249. Minn.—*Chambers v. Northwestern Mut. Life Ins. Co.*, 64 Minn. 495, 67 N. W. 367. Mo.—*Farmers' Bank v. Manchester Assur. Co.*, 106 Mo. App. 114, 80 S. W. 299. Ore.—*Long Creek Bldg. Ass'n v. State Ins. Co.*, 29 Ore. 569, 46 Pac. 366. R. I.—*Whipple v. United Fire Ins. Co.*, 20 R.

8. Statutes.—Where plaintiff relies upon a statute, he must allege all facts necessary to bring himself within it.⁹⁵

I. 260, 35 Atl. 498. **S. C.**—Kingman v. Lancashire Ins. Co., 54 S. C. 599, 32 S. E. 762. **S. D.**—Hudson v. Archer, 4 S. D. 128, 55 N. W. 1099. **Tenn.** London & Lancashire Fire Ins. Co. v. Crunk, 91 Tenn. 376, 23 S. W. 140. **Tex.**—Modern Order of Practorians v. Taylor (Tex. Civ. App.), 127 S. W. 260. **Wis.**—Johnston v. Northwestern Live Stock Ins. Co., 94 Wis. 117, 68 N. W. 868; Bank of River Falls v. German American Ins. Co., 72 Wis. 535, 40 N. W. 506; Redman v. Aetna Ins. Co., 49 Wis. 431, 4 N. W. 591.

Need not negative matters of defence in an action on a bond. United Surety Co. v. Summers, 110 Md. 95, 72 Atl. 775.

If payment is not to be made if a contingency happens during the continuance of a contract, its nonhappening need not be alleged. Root v. Childs, 68 Minn. 142, 70 N. W. 1087.

95. U. S.—Alabama v. Burr, 115 U. S. 413, 6 Sup. Ct. 81, 29 L. ed. 435; Beck v. Johnson, 169 Fed. 154. **Cal.**—Dye v. Dye, 11 Cal. 163. **Conn.**—Broschart v. Tuttle, 59 Conn. 1, 21 Atl. 925. **Ga.**—Central of Ga. R. Co. v. Chicago Portrait Co., 122 Ga. 11, 49 S. E. 727. **Idaho.**—Perkins v. Loux, 14 Idaho 307, 95 Pac. 694; Sherwood v. Stephens, 13 Idaho 399, 90 Pac. 345. **Ind.**—Princeton Coal Min. Co. v. Lawrence, 95 N. E. 423; Touhey v. City of Decatur, 93 N. E. 540; State v. Adams Express Co., 172 Ind. 10, 87 N. E. 712; Chicago, I. & L. R. Co. v. Barnes, 164 Ind. 143, 73 N. E. 91; Chicago & E. R. Co. v. Hamerick (Ind. App.), 96 N. E. 649; Zeller, McClellan & Co. v. Vinardi, 42 Ind. App. 232, 85 N. E. 378; Fleming v. City of Indianapolis, 6 Ind. App. 80, 32 N. E. 1135. **Ia.** Bradbury v. Chicago, R. I. & P. R. Co., 149 Iowa 51, 128 N. W. 1. **Kan.** Fowler v. Enzenperger, 77 Kan. 406, 94 Pac. 995. **Me.**—Inhabitants of Peru v. Barrett, 100 Me. 213, 60 Atl. 968; Berry v. Stinson, 23 Me. 140. **Mass.** Hall v. Bumstead, 20 Pick. 2. **Mich.** Clark v. Village of North Muskegon, 88 Mich. 308, 50 N. W. 254; Howser v. Melcher, 40 Mich. 185. **Mo.**—Williams v. Atchison, T. & S. F. R. Co., 233 Mo. 666, 136 S. W. 304; Mathieson v. St. Louis & S. F. R. Co., 219 Mo.

542, 118 S. W. 9; Baird v. Citizens' R. Co., 146 Mo. 265, 48 S. W. 78; McIntosh v. Missouri Pac. R. Co., 103 Mo. 131, 15 S. W. 80; Barker v. Hannibal & St. J. R. Co., 91 Mo. 86, 14 S. W. 280; Kennayde v. Pacific R. Co., 45 Mo. 255; Bradshaw v. Western Union Tel. Co., 150 Mo. App. 711, 131 S. W. 912; Kingston v. Newell, 125 Mo. App. 389, 102 S. W. 604. **Mont.**—Thurman v. Pittsburgh & Mont. Copper Co., 41 Mont. 141, 108 Pac. 588; Miley v. Northern Pac. R. Co., 41 Mont. 51, 108 Pac. 5; Kelly v. Northern Pac. R. Co., 35 Mont. 243, 88 Pac. 1009. **Neb.**—Schuyler Nat. Bank v. Bollong, 24 Neb. 821, 40 N. W. 411. **N. H.**—Henniker v. Coconocook Valley R. Co., 29 N. H. 146. **N. J.**—Lott v. Leventhal, 80 N. J. L. 216, 76 Atl. 328; Thorpe v. Rankin, 19 N. J. L. 36. **N. Y.**—People v. Koster, 50 Misc. 46, 97 N. Y. Supp. 829; Ithaca Fire Dept. v. Rice, 108 App. Div. 100, 95 N. Y. Supp. 464; Seydel v. Corporation Liquidating Co., 92 N. Y. Supp. 225; Gunst v. Goldstein, 61 N. Y. Supp. 707. **N. D.**—Wishek v. Becker, 10 N. D. 63, 84 N. W. 590. **Ohio.**—Haskins v. Alcott, 13 Ohio St. 210. **Tex.** Schloss v. Atchison, T. & S. F. R. Co., 85 Tex. 601, 22 S. W. 1014; Dorrance & Co. v. International & G. N. R. Co. (Tex. Civ. App.), 126 S. W. 694. **Vt.**—Westcott v. Central Vt. R. Co., 61 Vt. 438, 17 Atl. 745.

See the title "Statutes."

In an action to recover a statutory penalty, it must be alleged that the acts complained of were contrary to the statute imposing the penalty. Town of Griswold v. Gallup, 22 Conn. 208.

Where a statutory right of action is conditional on the action being brought within a specified time, plaintiff must plead that it was brought within such time. Stern v. La Compagnie Generale Transatlantique, 110 Fed. 996.

A mere reference to the statute is insufficient (Chicago & N. E. R. Co. v. Sturgis, 44 Mich. 538, 7 N. W. 213), unless there is a single substantive fact, shown affirmatively, constituting a cause of action (People v. Koster, 97 N. Y. Supp. 829).

See also the title "Statutes."

Exceptions in the enacting part of a statute must be negatived,⁹⁶ but the contrary is true as to mere provisos,⁹⁷ or exceptions contained in a subsequent clause or section,⁹⁸ or in another statute,⁹⁹ and as to exceptions and provisos having no bearing on the facts alleged as constituting a violation of the statute.¹

9. Matters of Law and Facts Judicially Noticed.—Presumptions of law need not be stated,² nor matters of fact of which judicial notice is taken.³ Under the codes it is not necessary to plead the conclusions

96. 1 Chit. Pl., 246, and the following cases: **U. S.**—Maxwell Land Grant Co. v. Dawson, 151 U. S. 586, 14 Sup. Ct. 458, 38 L. ed. 279. **Fla.**—Seaboard Air Line Ry. Co. v. Nims, 61 Fla. 420, 54 So. 779. **Ill.**—Toledo, P. & W. R. Co. v. Lavery, 71 Ill. 522; St. Louis, J. & C. R. Co. v. Thomas, 47 Ill. 116. **Ind.**—Chicago & E. I. R. Co. v. Hamilton, 42 Ind. App. 512, 85 N. E. 1044; Pittsburg, C., C. & St. L. R. Co. v. Newsom (Ind. App.), 74 N. E. 21. **Ky.**—Bush v. Wathen, 104 Ky. 548, 47 S. W. 599. **Mich.**—Smalley v. Ashland Brown-Stone Co., 114 Mich. 104, 72 N. W. 29; Myers v. Carr, 12 Mich. 63. **Minn.**—Lawver v. Shingerland, 11 Minn. 447; Faribault v. Hulett, 10 Minn. 30. **Neb.**—Cram v. Chicago, B. & Q. R. Co., 85 Neb. 586, 123 N. W. 1045. **N. J.**—Vandergrift v. Meihle, 66 N. J. L. 92, 49 Atl. 16. **N. Y.**—Rowell v. Janvrin, 151 N. Y. 60, 45 N. E. 398; Harris v. White, 81 N. Y. 532; Seydel v. Corporation Liquidating Co., 92 N. Y. Supp. 225; Steuben County v. Wood, 48 N. Y. Supp. 471. **Tex.**—Lane v. Bell, 53 Tex. Civ. App. 213, 115 S. W. 918.

The enacting clause referred to is one which creates an offense and prescribes a penalty. *Berry v. Stimson*, 23 Me. 140.

See also the title "Statutes."

97. **U. S.**—Schlemmer v. Buffalo, R. & P. R. Co., 205 U. S. 1, 27 Sup. Ct. 407, 51 L. ed. 681. **Fla.**—Seaboard Air Line Ry. v. Nims, 61 Fla. 420, 54 So. 779. **Minn.**—Faribault v. Hulett, 10 Minn. 30. **N. Y.**—Rowell v. Janvrin, 151 N. Y. 60, 45 N. E. 398; Harris v. White, 81 N. Y. 532. **Tex.**—Lane v. Bell, 53 Tex. Civ. App. 213, 115 S. W. 918.

"A proviso only exempts a thing within the statute from its operation in certain circumstances or on certain conditions." *Myers v. Carr*, 12 Mich. 63.

See also the title "Statutes."

98. 1 Chit. Pl., 246, and the following cases: **Ill.**—Toledo, P. & W. R. Co. v. Lavery, 71 Ill. 522. **Ind.**—Cleveland, C., C. & St. L. R. Co. v. Gray, 148 Ind. 266, 46 N. E. 675; Central Indiana R. Co. v. Smith, 42 Ind. App. 365, 85 N. E. 26. **Ky.**—Bush v. Wathen, 104 Ky. 548, 47 S. W. 599. **Me.**—Berry v. Stimson, 23 Me. 140. **Mich.**—Smalley v. Ashland Brown-Stone Co., 114 Mich. 104, 72 N. W. 29; Myers v. Carr, 12 Mich. 63. **Neb.**—Cram v. Chicago, B. & Q. R. Co., 85 Neb. 586, 123 N. W. 1045. **N. J.**—Vandergrift v. Meihle, 66 N. J. L. 92, 49 Atl. 16.

See also the title "Statutes."

99. **Ind.**—Cleveland, C., C. & St. L. R. Co. v. Gray, 148 Ind. 266, 46 N. E. 675; Central Indiana R. Co. v. Smith, 42 Ind. App. 365, 85 N. E. 26. **Me.**—Berry v. Stimson, 23 Me. 140. **N. Y.**—Rowell v. Janvrin, 151 N. Y. 60, 45 N. E. 398.

See also the title "Statutes."

1. *People v. Lewis*, 131 App. Div. 336, 115 N. Y. Supp. 909.

See also the title "Statutes."

2. **Cal.**—Henke v. Eureka Endowment Assn., 100 Cal. 429, 34 Pac. 1089. **Idaho.**—Bates v. Capital State Bank, 18 Idaho 429, 110 Pac. 277. **Ohio.**—Baltimore & O. R. Co. v. Wilson, 31 Ohio St. 555.

Matters of fact which the law presumes from other facts alleged. *State v. Barber*, 4 Wyo. 56, 32 Pac. 14.

An implied promise to pay, it being matter of law. It is sufficient to allege facts upon which such implied promise arises. *Wilcox v. Jamieson*, 20 Colo. 158, 36 Pac. 902.

Need not allege a public duty imposed by law. *Louisville & Portland Canal Co. v. Murphy*, 9 Bush (Ky.) 522.

3. *Baltimore & O. R. Co. v. Wilson*, 31 Ohio St. 555.

See the title "Judicial Notice," 7 ENCYCLOPÆDIA OF EVIDENCE.

of law which follow from the facts stated.⁴

10. **Facts Implied From Those Alleged.** — Facts necessarily implied from these alleged need not be stated.⁵ But essential facts cannot be supplied by remote implication or inference.⁶

11. **Anticipating Defenses, and Effect of Alleging Matters of Defense.** — The plaintiff is only required to set forth his own cause of action.⁷ A declaration, complaint, or equivalent pleading alleging material and relevant facts which are a defense to the action is bad unless it also alleges facts avoiding such defense.⁸ Where the pleading

4. *National Citizens' Bank v. Top-litz*, 178 N. Y. 464, 71 N. E. 1.

It is sufficient if plaintiff states the facts and leaves the court to find the law. *Otto v. Young*, 227 Mo. 193, 127 S. W. 9.

The statute requires a plain and concise statement of facts, and not a statement of their legal effect, or of the legal conclusions inferred from them. *Distler v. Dabney*, 3 Wash. 200, 28 Pac. 335.

Where the facts alleged show that plaintiff is entitled to the equitable relief prayed for, it is not necessary to allege that he has no adequate remedy at law. *Sullivan v. Bitter*, 51 Tex. Civ. App. 604, 113 S. W. 193.

Though under the code plaintiff is not bound to state the legal effect of the facts pleaded, if he does so, he cannot complain if the adverse party and the court accept and act upon his own theory, especially where the petition is ambiguous and will support that theory as well as or better than any other. *Bailey v. Mosher*, 63 Fed. 488, 11 C. C. A. 304.

5. **Conn.**—*Lord v. Russell*, 64 Conn. 86, 29 Atl. 242; *Lee v. Stiles*, 21 Conn. 500; *Case v. Humphrey*, 6 Conn. 137. **Idaho.**—*Bates v. Capital State Bank*, 18 Idaho 429, 110 Pac. 277. **Ky.** *Louisville & Portland Canal Co. v. Murphy*, 9 Bush 522. **Mont.**—*Harmon v. Fox*, 31 Mont. 324, 78 Pac. 517.

A promise to pay need not be alleged in terms where facts are stated from which the law implies one. *Ball v. Beaumont*, 59 Neb. 631, 81 N. W. 858; *Bowen v. Emmerson*, 3 Ore. 452.

Facts averred carry with them all necessary inferences. *Pittsburgh, C., & St. L. R. Co. v. Rogers* (Ind. App.), 87 N. E. 28.

"What is plainly implied in a pleading is as much a part of it as what is expressed." *Western Real Estate Trustees v. Hughes*, 172 Fed. 206, 96 C. C. A. 653.

Where the primary or main facts are alleged, all merely subordinate and consequential facts that can be reasonably implied therefrom are admissible in evidence without being pleaded. *Interstate R. Co. v. Tyree*, 110 Va. 38, 65 S. E. 500.

"The pleading will be held to state all facts that can be implied from the allegations by reasonable and fair intendment, and facts so impliedly averred are traversable in the same manner as though directly stated." *Wallace v. Jones*, 182 N. Y. 37, 74 N. E. 576; *Sage v. Culver*, 147 N. Y. 241, 41 N. E. 513.

It is sufficient to state the facts from which the law infers a liability, or implies a promise. *Conaughty v. Nichols*, 42 N. Y. 83; *Jordan & S. Plankroad v. Morley*, 23 N. Y. 553.

Plaintiff for whose benefit a contract is made need not allege acceptance of it, for an acceptance is implied from bringing suit thereon. *Coppage v. Gregg*, 127 Ind. 359, 26 N. E. 903; *Foster v. Leininger*, 33 Ind. App. 669, 72 N. E. 164.

The allegation that a certain condition exists because of a certain fact necessarily carries with it the implication that the fact exists also. *Bank of Anderson v. Home Ins. Co.*, 14 Cal. App. 208, 111 Pac. 507.

6. *Price v. Bouteiller*, 79 Conn. 255, 64 Atl. 227.

The statement of a fact material to the cause of action cannot be obviated by the statement of another fact which raises a *prima facie* presumption of its existence. *Maguiar v. Henry*, 84 Ky. 1.

7. *Winemiller v. Laughlin*, 51 Ohio St. 421, 38 N. E. 111.

8. *Johnson v. Harrison* (Ind.), 97 N. E. 930; *Latta v. Miller*, 109 Ind. 302, 10 N. E. 100; *Sutton v. Todd*, 24 Ind. App. 519, 55 N. E. 980.

In determining whether the com-

avoids the defense, however, it is not vitiated because the defense is alleged.⁹

As a general rule the declaration, complaint or equivalent pleading, need not and should not negative matters of defense,¹⁰ such as,

plaint states a cause of action, allegations tending to discharge defendant are to be considered as well as those which tend to charge him. *Calvo v. Davies*, 73 N. Y. 211.

If the facts alleged reasonably tend to establish some defense which would defeat the action, enough additional facts must be set out to negative it. *Cedartown Cotton & Export Co. v. Miles*, 2 Ga. App. 79, 58 S. E. 289.

A complaint stating facts which affirmatively show that plaintiff was guilty of contributory negligence is demurrable. *Clark v. Chicago, M. & St. P. R. Co.*, 28 Minn. 69, 9 N. W. 75.

If the complaint shows that plaintiff's own act was the proximate cause of the injury complained of, it must allege freedom from negligence in the doing of such act. *Ball v. Gussenhoven*, 29 Mont. 322, 74 Pac. 871.

Where the face of the petition discloses that the cause of action is barred by limitations, plaintiff must plead an exception relieving him from the operation of the statute. *Burrus v. Cook*, 117 Mo. App. 385, 93 S. W. 888, dissenting opinion adopted as the opinion of the supreme court, 114 S. W. 1065.

9. *Johnson v. Harrison* (Ind.), 97 N. E. 930; *Lake Erie & W. R. Co. v. Holland*, 162 Ind. 406, 69 N. E. 138; *Chicago, C. & L. R. Co. v. West*, 37 Ind. 211.

10. **U. S.**—*Gelpcke v. City of Dubuque*, 1 Wall. 221, 17 L. ed. 519. **Ala.** *Brent v. Baldwin*, 160 Ala. 635, 49 So. 343; *Cassells' Mill v. Strater Bros. Grain Co.*, 166 Ala. 274, 51 So. 969; *Lewis v. Burton*, 74 Ala. 317; *Booth v. Comegys*, Minor 201. **Cal.**—*Gummer v. Mairs*, 140 Cal. 535, 74 Pac. 26; *Allen v. Home Ins. Co.*, 133 Cal. 29, 65 Pac. 138; *Jaffe v. Lilienthal*, 86 Cal. 91, 24 Pac. 835; *Munson v. Bowen*, 80 Cal. 572, 22 Pac. 253; *Canfield v. Tobias*, 21 Cal. 349. **Colo.**—*Downey v. Colorado Fuel & Iron Co.*, 48 Colo. 27, 108 Pac. 972. **Conn.**—*Mix v. Page*, 14 Conn. 329. **Ga.**—*Moss v. Chappell*, 126 Ga. 196, 54 S. E. 968; *Adams v. Haigler*, 123 Ga. 659, 51 S. E. 638; *Central R. Co. v. Bagley*, 121 Ga. 781, 49

S. E. 780; *Humphreys v. Bush*, 118 Ga. 628, 45 S. E. 911; *Cedartown Cotton & Export Co. v. Miles*, 2 Ga. App. 79, 58 S. E. 289. **Ill.**—*Scottish Nat. Ins. Co. v. Adams*, 122 Ill. App. 471. **Ind.** *Lake Erie & W. R. Co. v. Holland*, 162 Ind. 406, 69 N. E. 138; *Cleveland, C., C. & St. L. R. Co. v. Gray*, 148 Ind. 266, 46 N. E. 675; *Bowlus v. Phenix Ins. Co.*, 133 Ind. 106, 32 N. E. 319; *Du Pont v. Beck*, 81 Ind. 271. **Ia.** *Reed v. Hollingsworth*, 135 N. W. 37. **Kan.**—*Bingman v. Walter*, 80 Kan. 617, 103 Pac. 120; *Akin v. Davies*, 11 Kan. 580; *Frick v. Carson*, 3 Kan. App. 478, 43 Pac. 820. **Md.**—*Aetna Indem. Co. v. George A. Fuller Co.*, 111 Md. 321, 73 Atl. 738, 74 Atl. 369. **Minn.**—*Young v. Young*, 18 Minn. 90. **Mo.**—*Farmers Bank v. Manchester Assur. Co.*, 106 Mo. App. 114, 80 S. W. 299. **Neb.** *Vanderveer v. Moran*, 79 Neb. 431, 112 N. W. 581. **N. Y.**—*Welcke v. Trageser*, 131 App. Div. 737, 116 N. Y. Supp. 161; *Swartz v. Brown*, 119 N. Y. Supp. 1024; *Silverman v. Weir*, 114 N. Y. Supp. 6. **Ore.**—*Boothe v. Farmers' & Traders' Nat. Bank*, 98 Pac. 509. **Pa.** *Black v. Isaacman*, 44 Pa. Super. 476; *Truby v. American Natural Gas Co.*, 38 Pa. Super. 166; *Hastings v. Speer*, 34 Pa. Super. 478. **Tex.**—*Lane v. Bell*, 53 Tex. Civ. App. 213, 115 S. W. 918; *San Antonio Light Pub. Co. v. Lewy*, 52 Tex. Civ. App. 22, 113 S. W. 574.

Unless it constitutes a qualification of the original right or liability. *Mix v. Page*, 14 Conn. 329.

It is not permissible at common-law, but may be done in equity. *Henry v. Lynde*, 12 Pa. Co. Ct. 189.

Plaintiff may not insert in his statement of claim matters to rebut an anticipated defense and compel defendant to reply to such matters in his affidavit of defense. *Kimball v. Grant*, 19 Pa. Co. Ct. 96; *Henry v. Lynde*, 12 Pa. Co. Ct. 189.

A complaint in an action against an infant for necessities need not allege that defendant has no father or other person *in loco parentis* whose duty it is to support him. *Goodman v. Alexander*, 165 N. Y. 289, 59 N. E. 145.

It is not necessary to allege that

for example, the defense of contributory negligence,¹¹ or assumption of

the plaintiffs could not have saved themselves from loss. *Porter v. Burkett*, 65 Tex. 383.

In an action to recover the balance due on a contract for the sale of goods, plaintiff need not anticipate a claim for damages for failure to deliver the full amount sold, which would be a proper subject of counterclaim. *Hills v. Edmund Peycke Co.*, 14 Cal. App. 32, 110 Pac. 1088.

Discharge in Bankruptcy.—*Shumate v. Ryan*, 127 Ga. 118, 56 S. E. 103.

Self defense, in an action for assault. *Culberson v. Empire Coal Co.*, 156 Ala. 416, 47 So. 237.

Bona Fide Purchaser.—*Rozell v. Chicago Mill & Lumb. Co.*, 76 Ark. 525, 89 S. W. 469.

A complaint by the indorsee of a negotiable instrument need not allege facts showing that he is a bona fide purchaser to avoid a defense of fraud. *Johnson v. Harrison (Ind.)*, 97 N. E. 930.

That the contract in suit is unlawful, where the complaint does not show that it is. *Bernstein v. Downs*, 112 Cal. 197, 44 Pac. 567.

The fact that there is an offset and the amount thereof are matters of defense, and a motion to make an unnecessary allegation in relation thereto in the complaint more specific is properly denied. *Cox v. Cronan*, 82 Conn. 175, 72 Atl. 927.

Compliance with state laws by a foreign corporation plaintiff. Cal.—*South Yuba Water Co. v. Rosa*, 80 Cal. 333, 22 Pac. 222; *Bernheim Distilling Co. v. Elmore*, 12 Cal. App. 85, 106 Pac. 720. Mo.—*United Shoe Machinery Co. v. Ramlose*, 210 Mo. 631, 109 S. W. 567; *Groneweg & Schmoentgen Co. v. Estes*, 139 Mo. App. 36, 119 S. W. 513; *Parlin & Orendorff Co. v. Boatman*, 84 Mo. App. 67. Okla.—*White Sewing Mach. Co. v. Peterson*, 23 Okla. 361, 100 Pac. 513. Va.—*Nickels v. People's Bldg., Loan & Sav. Assn.*, 93 Va. 380, 25 S. E. 8.

See also the title "Corporations."

Effect of Violation of the Rule. Including matter anticipatory of a defense in a statement otherwise sufficient will not be fatal. *Black v. Isaacman*, 44 Pa. Super. 476.

Such allegations are to be treated

as surplusage, but as a general rule the declaration will not on that account be obnoxious to demurrer. *Leshner v. U. S. Fidelity & Guaranty Co.*, 239 Ill. 502, 88 N. E. 208, affirming 144 Ill. App. 632; *Scottish Nat. Ins. Co. v. Adams*, 122 Ill. App. 471.

A plaintiff may, subject to liability to attack by motion or demurrer, plead matter in avoidance of an anticipated defense, and may supplement the same in his reply by allegations not inconsistent therewith. *Western Travelers' Acc. Assn. v. Tomson*, 72 Neb. 661, 101 N. W. 341, 103 N. W. 695, 105 N. W. 293.

Where plaintiff undertakes to negative conditions, subsequent, the allegations in that regard are unnecessary, and it is not incumbent on plaintiff to prove them in the first instance though defendant joins issue thereon. *Jones v. United States Mut. Acc. Ins. Assn.*, 92 Iowa 652, 61 N. W. 485.

11. **U. S.**—*Western Real Estate Trustees v. Hughes*, 172 Fed. 206, 95 C. C. A. 658; *Chicago, G. W. R. Co. v. Price*, 97 Fed. 423, 38 C. C. A. 239. Ala.—*American Bolt Co. v. Fennell*, 158 Ala. 984, 48 So. 97; *Culberson v. Empire Coal Co.*, 156 Ala. 416, 47 So. 237; *Broslin v. Kansas City, M. & B. R. Co.*, 114 Ala. 398, 21 So. 475. Ga. Except under the fellow servant act. *Great Cosmopolitan Shows v. Petty*, 7 Ga. App. 236, 66 S. E. 624. Ind. *Burns' Ann. St.*, 1908, §362; *Inland Steel Co. v. Yedinak*, 172 Ind. 423, 87 N. E. 229; *Dieckman v. Louisville & S. I. T. Co.*, 46 Ind. App. 11, 89 N. E. 909, 91 N. E. 179; *Baltimore & O. S. W. R. Co. v. McOskey*, 44 Ind. App. 255, 88 N. E. 950. Ky.—*City of Henderson v. Sizemore*, 31 Ky. L. Rep. 1134, 104 S. W. 722; *Louisville & Portland Canal Co. v. Murphy*, 9 Bush 522. Minn.—*Clark v. Chicago, M. & St. P. R. Co.*, 28 Minn. 69, 9 N. W. 75. Mont. *Pryor v. City of Walkerville*, 31 Mont. 618, 79 Pac. 240; *Ball v. Gusenhoven*, 29 Mont. 322, 74 Pac. 871; *Cummings v. Helena & L. S. & R. Co.*, 26 Mont. 434, 68 Pac. 852. N. H.—*Smith v. Halahan*, 75 N. H. 534, 78 Atl. 122; *Corey v. Bath*, 35 N. H. 530; *Smith v. Eastern Railroad*, 35 N. H. 356. N. Y.—*Shaw v. Feltman*, 106 N. Y. Supp. 1043. Va. *Interstate R. Co. v. Tyree*, 110 Va.

risk,¹² the breach of conditions subsequent in a contract,¹³ limitations,¹⁴ payment,¹⁵ or infancy.¹⁶ It is sometimes permissible to do so,

38, 65 S. E. 500; Newport News Pub. Co. v. Beaumeister, 52 S. E. 627. **W. Va.** Hoffman v. Dickinson, 31 W. Va. 142, 6 S. E. 53; Snyder v. T. C. & St. L. R. Co., 11 W. Va. 14.

See also City of Montgomery v. Wyche, 53 So. 786.

In Montana, as a general rule, plaintiff need not allege the absence of contributory negligence (Badovinac v. Northern Pac. R. Co., 39 Mont. 454, 104 Pac. 543; Nord v. Boston & Mont. C. C. & S. M. Co., 33 Mont. 464, 84 Pac. 1116, 89 Pac. 647; Orien Ins. Co. v. Northern Pac. R. R. Co., 31 Mont. 502, 78 Pac. 1036); but the contrary is true where it appears from other allegations in the complaint that the proximate cause of the injury was the act of the plaintiff (Badovinac v. Northern Pac. R. Co., 39 Mont. 454, 104 Pac. 543; Orient Ins. Co. v. Northern Pac. R. Co., 31 Mont. 502, 78 Pac. 1036; Ball v. Gussenhoven, 29 Mont. 321, 74 Pac. 871; Kennon v. Gilmer, 4 Mont. 433, 2 Pac. 21).

In the federal courts it is not necessary to negative contributory negligence, though a contrary rule prevails in the state courts of the state in which the action is tried. Chicago G. W. R. Co. v. Price, 97 Fed. 423, 38 C. C. A. 239.

See also the title "Negligence."

12. **U. S.**—Pennsylvania R. Co. v. Forstall, 159 Fed. 893, 87 C. C. A. 78. **Ark.**—A. L. Clark Lumb. Co. v. Johns, 98 Ark. 211, 135 S. W. 892. **N. Y.** Shaw v. Feltman, 106 N. Y. Supp. 1043.

Contra.—Cleveland, C., C. & St. L. R. Co. v. Gossett, 172 Ind. 525, 87 N. E. 723.

See also the title "Negligence."

13. **Cal.**—Blasingame v. Home Ins. Co., 75 Cal. 633, 17 Pac. 925. **Conn.** Lounsbury v. Protection Ins. Co., 8 Conn. 458. **Fla.**—Tillis v. Liverpool & London & Globe Ins. Co., 46 Fla. 268, 35 So. 171. **Ia.**—Jones v. United States Mut. Acc. Assn., 92 Iowa 652, 61 N. W. 485; Sutherland v. Standard Life & Acc. Ins. Co., 87 Iowa 505, 54 N. W. 453. **Ore.**—Long Creek Bldg. Assn. v. State Ins. Co., 29 Ore. 569, 46 Pac. 366. **R. I.**—Whipple v. United Fire Ins. Co., 20 R. I. 260, 38 Atl.

498. **S. C.**—Kingman v. Lancashire Ins. Co., 54 S. C. 599, 32 S. E. 762. **S. D.**—Hudson v. Archer, 4 S. D. 128, 55 N. W. 1099. **Tenn.**—London & Lancashire Fire Ins. Co. v. Crumk, 91 Tenn. 376, 23 S. W. 140. **Tex.**—Wooters v. International & G. N. R. Co., 54 Tex. 294. **Wash.**—Ferrandini v. Bankers' Life Assn., 51 Wash. 442, 99 Pac. 6. **Wis.**—Johnston v. Northwestern Livestock Ins. Co., 94 Wis. 117, 68 N. W. 863; Bank of River Falls v. German American Ins. Co., 72 Wis. 535, 40 N. W. 506; Redman v. Aetna Ins. Co., 49 Wis. 431, 4 N. W. 591.

See also IX, A, 7, *supra*, and the title "Contracts."

14. **Cal.**—Donahue v. Stockton Gas & Electric Co., 6 Cal. App. 276, 92 Pac. 196. **Kan.**—Backus v. Clark, 1 Kan. 287. **Ky.**—Swinebroad v. Wood, 29 Ky. L. Rep. 1202, 97 S. W. 25. **N. Y.** Church v. Stevens, 56 Misc. 572, 107 N. Y. Supp. 310.

Contract or statutory. Leshner v. U. S. Fidelity & Guaranty Co., 239 Ill. 502, 88 N. E. 208, *affirming* 144 Ill. App. 632.

It is not necessary to negative the bar of the statute unless *prima facie*, on the facts alleged, the action would appear to be barred, in which case it is necessary to allege the exception deemed sufficient to take the case out of the statute or to prevent its running. Columbia Sav. & Loan Assn. v. Clause, 13 Wyo. 166, 78 Pac. 708.

See also the title "Limitation of Actions."

15. **Romer v. Conter**, 53 Minn. 171, 54 N. W. 1052; **Robertson Lumb. Co. v. State Bank**, 14 N. D. 511, 105 N. W. 719.

But where the breach of the contract sued on consists of nonpayment of an agreed sum, plaintiff must allege that it has not been paid. **Lent v. New York & M. R. Co.**, 130 N. Y. 504, 29 N. E. 988.

See also the title "Payment."

16. **Goodman v. Alexander**, 165 N. Y. 289, 59 N. E. 145.

A complaint in an action for specific performance of a contract made by a married woman need not allege that she was of the age of twenty-one years, though otherwise the con-

however,¹⁷ as where the matters so alleged strengthen the plaintiff's case,¹⁸ or where it is necessary to do so in order to make out a cause of action.¹⁹ It is not anticipating a defense to state facts which bring plaintiff's case within an exception to the general rule,²⁰ nor is the rule violated by a necessary and incidental disclosure of a defense in stating a cause of action.²¹ If plaintiff undertakes to negative a defense, he must effectually show that it is insufficient.²²

B. MANNER OF ALLEGING FACTS. — 1. General Rules. — The codes and practice acts of most of the states specifically provide that the complaint or equivalent pleading shall contain a plain and concise statement of the facts constituting the plaintiff's cause of action,²³

tract would be unenforceable. *Miller v. Fisher*, 1 Ariz. 232, 25 Pac. 651.

17. May anticipate the defense of *res adjudicata*. *Amschel v. Hosenfeld*, 20 Pa. Super. 376.

May plead waiver of conditions in a contract (*German Ins. Co. v. Shader*, 68 Neb. 1, 93 N. W. 972), or facts impeaching a release of the liability which is the foundation of the action (*Wade v. Rusher*, 4 Bosw. (N. Y.) 537).

18. *Johnson v. Harrison* (Ind.), 97 N. E. 930; *Hunt v. State*, 93 Ind. 311.

19. May do so in an action on a note, where a release of the maker from all liability is endorsed on the note. *Latta v. Miller*, 109 Ind. 302, 10 N. E. 100.

In an action on an insurance policy it was held proper for plaintiff to show the reason why the application did not correctly state the facts respecting the incumbrance. *Bowlus v. Phenix Ins. Co.*, 133 Ind. 106, 32 N. E. 319.

In an action against the clerk for issuing a license to marry plaintiff's infant daughter without his consent, the complaint must negative the existence of those facts which would authorize the issuance of the license. *Blann v. Beal*, 5 Ala. 357.

20. *Johnson v. Harrison* (Ind.), 97 N. E. 930; *Cleveland, C. & St. L. R. Co. v. Moore*, 170 Ind. 328, 82 N. E. 52, 84 N. E. 540.

21. *Johnson v. Harrison* (Ind.), 97 N. E. 930; *Lake Erie & W. R. Co. v. Holland*, 162 Ind. 406, 69 N. E. 138.

22. *Karr v. Board of Comrs.*, 170 Ind. 571, 85 N. E. 1; *Bowlus v. Phenix Ins. Co.*, 133 Ind. 106, 32 N. E. 319; *Morgan v. Lake Shore & M. S. R. Co.*, 130 Ind. 101, 28 N. E. 548; *Town of Andrews v. Sellers*, 11 Ind. App. 301,

38 N. E. 1101; *Jessup v. Jessup*, 7 Ind. App. 573, 34 N. E. 1017.

23. **Arizona.**—Rev. St., 1901, §1289; *Willard v. Carrigan*, 8 Ariz. 70, 68 Pac. 538.

Arkansas.—*Kirby's Dig.*, §6091; *Ball v. Fulton County*, 31 Ark. 379.

California.—In ordinary and concise language. Code Civ. Proc., §426; *Kinley v. Thelen*, 158 Cal. 175, 110 Pac. 513; *Barbour v. Flick*, 126 Cal. 628, 59 Pac. 122; *Hurlbutt v. Spaulding Saw Co.*, 93 Cal. 55, 28 Pac. 795; *Payne & Dewey v. Treadwell*, 16 Cal. 220; *Hardy v. Johnson*, 1 Wheat. (U. S.) 371, 17 L. ed. 502.

Colorado.—Code, 1910, §55; *Grimes v. Greenblatt*, 47 Colo. 495, 107 Pac. 1111; *Soden v. Murphy*, 42 Colo. 352, 94 Pac. 353; *Leitensdorfer v. King*, 7 Colo. 436, 4 Pac. 37.

Connecticut.—Gen. St., 1902, §§607, 614; *Craft Refrigerating Mach. Co. v. Quinnipiac Brewing Co.*, 63 Conn. 551, 29 Atl. 76; *Wall v. Toomey*, 52 Conn. 35.

Georgia.—Plainly, fully, and distinctly setting forth his charge, ground of complaint, and demand. Code, 1895, §4960; *Western & A. R. Co. v. Tate*, 129 Ga. 526, 59 S. E. 266; *Carter v. Penn*, 79 Ga. 747, 4 S. E. 896; *Logan v. Bond*, 13 Ga. 192; *Wrightsville & T. R. Co. v. Vaughan*, 9 Ga. App. 371, 71 S. E. 691; *Cedartown Cotton & Export Co. v. Miles*, 2 Ga. App. 79, 58 S. E. 289.

Idaho.—In ordinary and concise language. Rev. Codes, §4168; *Coleman v. Jagers*, 12 Idaho 125, 85 Pac. 894; *Rauh v. Oliver*, 10 Idaho 3, 77 Pac. 20; *Porter v. Allen*, 8 Idaho 358, 69 Pac. 105, 236; *Murphy v. Russell & Co.*, 8 Idaho 133, 67 Pac. 421; *Shaw v. Manville*, 4 Idaho 369, 39 Pac. 559.

Indiana.—A statement of the facts

constituting the cause of action, in plain and concise language, in such manner as to enable a person of common understanding to know what is intended. *Burns' Ann. St.*, 1908, §343; *Terre Haute Electric Co. v. Roberts*, 174 Ind. 351, 91 N. E. 941; *Thomas Madden, Son & Co. v. Wilcox*, 174 Ind. 657, 91 N. E. 933, *affirming* 88 N. E. 871, 89 N. E. 955; *City of Logansport v. Kihm*, 159 Ind. 68, 64 N. E. 595; *Harvey v. Hand (Ind. App.)*, 95 N. E. 1020; *Holcomb v. Norman (Ind. App.)*, 91 N. E. 625; *Wabash R. Co. v. Beedle (Ind.)*, 87 N. E. 690, 88 N. E. 535.

Iowa.—"A statement of the facts constituting plaintiff's cause of action." *Code*, §3559; *Holloway v. Griffith*, 32 Iowa 409.

Kansas.—In ordinary and concise language. *Gen. St.*, 1909, §5685; *Arnold v. Atchison, T. & S. F. R. Co.*, 81 Kan. 400, 105 Pac. 541; *McKeever v. Buker*, 80 Kan. 201, 101 Pac. 991; *Edwards v. Hartshorn*, 72 Kan. 19, 82 Pac. 520; *Chase v. Atchison, T. & S. F. R. Co.*, 70 Kan. 546, 79 Pac. 153; *McGonigle v. Atchison*, 33 Kan. 726, 7 Pac. 550; *Bernhard v. City of Wyandotte*, 33 Kan. 465, 6 Pac. 617; *Morris v. Case*, 4 Kan. App. 691, 46 Pac. 54; *Frick v. Carson*, 3 Kan. App. 478, 43 Pac. 820.

Kentucky.—The petition must state facts which constitute a cause of action in favor of the plaintiff against the defendant. *Civ. Code*, 1906, §90; *Maguiar v. Henry*, 84 Ky. 1; *Hill v. Barrett*, 14 B. Mon. 83; *Louisville & Portland Canal Co. v. Murphy*, 9 Bush 522; *Stivers v. Baker*, 10 Ky. L. Rep. 523, 9 S. W. 491.

Louisiana.—"The petition must contain a clear and concise statement of the object of the demand, as well as of the nature of the title, or the cause of action on which it is founded." *Code Pr.*, art. 172.

Maryland.—Any declaration which contains a plain statement of the facts necessary to constitute a ground of action shall be sufficient. *Pub. Gen. Laws*, art. 75, §3; *Lapp v. Stanton*, 81 Atl. 675; *Caledonian Ins. Co. v. Traub*, 80 Md. 214, 30 Atl. 904; *Chesapeake & P. Tel. Co. v. Mackenzie*, 74 Md. 36, 21 Atl. 690; *Ruby v. State*, 55 Md. 484; *Crichton v. Smith*, 34 Md. 42.

Massachusetts.—The declaration shall state concisely and with substantial certainty the substantive facts neces-

sary to constitute the cause of action. *Rev. Laws*, c. 173, §6; *Dolan v. Alley*, 153 Mass. 380, 26 N. E. 989; *Bretton v. Anthony*, 103 Mass. 37; *Warren v. Ferdinand*, 9 Allen 357; *Denny v. Denny*, 8 Allen 311; *Prentiss v. Barnes*, 6 Allen 410.

Minnesota.—*Rev. Laws*, 1905, §4127; *Lovering v. Webb Pub. Co.*, 108 Minn. 62, 118 N. W. 61; *Rey v. Simpson*, 22 How. (U. S.) 341, 16 L. ed. 260.

Mississippi.—*Code*, 1906, §729; *Coopwood v. McCandless*, 54 So. 1007; *Lamkin v. Nye*, 43 Miss. 241.

Missouri.—*Rev. St.*, 1909, §1794; *Rush v. Brown*, 101 Mo. 586, 14 S. W. 735; *Christy v. Butcher*, 153 Mo. App. 397, 134 S. W. 1058; *Bick v. Vaughn*, 140 Mo. App. 595, 120 S. W. 618; *Central American Steamship Co. v. Mobile & O. R. Co.*, 144 Mo. App. 43, 128 S. W. 822.

Montana.—In ordinary and concise language. *Rev. Code*, 1907, §6532; *Hosty v. Moulton Water Co.*, 39 Mont. 310, 102 Pac. 568; *Forsell v. Pittsburgh & Mont. Copper Co.*, 38 Mont. 403, 100 Pac. 218; *Raiche v. Morrison*, 37 Mont. 244, 95 Pac. 1061; *State v. Owsley*, 17 Mont. 94.

Nebraska.—In ordinary and concise language. *Comp. St.*, 1911, §6666; *Ball v. Beaumont*, 59 Neb. 631, 81 N. W. 858.

Nevada.—In ordinary and concise language. *Comp. Laws*, §3134.

New Jersey.—*Laws* 1912, c. 231, Schedule A, §§17, 35.

New York.—*Code Civ. Proc.*, §481; *Payne v. New York, S. & W. R. Co.*, 201 N. Y. 436, 95 N. E. 19, *reversing* 141 App. Div. 833, 125 N. Y. Supp. 1011; *Keefe v. Lee*, 197 N. Y. 68, 90 N. E. 344, *reversing* 109 N. Y. Supp. 1134; *National Citizens' Bank v. Toplitz*, 178 N. Y. 464, 71 N. E. 1; *Theiling v. Marshall*, 124 N. Y. Supp. 1066; *Consolidated Rubber Tire Co. v. Firestone Tire & Rubber Co.*, 120 N. Y. Supp. 128; *People v. Lewis*, 131 App. Div. 336, 115 N. Y. Supp. 909; *Todd v. Union Casualty & Surety Co.*, 70 App. Div. 52, 74 N. Y. Supp. 1062.

North Carolina.—*Rev.*, 1905, §467; *Eddleman v. Lentz*, 72 S. E. 1011; *Staton v. Webb*, 49 S. E. 55; *Lassiter v. Norfolk & C. R. Co.*, 136 N. C. 89, 48 S. E. 642; *Glenn v. Sumner*, 132 U. S. 152, 10 Sup. Ct. 41, 33 L. ed. 301.

North Dakota.—Rev. Codes, 1905, §6552.

Ohio.—In ordinary and concise language. Gen. Code, 1910, §11,305; State v. Collins, 82 Ohio St. 240, 92 N. E. 439; Baltimore & O. R. Co. v. Wilson, 31 Ohio St. 555.

Oklahoma.—In ordinary and concise language. Comp. Laws, 1909, §5627; Eggleston v. Williams, 120 Pac. 944.

Oregon.—L. O. L., §67; Woodward v. Oregon R. & N. Co., 18 Ore. 289, 22 Pac. 1076.

Pennsylvania.—The declaration in actions of assumpsit or trespass shall consist of a concise statement of plaintiff's demand as provided in Act March 21, 1806, §5; Act May 25, 1887, §3 (P. L. 271), 3 Purdon's Dig., 3615; National Bank v. Lake Erie Asphalt Block Co., 82 Atl. 773; Mink v. Shaffer, 124 Pa. 280, 16 Atl. 805.

The statute does not exclude from its operation cases cognizable before a justice of the peace. The reference to the Act of 1806 "was for the purpose of designating the kind of statement contemplated by the Act of 1887, and not for the purpose of reading into the latter all the provisions and restrictions of the former act." Lanfer v. Landis, 125 Pa. 104, 17 Atl. 242.

The reference to the act of 1806 relates to the form of the declaration and not to its substance. Emmens v. Gebhart, 7 Pa. Co. Ct. 522.

South Carolina.—Code Civ. Proc., §163; Nance v. Georgia, C. & N. R. Co., 35 S. C. 307, 14 S. E. 629; Bank of Timmonsville v. Fidelity & Casualty Co., 120 Fed. 315.

South Dakota.—Code Civ. Proc., §119; Iowa & Dak. Tel. Co. v. Schamber, 15 S. D. 588, 91 N. W. 78; Sherman v. Port Huron E. & T. Co., 8 S. D. 343, 66 N. W. 1077; Caldwell v. Myers, 2 S. D. 506, 51 N. W. 210; Aultman & Co. v. Siglinger, 2 S. D. 442, 50 N. W. 911.

Tennessee.—All pleadings shall state only material facts, without argument or inference, as briefly as is consistent with presenting the matter in issue in an intelligible form. Shannon's Code, §4602.

"Any pleading possessing the following requisites is sufficient: (1) When it conveys a reasonable certainty of meaning; (2) when, by a fair and natural construction, it shows a

substantial cause of action or defense." Shannon's Code, §4605.

Texas.—A full and clear statement of the cause of action, and such other allegations, pertinent to the cause, as the plaintiff may deem necessary to sustain his suit. Sayle's Civ. St., art. 1191; Edgar v. Galveston City Co., 46 Tex. 421; Beal v. Batte, 31 Tex. 372; Trinity & B. V. R. Co. v. Saunders (Tex. Civ. App.), 120 S. W. 272.

Utah.—In ordinary and concise language. Comp. Laws, 1907, §2960; Kilpatrick-Koch Dry-Goods Co. v. Box, 13 Utah 494, 45 Pac. 629; Parley's Park Silver Min. Co. v. Kerr, 130 U. S. 256, 9 Sup. Ct. 511, 32 L. ed. 906.

Washington.—Rem. & Ball. Anno. Codes & St., §253; Fransioli v. Thompson, 55 Wash. 259, 104 Pac. 278; Distler v. Dabney, 3 Wash. 200, 28 Pac. 335.

Wisconsin.—Constituting each cause of action. St., 1898, §2646; Hiles v. Johnson, 67 Wis. 517, 30 N. W. 721.

Wyoming.—In ordinary and concise language. Comp. Laws, 1910, §4379; Ramsey v. Johnson, 7 Wyo. 392, 52 Pac. 1084.

Is sufficient if the facts are stated in a plain and concise manner, with a demand for judgment. Budd v. Howard Thomas Co., 40 Misc. 52, 81 N. Y. Supp. 152.

The pleading should contain a statement of the facts constituting the cause of action, so plainly and concisely worded that what is intended may be known from what is said in the pleading. Island Coal Co. v. Clemmitt, 19 Ind. App. 21, 49 N. E. 38.

Facts Must Be Stated Concisely. New Bern Banking & Trust Co. v. Duffy (N. C.), 72 S. E. 96; Blackmore v. Winders, 144 N. C. 212, 56 S. E. 874; Clark v. Lindsay, 7 Pa. Super. 43; Park v. Standard Spinning Co., 135 Fed. 560.

"One of the purposes of the code is to substitute specific and concise statements of the actual facts of each controversy for the more general declarations of demands formerly in use in courts of law, and the unnecessarily prolix and elaborate pleadings in chancery. The object in view is to have the defendant fully advised in each case of the precise complaint he is called upon to meet." Rush v. Brown, 191 Mo. 580, 14 S. W. 735.

A concise statement means "one

without unnecessary repetition.²⁴ Facts should be stated in narrative form,²⁵ and in their logical and natural order.²⁶

Under the common law system of pleading the facts are required to be stated according to their legal effect.²⁷ Under the codes and practice acts they may ordinarily be pleaded either as they actually exist or according to their legal effect.²⁸

that expresses, in comprehensive and brief terms, the facts which constitute the cause of action." *Anchor Sav. Bank v. Stoneham Tannery Co.*, 8 Pa. Co. Ct. 303.

The provision that the cause of action shall be plainly and concisely stated "does not mean that essential fullness of statement shall be sacrificed to conciseness, but that all the facts going to make up the cause of action must be stated as plainly and concisely as is consistent with accuracy, and that no material allegation should be omitted." *Eddleman v. Lentz* (N. C.), 72 S. E. 1011.

The plain and concise statement of facts required by the statute "is not necessarily limited to a statement of meager ultimate facts, which might enable the plaintiff to recover nominal damages, but means such a comprehensive statement of the facts constituting the cause of action upon which the pleader expects to recover as will enable the defense to comprehend the nature of the cause of action." *Lovering v. Webb Pub. Co.*, 108 Minn. 62, 118 N. W. 61.

24. *Ark.*—*Kirby's Dig.*, §6091. *Colo.* Code, 1910, §55. *Ind.*—Without repetition. *Burns' Ann. St.*, 1908, §343; *Harvey v. Hand* (Ind. App.), 95 N. E. 1020. *Kan.*—*Gen. St.*, 1909, §5685. *Minn.*—*Rev. Laws*, 1905, §4127. *Miss.* Code, 1906, §729. *Neb.*—Without repetition. *Comp. St.*, 1911, §6666. *N. Y.* Code Civ. Proc., §481. *N. C.*—*Rev.*, 1905, §467. *N. D.*—*Rev. Codes*, 1905, §6852. *Okla.*—Without repetition. *Comp. Laws*, 1909, §5627. *Ore.*—*Lord's Ore. Laws*, §67. *S. C.*—Code Civ. Proc., §163; *Bank of Timmons v. Fidelity & Casualty Co.*, 120 Fed. 315. *S. D.* Code Civ. Proc., §119. *Wash.*—*Rem. & Ball. Ann. Codes & St.*, §258. *Wis.* *St.*, 1898, §2646.

See also *N. J. Laws* 1912, c. 231, Schedule A, §25.

The essential facts should be alleged

simply and without unnecessary proximity. *Baltzell v. Nosler*, 1 Iowa 588.

The statute prohibits unnecessary repetition, but does not prohibit repetition entirely. *Manders v. Craft*, 3 Colo. App. 236, 32 Pac. 836.

25. *Wall v. Toomey*, 52 Conn. 35.

26. "In a declaration artistically drawn the pleader should set out the facts which constitute his cause of action logically, and in their natural order, showing his right, the injury, and the cause of action." *Williams v. Raper*, 67 Mich. 427, 34 N. W. 890.

"It being the object of all pleading to reach a specific and definite issue upon a material fact which constitutes the subject-matter of dispute, the facts constituting the cause of action or ground of defense should now, as before the code, be stated in their logical order and with clearness and precision. The right invaded, the breach of duty, and the resulting damage, should be made clearly to appear from the facts stated." *Baltimore & O. R. Co. v. Wilson*, 31 Ohio St. 555.

27. 1 Chit. Pl., 237. Matter of inducement may be alleged according to its legal effect. 1 Chit. Pl. 292; *Edwards v. National Window Glass Jobbers' Assn.* (N. J.), 68 Atl. 800.

28. *Rochester R. Co. v. Robinson*, 133 N. Y. 242, 30 N. E. 1008; *New York News Pub. Co. v. National Steamship Co.*, 148 N. Y. 39, 42 N. E. 514.

It is sufficient to allege that a corporation was "duly" organized, and it is not necessary to show the precise steps taken to accomplish that result. *Lorillard v. Clyde*, 86 N. Y. 384.

The performance of statutory conditions precedent to the right to sue may be pleaded in the form of conclusions of fact without setting out in detail all the evidentiary facts. *United Building Material Co. v. Odell*, 67 Misc. 584, 123 N. Y. Supp. 313.

Acts and contracts may be stated according to their legal effect. *Craft Re-*

Clearness and Certainty. — Both under the common law system of pleading and under the codes, the essential facts must be alleged clearly and distinctly,²⁹ accurately,³⁰ and with reasonable certainty,³¹ in such

frigerating Mach. Co. v. Quinnipiac Brew. Co., 63 Conn. 559, 29 Atl. 76; *N. J. Laws* 1912, c. 231, Schedule A, §21, p. 388.

As to the right to plead written instruments according to their legal effect see IX, B, 6, *infra*.

29. *United States Fidelity & Guaranty Co. v. District Grand Lodge, etc.*, 58 Fla. 373, 50 So. 952; *Woodbury v. Tampa Water Works Co.*, 57 Fla. 243, 49 So. 556; *Hoopes v. Crane*, 56 Fla. 395, 47 So. 992; *Ferguson v. National Shoemakers (Me.)*, 79 Atl. 469.

The facts constituting the cause of action must be stated with sufficient clearness and fullness to enable the court to see that, upon the facts stated, the plaintiff is entitled to relief. *Aultman & Co. v. Stigliger*, 2 S. D. 442, 50 N. W. 911.

The code contemplates succinctness and perspicuity. The petition should be as much a logical statement of plaintiff's cause of action as was required by the rules of the common law, the cause of action being made clear and palpable, and not concealed, either by terms and expressions too general, or by a too copious use of language. *McConnoughey v. Weider*, 2 Iowa 408.

"All matters of substance essential to a good cause of action must be set out with clearness and precision, but the use of technical words is not required." *Young v. Geiske*, 209 Pa. 515, 58 Atl. 887.

There must be certainty, clearness and conciseness, and a compliance with the other essential rules in the science of pleading which have been adopted for the purpose of evolving real issues from the controversy. *New Bern Banking & Trust Co. v. Duffy*, 156 N. C. 83, 72 S. E. 96; *Blackmore v. Winders*, 144 N. C. 212, 56 Atl. 874.

As to all matters of substance, completeness, accuracy and precision are as necessary as they were formerly. *Murphy v. Taylor*, 173 Pa. 317, 33 Atl. 1041; *Winkleblake v. Van Dyke*, 161 Pa. 5, 28 Atl. 937; *Newbold v. Pennock*, 154 Pa. 591, 26 Atl. 606; *Fritz v. Hathaway*, 135 Pa. 274, 19 Atl.

1011; *Fisher v. Paff*, 11 Pa. Super. 401.

The code rule requiring pleadings to be construed favorably to the pleader does not permit him "to disregard the ordinary and familiar rule requiring pleadings to be so drawn as to present clearly the issues in the case." *Eddleman v. Lentz* (N. C.), 72 S. E. 1011.

30. *Murphy v. Taylor*, 173 Pa. 317, 33 Atl. 1041; *Winkleblake v. Van Dyke*, 161 Pa. 5, 28 Atl. 937; *Newbold v. Pennock*, 154 Pa. 591, 26 Atl. 606; *Fritz v. Hathaway*, 135 Pa. 274, 19 Atl. 1011; *Fisher v. Paff*, 11 Pa. Super. 401.

"It should be not only concise, but precise; exhibiting, with accuracy and completeness, the ground on which recovery is sought." *Clark v. Lindsay*, 7 Pa. Super. 43.

Technical accuracy of pleading is not required in the district court, and it is sufficient if the state of demand states a legal cause of action, appraising the defendant of the claim against him, and so stating it that it may afterwards appear what was decided. *De Jianne v. Citizens' Protective Assn.*, 79 N. J. L. 107, 74 Atl. 443; *O'Donnell v. Weiler*, 72 N. J. L. 142, 59 Atl. 1055; *Patten v. Heustis*, 26 N. J. L. 293.

31. *Will's Gould Pl.*, 366, *et seq.*, and the following cases: Fla.—*Capital City Bank v. Hilson*, 59 Fla. 215, 51 So. 853; *Bennett v. Herring*, 1 Fla. 434. Ind.—*Evansville & S. T. Co. v. Spiegel* (Ind. App.), 94 N. E. 718. Mass.—*Read v. Smith*, 1 Allen 519. N. C.—*New Bern Banking & Trust Co. v. Duffy*, 156 N. C. 83, 72 S. E. 96; *Blackmore v. Winders*, 144 N. C. 212, 56 Atl. 874.

"While the plaintiff is not required to make a detailed and minute statement of the circumstances of the cause of action, he must nevertheless set forth in his declaration the facts upon which he bases his action, with a particularity and certainty that will reasonably inform the defendant what he proposes to prove at the trial, in order that the defendant may have a fair opportunity to meet and controvert those

a way as to fully advise the defendant of the cause of action he is called upon to meet so that he may prepare his defense.³² The aver-

facts in defense." *Campbell v. Walker* (Del.), 76 Atl. 475. See also to the same effect, *King v. Wilmington & N. C. E. R. Co.*, 1 Penne. (Del.), 452, 41 Atl. 975.

In making the required specification of circumstances it is not sufficient to state a mere conclusion of law, nor the result or conclusion of fact arising from circumstances not set forth in the declaration, nor to make a general statement of facts which admits of almost any proof to sustain it. *Campbell v. Walker* (Del.), 76 Atl. 475; *King v. Wilmington & N. C. E. R. Co.*, 1 Penne. (Del.), 452, 41 Atl. 975.

Before the adoption of the practice act the rule was "that the declaration must allege all circumstances necessary for the support of the action, and contain a full, regular and methodical statement of the injury which the plaintiff has sustained, with such precision, certainty and clearness that the defendant, knowing what he is called upon to answer, may be able to plead a direct and unequivocal plea; and that the jury may be able to give a complete verdict upon the issue, and the court, consistently with the rules of law, may give a certain and distinct judgment upon the premises. 1 Chit. Pl., 285." *Read v. Smith*, 1 Allen (Mass.) 519.

The common law rule as to certainty is embraced in the code provision requiring a statement of the facts in plain and concise language. *Speeder Cycle Co. v. Teeter*, 18 Ind. App. 474, 48 N. E. 595.

For a full discussion of this question see the title "**Certainty In Pleading.**"

32. Fla.—*Kirton v. Atlantic C. L. R. Co.*, 57 Fla. 79, 49 So. 1024. Idaho.—*McLean v. City of Lewiston*, 8 Idaho 472, 69 Pac. 478; *Porter v. Allen*, 8 Idaho 358, 69 Pac. 105, 236. Ind.—*Lincoln v. Ragsdale*, 7 Ind. App. 354, 31 N. E. 581. Md.—*Lapp v. Stanton*, 81 Atl. 675; *Anne Arundel County v. Carr*, 111 Md. 141, 73 Atl. 668; *Gent v. Cole*, 38 Md. 110. Mass.—*Read v. Smith*, 1 Allen 519. Mich.—*Creen v. Michigan Cent. R. Co.*, 133 N. W. 956. Pa.—*National Bank v. Lake Erie Asphalt Block Co.*, 82 Atl. 773; *Smith,*

Kline & French Co. v. Smith, 166 Pa. 563, 31 Atl. 343; *Park v. Standard Spinning Co.*, 135 Fed. 860.

"The time, place and circumstances of the matter in action, so far as relied on and within the knowledge of the party, must be specified with a fullness and fairness that will reasonably appraise the opposing party of what he is required to meet." *Campbell v. Walker* (Del.), 76 Atl. 475. See also to the same effect, *Jones v. Peoples Ry.*, 4 Penne. (Del.) 201, 53 Atl. 1065; *King v. Wilmington & N. C. E. R. Co.*, 1 Penne. (Del.), 452, 41 Atl. 975.

"Facts must be set forth with certainty, so that they may be understood by the party, who is to answer them, by the jury, who are to ascertain the truth of the allegation, and by the court, who is to give judgment thereon." 1 Chit. Pl. (9th Am. ed.) 232; *Alabama Great Southern R. Co. v. Cardwell* (Ala.), 55 So. 185; *Virginia Cedar Works v. Dalea*, 109 Va. 333, 64 S. E. 41; *Moore v. Baltimore & O. R. Co.*, 103 Va. 189, 48 S. E. 887.

Under the Codes.—The reformed procedure does not abolish the rule that "the facts must be so plainly and fully and distinctly set forth as to inform the opposite party of the grounds of the plaintiff's action, to enable the jury to find an intelligible and complete verdict, and to enable the court to declare distinctly the law of the case." *Murphy v. Lawrence*, 2 Ga. 257.

One of the great objects to be attained by the code "was to compel the plaintiff to place upon the record the specific and particular facts which he claims entitle him to recover. The field of inquiry is thus narrowed, and defendant is enabled to come into court advised beforehand of the particular facts he must come prepared to contest." *Woodward v. Oregon R. & N. Co.*, 18 Ore. 296, 22 Pac. 1076.

The object of the provision requiring a plain and concise statement of the facts constituting the cause of action is to notify the defendant in advance of the issues to be tried in order that he may properly prepare his defense. *Thill v. Hoyt*, 37 App. Div. 521, 56 N. Y. Supp. 78.

ments must be sufficiently intelligible so that a material issue may be taken upon them.³³

In order to prevent prolixity, general pleading is permitted where the subject comprehends multiplicity of matter and a great variety of facts.³⁴ Less particularity is required in averring matter of inducement,³⁵ and matters which are, in their nature, more within the knowledge of the defendant than the plaintiff.³⁶

Must Be Stated Positively.—Facts must be alleged positively,³⁷ and directly,³⁸ and not argumentatively,³⁹ or by way of recital,⁴⁰ or left to inference.⁴¹

Conclusions of Law.—Except as the rule has been modified by statute, the pleader must state facts and not conclusions of law.⁴² Statutes in many states, however, provide that certain matters may be alleged in the form of a conclusion, such as the rendition of a judgment,⁴³ or

The code should not be so interpreted as to sanction such vagueness and uncertainty as would leave the adverse party in doubt as to the relief demanded, and hence as to the mode of trial and the issues which would be decisive. *Rush v. Brown*, 101 Mo. 586, 14 S. W. 735.

But plaintiff is not obliged to disclose his case with the same niceness and precision as was required in a declaration. *Murdock v. Martin*, 132 Pa. 86, 18 Atl. 1114.

33. *Barns v. Reeves*, 127 Ala. 127, 28 So. 534.

34. 1 Chit. Pl., 235; *Chicago St. L. & P. R. Co. v. Wolcott*, 141 Ind. 267, 39 N. E. 451; *Equitable Acc. Ins. Co. v. Stout*, 135 Ind. 444, 33 N. E. 623.

35. *Pfeiffer v. Wilke* (Tex. Civ. App.), 107 S. W. 361.

36. Ala.—*Louisville & N. R. Co. v. Jones*, 83 Ala. 376, 3 So. 902. Mo.—*McNees v. Missouri Pac. R. Co.*, 22 Mo. App. 224. N. Y.—*Nellis v. De Forest*, 18 Barb. 61. S. C.—*Hughes v. Orangeburg Mfg. Co.*, 81 S. C. 354, 62 S. E. 404.

37. Merely stating that facts are alleged to exist is insufficient. *Holton v. Sand Point Lumb. Co.*, 7 Idaho 573, 64 Pac. 889.

38. *Indianapolis Traction & Terminal Co. v. Mathews* (Ind.), 97 N. E. 320; *Louisville & R. Co. v. Sandford*, 117 Ind. 265, 19 N. E. 770; *Pittsburgh, C., C. & St. L. R. Co. v. Rogers*, 45 Ind. App. 230, 87 N. E. 28; *Aultman & Co. v. Siglinger*, 2 S. D. 442, 50 N. W. 911.

"The foregoing words being spoken"

is not a compliance with the code, since it does not state in terms that they were spoken, but merely assumes that they were. *Thompson v. Read*, 63 Misc. 235, 118 N. Y. Supp. 453.

39. *Crump v. Mins*, 64 N. C. 767.

40. Ind.—*Gfroerer v. Gfroerer*, 173 Ind. 424, 90 N. E. 606; *Sutton v. Tood*, 24 Ind. App. 519, 55 N. E. 980. Mo.—*Nichols & Shepard Co. v. Hubert*, 150 Mo. 620, 51 S. W. 1031. S. D.—*Aultman & Co. v. Siglinger*, 2 S. D. 442, 50 N. W. 911.

41. Conn.—*Price v. Bonteiller*, 79 Conn. 255, 64 Atl. 227. Ind.—*Indianapolis Traction & Terminal Co. v. Mathews*, 97 N. E. 320; *Louisville, etc., R. Co. v. Sandford*, 117 Ind. 265, 19 N. E. 770; *Pittsburg, C., C. & St. L. R. Co. v. Rogers*, 45 Ind. App. 230, 87 N. E. 28. Va.—*Eaton v. Moore*, 111 Va. 400, 69 S. E. 326.

42. See the title "Conclusions of Law."

43. In pleading a judgment or other determination of a court or officer, it is not necessary to state the facts conferring jurisdiction, but is sufficient to state that such judgment was duly made or given. Cal.—*Code Civ. Proc.*, §456; *Williams v. Lane*, 158 Cal. 39, 109 Pac. 873. Ia.—*Code*, §3625; *American Emigrant Co. v. Fuller*, 83 Iowa 599, 50 N. W. 48. Minn.—*Rev. Laws*, 1905, §4146. Neb.—*Comp. St.*, 1911, §6698. N. Y.—*Code Civ. Proc.*, §532; *Baxter v. Lancaster*, 58 App. Div. 380, 68 N. Y. Supp. 1093. N. D.—*Rev. Codes*, 1905, §6871. Ohio.—*Gen. Code*, 1910, §11338. Okla.—*Comp. St.*, 1909, §5661. Ore.—*L. O. L.*, §87. See Ash-

the performance of conditions precedent in a contract,⁴¹ or the capacity

ley v. Pick, 53 Ore. 410, 100 Pac. 1103. **S. C.**—Code Civ. Proc., §182. **S. D.** Code Civ. Proc., §138. **Utah.**—Comp. Laws, 1907, §2990. **Wash.**—Rem. & Ball. Ann. Codes & St., §287. **Wis.**—St., 1898, §2673. **Wyo.**—Comp. St., 1910, §4410.

Even if it is not necessary to use the precise language of the statute, words to the same effect or substance must be used. *People v. Bacon*, 37 App. Div. 414, 55 N. Y. Supp. 1045; *Hunt v. Dutcher*, 13 How. Pr. (N. Y.) 539.

The word "duly" must be used. *Hunt v. Dutcher*, 13 How. Pr. (N. Y.) 539.

In pleading a judgment of a justice's court, "the statement that the judgment was 'duly given' is one of substance and the omission to allege it is fatal to the complaint." *Tuttle v. Robinson*, 91 Hun 187, 36 N. Y. Supp. 346.

It is insufficient to allege merely that a "judgment was recovered" in a court of special and limited jurisdiction, and was "duly entered and docketed." *People v. Bacon*, 37 App. Div. 414, 55 N. Y. Supp. 1045.

The word "duly" means according to law, and includes both form and substance. The expression "duly adjudged" means adjudged according to law, "that is, according to the statute governing the subject, and implies the existence of every fact essential to perfect regularity of procedure, and to confer jurisdiction both of the subject-matter and of the parties affected by the judgment." *Brownell v. Town of Greenwich*, 114 N. Y. 518, 22 N. E. 24.

In the case of a judgment of a court of general and superior jurisdiction it is not necessary to allege that the court acquired jurisdiction, and hence the omission of the word "duly" in declaring on such a judgment is immaterial. Such qualifying word is necessary only in pleading the determination of a court or officer of special jurisdiction. *Rutenie v. Hamaker*, 40 Ore. 450, 67 Pac. 196.

At common law in pleading judgments of inferior courts of special and limited jurisdiction, a general averment of jurisdiction was not sufficient, but it was necessary to state the facts upon which jurisdiction depended, and

to show jurisdiction of the person as well as of the subject-matter. *Tuttle v. Robinson*, 91 Hun 187, 36 N. Y. Supp. 346.

Even without the code provision such a general allegation is sufficient where the court is one of general jurisdiction. *Baxter v. Lancaster*, 58 App. Div. 380, 68 N. Y. Supp. 1093.

41. Cal.—Code Civ. Proc., §457; *Richards v. Travelers Ins. Co.*, 89 Cal. 170, 26 Pac. 762; *Cowan v. Phenix Ins. Co.*, 78 Cal. 181, 20 Pac. 408. See *Allen v. Home Ins. Co.*, 133 Cal. 29, 65 Pac. 139; *California Imp. Co. v. Reynolds*, 123 Cal. 88, 55 Pac. 802. **Fla.**—Rev. St., §1045; *Hartford Fire Ins. Co. v. Redding*, 47 Fla. 228, 37 So. 62; *Tillis v. Liverpool & London & Globe Ins. Co.*, 46 Fla. 268, 35 So. 171. **Ind.**—Burns' Ann. St., 1908, §376; *Fireman's Fund Ins. Co. v. Finklestein*, 164 Ind. 376, 73 N. E. 814; *Mondamin Meadows Dairy Co. v. Brudi*, 163 Ind. 642, 72 N. E. 643; *Fairbanks v. Meyers*, 98 Ind. 92; *Purdue v. Noffsinger*, 15 Ind. 386; *Jennings v. Shertz*, 45 Ind. App. 120, 88 N. E. 729; *Workmen's Mut. Protective Assn. v. Swanson*, 43 Ind. App. 379, 87 N. E. 668; *Ohio Farmers' Ins. Co. v. Vogel* (Ind. App.), 73 N. E. 612. **Ia.**—Code, §3626; *Clark v. Riddle*, 100 Iowa 270, 70 N. W. 207; *Brook v. Des Moines Ins. Co.*, 96 Iowa 39, 64 N. W. 685; *Halferty v. Wilmering*, 112 U. S. 713, 5 Sup. Ct. 364, 28 L. ed. 858. **Minn.**—Rev. Laws, 1905, §4150. **Mo.** *Farmers Bank v. Manchester Assur. Co.*, 106 Mo. App. 114, 80 S. W. 299. **Neb.**—Comp. St., 1911, §6699; *German-American Ins. Co. v. Etherton*, 25 Neb. 565, 41 N. W. 406. **N. J.**—Prac. Act, §118, 3 Comp. St. 4089; *Dimick v. Metropolitan Life Ins. Co.*, 67 N. J. L. 367, 51 Atl. 692; *Stratton v. Essex County Park Co.*, 164 Fed. 901. **N. Y.** Code Civ. Proc., §533; *Sager v. Gonnermann*, 50 Misc. 500, 100 N. Y. Supp. 406; *Fox v. Cowperthwait*, 60 App. Div. 528, 69 N. Y. Supp. 912; *Ketchum v. Belding*, 58 App. Div. 295, 68 N. Y. Supp. 1099; *Clement v. Dowling*, 171 Fed. 607. **N. D.**—Rev. Codes, 1905, §6872. **Ohio.**—Gen. Code, 1910, §11339; *Royal Ins. Co. v. Ries*, 80 Ohio St. 272, 88 N. E. 638; *Crawford v. Satterfield*, 27 Ohio St. 421. **Okla.**—Comp. St., 1909, §5662. **Ore.**—L. O. L., §88; *Tongue v. State Board of Agriculture*,

of a plaintiff suing as a corporation,⁴⁵ or partnership,⁴⁶ or in a representative capacity.⁴⁷

The federal courts will follow the state practice in determining the sufficiency and scope of the declaration or complaint in actions at law.⁴⁸

55 Ore. 61, 105 Pac. 250; Long Creek Bldg. Assn. v. State Ins. Co., 29 Ore. 569, 46 Pac. 366; Fisk v. Henarie, 13 Ore. 156, 9 Pac. 322. **S. C.**—Code Civ. Proc., §183. **S. D.**—Code Civ. Proc., §139; Stenson v. Elfmann, 26 S. D. 134, 128 N. W. 588. **Utah.**—Comp. Laws, 1907, §2991. **Wash.**—Rem. & Ball. Ann. Codes & St., §288. **Wis.**—St., 1898, §2674; Bank of River Falls v. German-American Ins. Co., 72 Wis. 535, 40 N. W. 506; Schobach v. Germantown Farmers' Mut. Ins. Co., 59 Wis. 86, 17 N. W. 969; Reif v. Paige, 55 Wis. 496, 13 N. W. 473; Boardman v. Westchester Fire Ins. Co., 54 Wis. 364, 11 N. W. 417. **Wyo.**—Comp. St., 1910, §4411.

Is permissible only in the cases authorized, and express reference must be made to the provision counted on. Howser v. Melcher, 40 Mich. 185.

The statute applies equally where performance by some person other than the plaintiff is involved. Dimick v. Metropolitan Life Ins. Co., 67 N. J. L. 273, 51 Atl. 602.

The statute applies in actions of assumpsit. Dimick v. Metropolitan Life Ins. Co., 67 N. J. L. 367, 51 Atl. 692.

A general allegation of performance is overcome by specific allegations showing the contrary. Home Ins. Co. v. Lindsey, 26 Ohio St. 348.

The word "duly" must be used. Clement v. American Fire Ins. Co., 70 App. Div. 435, 75 N. Y. Supp. 484.

An allegation "that the work was performed according to contract" is equivalent to an allegation that the plaintiff duly performed all the conditions on his part, and is sufficient. Griffin v. Pitman, 8 Ore. 342.

That the plaintiff "fully complied with all the conditions of said contract" is sufficient. Supreme Tent, etc., v. Ethridge, 43 Ind. App. 475, 87 N. E. 1049.

"The legal effect of the general averment is that the plaintiff has specifically performed each and every act and thing required by the nature and terms of the contract, upon which the

action is brought, necessary for the plaintiff to do, as a condition precedent, to render the defendant liable upon the contract set forth in the petition. It includes as well express conditions precedent, as constructive and implied conditions: such as previous demand or request, previous notice, readiness to perform." Crawford v. Satterfield, 27 Ohio St. 421.

Waiver. It is insufficient to allege, without more, that he has complied with all conditions precedent except in so far as compliance has been waived. "If he has performed, then that fact must be alleged without qualification. If he has not performed, for the reason that defendant waived performance, then the conditions waived and the facts and circumstances constituting such waiver must be alleged." Todd v. Union Casualty & Surety Co., 70 App. Div. 52, 74 N. Y. Supp. 1062.

In pleading performance, "plaintiff may safely assume that conditions which have been waived will not be relied upon, and allegations of waiver, to meet a defense based on such conditions are not inconsistent with the statutory allegation that all conditions on his part have been duly performed." German Ins. Co. v. Shader, 68 Neb. 1, 93 N. W. 972.

At common law it was necessary to set out all the facts that went to show performance. Crawford v. Satterfield, 27 Ohio St. 421.

45. **Ia.**—Code, §3627; Halferty v. Wilmering, 112 U. S. 713, 5 Sup. Ct. 364, 28 L. ed. 858. **Minn.**—Rev. Laws, 1905, §4148. **Utah.**—Comp. Laws, 1907, §3000.

46. **Iowa** Code, §3627; Halferty v. Wilmering, 112 U. S. 713, 5 Sup. Ct. 364, 28 L. ed. 858; Utah Comp. Laws, 1907, §3000.

47. **Iowa**, Code, §3627; Halferty v. Wilmering, 112 U. S. 713, 5 Sup. Ct. 364, 28 L. ed. 858; Utah, Comp. Laws, 1907, §3000.

48. Glenn v. Sumner, 132 U. S. 152, 10 Sup. Ct. 41, 33 L. ed. 301; Robertson v. Perkins, 129 U. S. 233, 9 Sup.

2. Allegations on Information and Belief.—Allegations on information and belief are generally permissible under the codes,⁵⁰ but matters of public record may not be so alleged.⁵⁰ Where allowable, the facts must be charged as facts, so that issue may be joined on them.⁵¹

3. Alternative Pleading.—Facts may not be alleged disjunctively, or in the alternative, except when expressly authorized by statute.⁵² In some states this form of pleading is permissible.⁵³ Where allowed,

Ct. 279, 32 L. ed. 686; *J. W. Bishop Co. v. Shelhorse*, 141 Fed. 643, 72 C. C. A. 337.

49. **N. C.**—Rev., 1905, §489. *Utah*. Flagstaff S. M. Co. v. Patrick, 2 Utah 304; *Thackara, Buck & Co. v. Reid*, 1 Utah 238. *Wash.*—*Warburton v. Ralph*, 9 Wash. 537, 38 Pac. 140.

Allegations as to matters peculiarly within the knowledge of the defendants, and as to which the plaintiffs could learn only from statements made by others, may be based on information and belief. *Campbell-Kawannakoa v. Campbell*, 152 Cal. 201, 92 Pac. 184; *McDermott v. Anaheim Union Water Co.*, 124 Cal. 112, 56 Pac. 779.

An allegation that a debtor has no property other than that conveyed which is subject to execution may be so made. *Kraemer v. Williams*, 131 App. Div. 236, 115 N. Y. Supp. 721.

Matters ascertainable from the records of the defendant corporation may be so alleged though such records are open to the inspection of the plaintiff since such records may be contradicted if they do not speak the truth. *McDermott v. Anaheim Union Water Co.*, 124 Cal. 112, 56 Pac. 779.

In Missouri such allegations are permissible only in the case of alternative pleading. *Nichols & Shepard Co. v. Hubert*, 150 Mo. 620, 51 S. W. 1031.

50. Is not permissible in pleading a matter relating to the existence or non-existence of a public record, the truth of which is readily ascertainable. *Steinberg v. Saltzman*, 130 Wis. 419, 110 N. W. 198.

51. An allegation that a party "is informed and believes" that certain facts exist, without further alleging on information and belief that such facts do exist, is insufficient. *Idaho*. *Swank v. Sweetwater Irr. & Power Co.*, 15 Idaho 353, 98 Pac. 297. *Mo.*—*Nichols & Shepard Co. v. Hubert*, 150 Mo.

620, 51 S. W. 1031. *Wash.*—*Warburton v. Ralph*, 9 Wash. 537, 38 Pac. 140.

An allegation that plaintiff "has reason to believe" and therefore "alleges" is sufficient. *Ware-Kramer Tobacco Co. v. American Tobacco Co.*, 180 Fed. 160.

52. *Ala.*—*Gloss-Sheffield Steel & Iron Co. v. Smith*, 166 Ala. 437, 52 So. 38. *Ind.*—*Wheeler v. Thayer*, 121 Ind. 64, 22 N. E. 972. *Minn.*—*Anderson v. Minneapolis, St. P. & S. S. M. R. Co.*, 103 Minn. 224, 114 N. W. 1123. *S. C.* *Iseman v. McMillan*, 36 S. C. 27, 15 S. E. 336.

It is not permissible, even though if either of the averments is true, a cause of action will lie. *Jamison v. King*, 50 Cal. 132.

In Clague v. Hodgson, 16 Minn. 329, it was held that an allegation that defendant "took or caused to be taken" certain property from the defendant was not bad as a statement in the alternative, since defendant was equally liable in either case and the statements amounted to the same thing, and hence the latter was surplusage.

Remedy.—The defect is one of substance and is reached by general demurrer. *Macurda v. Lewiston Journal Co.*, 104 Me. 554, 72 Atl. 490.

A demurrer will lie on the ground that the complaint is uncertain and ambiguous. *Jamison v. King*, 50 Cal. 132.

Where the only effect is to make the pleading uncertain, the remedy is by motion. Where two causes of action are alleged, one of which is sufficient to constitute a cause of action and the other not, they neutralize each other, and demurrer will lie. *Anderson v. Minneapolis, St. P. & S. S. M. R. Co.*, 103 Minn. 224, 114 N. W. 1123.

53. *Connecticut.*—*Craft Refrigerating Mach. Co. v. Quinnipiac Brewing Co.*, 63 Conn. 551, 29 Atl. 76.

different states of facts may be alleged in the alternative, where, if either is true, a cause of action is shown,⁵⁴ but not where defendant would be liable under one of them and not under the other.⁵⁵

4. Ultimate as Distinguished From Evidentiary Facts.—The plaintiff is only required to plead the ultimate facts which go to make up his cause of action. He need not, and should not, plead mere matters of evidence.⁵⁶

Massachusetts.—If the nature of the case requires it, breaches may be alleged in the alternative. Rev. Laws, 1902, c. 173, §6, p. 1551.

Missouri.—Either party may allege any fact or title alternatively, declaring his belief of one alternative or the other, and his ignorance whether it be the one or the other. Rev. St., 1909, §1828. *Hendricks v. Calloway*, 211 Mo. 536, 111 S. W. 60; *Behen v. St. Louis Transit Co.*, 186 Mo. 430, 85 S. W. 346; *Nichols & Shepard Co. v. Hubert*, 150 Mo. 620, 51 S. W. 1031.

New Jersey.—Plaintiff may claim alternative relief based upon an alternative construction or ascertainment of his cause of action. Laws 1912, c. 231, Schedule A, §37, p. 391.

New York.—An alternative allegation is permissible where plaintiff knows that one or the other or both of two states of fact is true, but not which, and defendant would be liable in either case. *Mutual Life Ins. Co. v. McCurdy*, 103 N. Y. Supp. 829; *Hasberg v. Mutual Life Ins. Co.*, 80 N. Y. Supp. 867.

If such averments render the pleading uncertain, the remedy is by motion rather than by demurrer. *Hasberg v. Mutual Life Ins. Co.*, 80 N. Y. Supp. 867.

The allegation that defendant "sold or converted" certain securities is too vague and indefinite. *Sprague v. Currie*, 117 N. Y. Supp. 481.

Texas.—May plead an express contract and a *quantum meruit* in the alternative, in different counts, and recover on proof of either. *Jones v. Holtzen* (Tex. Civ. App.), 141 S. W. 121; *Morrison v. Bartlett* (Tex. Civ. App.), 131 S. W. 1146.

In an action to recover the value of cattle seized under an attachment it was held to be proper to allege in different counts that the cattle belonged to a partnership of which plaintiff was a member, or if not, that they belonged

to plaintiff and two other persons as joint owners, and to pray for recovery of the full value of the cattle for the benefit of the partnership, or, in the alternative, for the plaintiff's proportionate share of their value. *Merchants' & Farmers' Nat. Bank v. Johnson*, 49 Tex. Civ. App. 242, 108 S. W. 491.

Washington.—May declare on an express contract and an implied one in the alternative. *Holm v. Chicago, M. & St. P. R. Co.*, 59 Wash. 293, 109 Pac. 799.

54. If a petition is defective which fails to allege that plaintiff does not know which alternative is true, the remedy is by motion to make more definite and certain or to require an election rather than by motion to dismiss. Such a defect is waived by answering to the merits. *Hazelhurst Lumb. Co. v. Carlisle Mfg. Co.*, 130 Ky. 1, 112 S. W. 934.

55. *Hazelhurst Lumb. Co. v. Carlisle Mfg. Co.*, 130 Ky. 1, 112 S. W. 934.

The pleading must show a cause of action under both alternatives. *Baker v. Atlanta, B. & A. R. Co.*, 163 Ala. 101, 49 So. 751.

If either alternative is insufficient, the whole count is bad. *Mayor, etc., of Huntsville v. Ewing*, 116 Ala. 576, 22 So. 984. See also *X, infra*.

56. **U. S.**—*Campbell v. Wilcox*, 11 Wall. 421, 19 L. ed. 973; *Bank of Timmonsville v. Fidelity & Casualty Co.*, 120 Fed. 315. **Ala.**—*Alabama Great Southern R. Co. v. Cardwell*, 55 So. 185; *Dickersen v. Finley*, 158 Ala. 149, 58 So. 548; *Burns v. Reeves*, 127 Ala. 127, 28 So. 554. **Ark.**—*Ball v. Fulton County*, 31 Ark. 379; *Holleville v. Patrick*, 14 Ark. 208. **Cal.**—*Smith v. Matthews*, 81 Cal. 120, 22 Pac. 409; *Green v. Palmer*, 15 Cal. 411; *Ahlers v. Smiley*, 11 Cal. App. 343, 104 Pac. 997. **Conn.**—Gen. St., 1902, §614; *Finken v. Elm City Brass Co.*, 73 Conn.

5. Pleading Statutes.—Under the common law system of pleading, a statute on which the plaintiff relies must be both pleaded and counted on.⁵⁷ Pleading the statute is stating facts which bring the case within it,⁵⁸ and counting on it is making express reference to it by apt terms to show the source of right relied on.⁵⁹ Under the codes and practice acts of the various states it is generally not necessary to expressly refer to it, if it is a public act.⁶⁰

423, 47 Atl. 670. **Fla.**—*Bucki v. Cone*, 25 Fla. 1, 6 So. 160. **Ill.**—*Willard v. Zehr*, 215 Ill. 148, 74 N. E. 107; *Springer v. Schultz*, 205 Ill. 144, 68 N. E. 753, affirming 105 Ill. App. 544; *Owens v. Lehigh Valley Coal Co.*, 115 Ill. App. 142. **Ind.**—*Ohio & M. R. Co. v. Heaton*, 137 Ind. 1, 35 N. E. 687. **Ia.**—*Wallace v. Ryan*, 93 Iowa 115, 61 N. W. 395. **Ky.**—*Louisville & Portland Canal Co. v. Murphy*, 9 Bush. 522. **Md.**—*United Surety Co. v. Summers*, 110 Md. 95, 72 Atl. 775; *Philadelphia, B. & W. R. Co. v. Allen*, 62 Atl. 245; *Ruby v. State*, 55 Md. 484. **Mass.**—*Dolan v. Alley*, 153 Mass. 380, 26 N. E. 989. **Mich.**—*Williams v. Raper*, 67 Mich. 427, 34 N. W. 890; *Harvey v. McAdams*, 32 Mich. 472. **Mo.**—*McNess v. Missouri Pac. R. Co.*, 22 Mo. App. 224. **N. Y.**—*Rochester R. Co. v. Robinson*, 133 N. Y. 212, 30 N. E. 1008; *Emery v. Pease*, 20 N. Y. 62; *Cleminshaw v. Coon*, 120 N. Y. Supp. 181; *Weleke v. Trageser*, 131 App. Div. 737, 116 N. Y. Supp. 161; *Hamilton v. Hamilton*, 124 App. Div. 619, 109 N. Y. Supp. 221; *Doherty v. Shields*, 86 Hun 303; *Harpending v. Shoemaker*, 37 Barb. 270. **N. C.**—*Crump v. Nims*, 64 N. C. 767. **Ohio.**—*State v. Collins*, 32 Ohio St. 240, 92 N. E. 439. **S. C.**—*Park v. Southern R. Co.*, 78 S. C. 302, 58 S. E. 931. **Tex.**—*Ross v. Fitch*, 58 Tex. 148; *Houston & T. C. R. Co. v. Shafer*, 54 Tex. 641, 646; *San Antonio Light Pub. Co. v. Lewy*, 52 Tex. Civ. App. 22, 113 S. W. 574. **Va.**—*Chesapeake & O. R. Co. v. Melton*, 110 Va. 728, 67 S. E. 346; *Chesapeake & O. R. Co. v. Hunter*, 109 Va. 341, 64 S. E. 44. **W. Va.**—*Bradley v. Norfolk & W. R. Co.*, 66 W. Va. 462, 66 S. E. 653. **Wis.**—*Barney v. City of Hartford*, 73 Wis. 95, 40 N. W. 581.

See also *N. J. Laws* 1912, c. 231, Schedule A, §17, p. 388.

Only the ultimate facts as distinguished from the evidentiary facts. **Idaho.**—*McLean v. City of Lewiston*, 8 Idaho 472, 69 Pac. 478. **Minn.**—*Lov-*

ering v. Webb Pub. Co., 106 Minn. 62, 118 N. W. 61. **S. D.**—*Aultman & Co. v. Siglinger*, 2 S. D. 442, 50 N. W. 911.

Only the ultimate fact to be proven need be stated. The circumstances tending to prove the ultimate fact have no place in the pleading. *McAllister v. Kuhn*, 96 U. S. 87, 24 L. ed. 615.

Need only allege the ultimate facts, those which could not be struck out of the pleading without leaving it insufficient, and not the prior or probative facts which go to establish them. *Payne & Dewey v. Treadwell*, 16 Cal. 220.

The rule applies in equitable actions under the code. *Bowen v. Aubrey*, 22 Cal. 566.

Where plaintiff pleads his evidence and attempts to draw conclusions therefrom, the evidence must justify such conclusions. *Koehler v. Wilson*, 129 N. Y. Supp. 532.

57. *Leone v. Kelly*, 77 Conn. 569, 60 Atl. 136; *Howser v. Melcher*, 40 Mich. 185.

58. *Howser v. Melcher*, 40 Mich. 185.

59. *Howser v. Melcher*, 40 Mich. 185.

60. **Colo.**—*Denver, T. & G. R. Co. v. De Graff*, 2 Colo. App. 42, 29 Pac. 664. **Ind.**—*Ervin v. State*, 150 Ind. 332, 48 N. E. 249. **Ia.**—*Bradbury v. Chicago, R. I. & P. R. Co.*, 149 Iowa 51, 128 N. W. 1; *Chicago, B. & Q. R. Co. v. Porter Bros. & Hackworth*, 72 Iowa 426, 34 N. W. 286. **Kan.**—*Fowler v. Enzenperger*, 77 Kan. 406, 94 Pac. 995. **Me.**—*Inhabitants of Peru v. Barrett*, 100 Me. 213, 60 Atl. 968. **Mich.**—*Clark v. Village of North Muskegon*, 88 Mich. 308, 863, 50 N. W. 254. **Minn.**—*Meshbeshier v. Channellene Oil & Mfg. Co.*, 107 Minn. 104, 119 N. W. 428. **Mo.**—*Williams v. Atchison, T. & S. F. R. Co.*, 233 Mo. 666, 136 S. W. 304; *Lore v. American Mfg. Co.*, 160 Mo. 608, 61 S. W. 678; *Emerson v. St. Louis & H. R. Co.*, 111 Mo. 161, 19 S.

Ordinarily it is sufficient to declare in the terms of a penal act,⁶¹ or to allege a failure to perform a statutory duty substantially in the language of the statute imposing it,⁶² but to be so it must embrace all the essential parts of such language.⁶³

6. **Pleading Written Instruments.**—Written instruments may be pleaded in *hanc verba*,⁶⁴ or according to their legal effect.⁶⁵ Where pleaded in *hanc verba*, the instrument must show on its face in direct terms all that the pleader would be required to allege in pleading it under the other method.⁶⁶

W. 1113; Kennayde v. Pacific R. Co., 45 Mo. 255; Hance v. Wabash Western R. Co., 56 Mo. App. 476. **Mont.**—State v. Owsley, 17 Mont. 94, 42 Pac. 105. **N. J.**—South v. West Windsor Tp., 82 Atl. 852; Thorpe v. Rankin, 19 N. J. L. 36. **Vt.**—Morrisey v. Hughes, 65 Vt. 553, 27 Atl. 205; Westcott v. Central Vt. R. Co., 61 Vt. 438, 17 Atl. 745.

Need not refer to the section by number. Bennett v. Town of Canterbury, 23 Conn. 356; McKenzie v. United Rys. Co., 216 Mo. 1, 115 S. W. 13.

Where it is a domestic public statute, not penal. Leone v. Kelly, 77 Conn. 569, 60 Atl. 136; Town of Griswold v. Gallup, 22 Conn. 208.

But in an action to recover a statutory penalty, it must be alleged that the acts complained of were contrary to the statute imposing the penalty. Town of Griswold v. Gallup, 22 Conn. 208.

61. **Ark.**—State v. Aetna Fire Ins. Co., 66 Ark. 480, 51 S. W. 638. **Cal.** Fair v. Home Gas & Electric Co., 13 Cal. App. 589, 110 Pac. 347. **Ill.**—Gebhart v. Adams, 23 Ill. 397.

62. Pittsburgh, C., C. & St. L. R. Co. v. Brown, 44 Ind. 409; Pittsburgh, C., C. & St. L. R. Co. v. Newsome (Ind. App.), 74 N. E. 21; Blanchard-Hamilton Furniture Co. v. Colvin, 32 Ind. App. 393, 69 N. E. 1032.

63. W. H. Thomas & Son Co. v. Barnett, 135 Fed. 172.

64. Bliss Code Pl., §158, and the following cases: **Idaho.**—Porter v. Allen, 8 Idaho 358, 69 Pac. 105, 236; More v. Elmore County Irr. Co., 3 Idaho 729, 35 Pac. 171. **Tex.**—Bledsoe v. Wills, 22 Tex. 650. **Wash.**—Seal v. Cameron, 24 Wash. 62, 63 Pac. 1103. **Wis.**—Noonan v. Isley, 21 Wis. 138.

This is the most satisfactory method. Joseph v. Holt, 37 Cal. 250.

65. 1 Chit. Pl., 430; Bliss Code Pl.,

§158, and the following cases: **U. S.** Struthers v. Drexel, 122 U. S. 437, 7 Sup. Ct. 1293, 30 L. ed. 1216; Sheehy v. Mandeville, 7 Cranch. 208, 3 L. ed. 317; Bank of Timmonsville v. Fidelity & Casualty Co., 120 Fed. 315. **Fla.** Harrell v. Durrance, 9 Fla. 490. **Idaho.** Porter v. Allen, 8 Idaho 358, 69 Pac. 105, 236; More v. Elmore County Irr. Co., 3 Idaho 729, 35 Pac. 171. **Md.** United Surety Co. v. Summers, 110 Md. 95, 72 Atl. 775; Neale, Harris & Co. v. Fowler, 31 Md. 155; Armstrong v. Robinson, 5 Gill & J. 412. **Mass.** Rev. Laws, 1902, c. 173, §6; Higgins v. McDonnell, 16 Gray 386; Suffolk Bank v. Lowell Bank, 8 Allen 355. **Tex.** Wooters v. International & G. N. R. Co., 54 Tex. 294; Townner v. Sayre, 4 Tex. 28; Modern Order of Praetorians v. Taylor (Tex. Civ. App.), 127 S. W. 260. **Wash.**—Seal v. Cameron, 24 Wash. 62, 63 Pac. 1103.

Both at common law and under the code. Henke v. Eureka Endowment Assn., 100 Cal. 429, 34 Pac. 1089; Joseph v. Holt, 37 Cal. 250.

It is sufficient if its substance is correctly given. Fairbanks v. Isham, 16 Wis. 118.

Insurance policies are expressly excepted by the statute, and it is sufficient in such case for plaintiff to state the substantial facts on which he relies and allege that the defendant was thereby bound, by the terms of the policy, to pay him the sum sued for. Pierce v. Charter Oak Ins. Co., 138 Mass. 151.

The instrument should be set out in such a way that the court and the opposite party may know exactly its character, and not by a loose general conversational description. Bledsoe v. Wills, 22 Tex. 650.

66. Joseph v. Holt, 37 Cal. 250; More v. Elmore County Irr. Co., 3 Idaho 729, 35 Pac. 171.

Attaching Copies of Instruments Sued On.—In some jurisdictions an instrument which is the foundation of the action may be attached to the pleading and by apt allegations made a part thereof.⁶⁷

Statutes in many states provide that when an action is founded on certain classes of written instruments the original or a copy thereof must be filed with the declaration or complaint.⁶⁸ Such a statute does

67. *Porter v. Allen*, 8 Idaho 358, 69 Pac. 105, 236.

An instrument sued on may be attached to the complaint and referred to therein in such a way as to put defendant upon inquiry as to its contents, and in such case it need not be set out at length or in substance in the pleading. *Hays v. Dennis*, 11 Wash. 360, 39 Pac. 658.

Written instruments forming the whole or a part of the cause of action may be made a part of the pleading by attaching the originals or copies thereto and referring to them in the pleading in explanation of the allegations of the petition. *District & County Ct. rule 19* (67 S. W. xxi). *Connor v. Zackry*, 54 Tex. Civ. App. 188, 117 S. W. 177, 115 S. W. 867.

Attaching such instruments does not relieve the pleader of the duty of making proper allegations in the pleading as to matters of which the exhibits may be, in whole or in part, the evidence. *Connor v. Zackry*, 54 Tex. Civ. App. 188, 117 S. W. 177, 115 S. W. 867.

It is not essential that the instrument be described by its right name in the petition if a copy is attached and made a part thereof by reference. *English v. Helms*, 4 Tex. 228.

The terms of an instrument declared upon and made a part of the complaint control, on demurrer, general allegations and conclusions having for their purpose the qualification of its provisions. *Kienle v. Fred Gretsche Realty Co.*, 133 App. Div. 391, 117 N. Y. Supp. 500. See also, *Bogardus v. New York Life Ins. Co.*, 101 N. Y. 328, 4 N. E. 522.

An instrument annexed to the complaint cannot be considered in connection with a cause of action which does not refer to it. *Booz v. Cleveland School Furniture Co.*, 45 App. Div. 593, 61 N. Y. Supp. 407. See also the title "Exhibits."

In New Jersey, in pleading any document, a copy thereof may be annexed to the pleading, and referred to there-

in, with like effect as if it were recited at length. *Laws 1912, c. 231, Schedule A, §23, p. 389.*

68. **Florida.**—"All bonds, notes, bills of exchange, covenants and accounts upon which suit may be brought, or a copy thereof, shall be filed with the declaration." *Gen. St., 1906, §1449. Circuit Court rule 14.*

The object of the statute and rule is to appraise the defendant of the nature and extent of the cause of action alleged, in order that he may plead thereto with greater certainty. *State v. Seaboard Air Line Ry.*, 56 Fla. 670, 47 So. 986; *Royal Phosphate Co. v. Van Ness*, 53 Fla. 135, 43 So. 916; *First Nat. Bank v. Savannah, F. & W. R. Co.*, 36 Fla. 183, 18 So. 345.

Ordinarily such instrument forms no part of the declaration (*State v. Seaboard Air Line Ry.*, 56 Fla. 670, 47 So. 986; *Royal Phosphate Co. v. Van Ness*, 53 Fla. 135, 43 So. 916; *First Nat. Bank v. Savannah, F. & W. R. Co.*, 36 Fla. 183, 18 So. 345), unless made so by apt words (*Hoopess v. Crane*, 56 Fla. 395, 47 So. 992; *Royal Phosphate Co. v. Van Ness*, 53 Fla. 135, 43 So. 916).

In Illinois plaintiff must file a copy of the instrument sued on, and when so filed it becomes a part of the pleadings in the case. *Mauvoo v. Ritter*, 97 U. S. 389, 24 L. ed. 1050.

Indiana.—When any pleading is founded on a written instrument or on an account. *Burns' Ann. St., 1908, §368.*

The statute does not necessarily require a copy of the whole record to be filed in a suit on a judgment. *Snyder v. Snyder*, 25 Ind. 399.

Nebraska.—If the action is founded on a note, bill, or other written instrument, as evidence of indebtedness. If not so attached and filed the reason therefor must be shown in the pleading. *Comp. St., 1911, §6665.*

The petition is not objectionable where it is alleged that the instrument in suit has been lost and cannot be

found, though a diligent search has been made for it. *Ryan v. State Bank*, 10 Neb. 524, 7 N. W. 276.

Ohio.—When the action is founded on an account or written instrument of indebtedness, a copy thereof must be attached to and filed with the pleading, or the reason for its omission stated. Gen. Code, 1910, §11334.

"Except in the cases especially authorized by the code, each petition should embody in itself, and without reference to any other paper or exhibit, the facts which constitute the cause of action." *Lynd v. Caylor*, 1 Handy (Ohio) 576. Quoted with approval in *State v. Collins*, 82 Ohio St. 240, 92 N. E. 439.

Oklahoma.—When the action is founded on an account or written instrument of indebtedness, a copy must be attached and filed, or the reason for its omission stated.

If founded on a series of written instruments executed by the same person, it shall be sufficient to attach and file a copy of one only, and in succeeding causes of action to set forth in general terms descriptions of the several instruments respectively. *Comp. Laws*, §5075.

Pennsylvania.—The declaration in assumpsit must be accompanied by copies of all notes, contracts, book entries, or a particular reference to the records of any court within the county in which the action is brought, if any, upon which the plaintiff's claim is founded. A particular reference to such record or to the record of any deed or mortgage, or other instrument of writing recorded in such county shall be sufficient in lieu of the copy thereof. Act May 25, 1887, §3 (P. L. 271), 3 Purdon's Dig., 3621, *et seq.*

A copy must be attached or an excuse for not attaching it must be pleaded and proved. *Smith v. Smith*, 33 Pa. Co. Ct. 113.

This provision is not merely directory, but is absolutely imperative, "and if the copy of the written or printed contract on which the action is founded, or any part thereof, does not accompany the statement, and its absence is not satisfactorily accounted for, the omission cannot be supplied by averments of the contents or the substance of the missing paper." *Aeme Mfg. Co. v. Reed*, 181 Pa. 382, 37 Atl. 552; *White v. Sperling*, 24 Pa. Super. 120.

It is a sufficient excuse that the instrument is in the wrongful and illegal possession of the defendant. *Smith v. Smith*, 33 Pa. Co. Ct. 113.

The averment that the suit is brought upon a specialty, reciting it in *hæc verba* and declaring the recital to be unqualifiedly a "copy," is an averment of possession of the original and to all intents *profert* of it. *Smith v. Smith*, 33 Pa. Co. Ct. 113.

The copy so attached is merely a matter of evidence to aid in procuring precision of statement. *Second Nat. Bank v. Gardner*, 171 Pa. 267, 33 Atl. 188.

Failure to set out in full papers which are not essential to the cause of action is not fatal. *Peoples St. R. Co. v. Spencer*, 156 Pa. 85, 27 Atl. 113.

A written contract need not be filed where plaintiff's case is based on a subsequent oral modification thereof. *Malone v. Philadelphia & R. R.*, 157 Pa. 430, 27 Atl. 756.

In a suit on a foreign judgment it is not necessary that the note on which such judgment was based be incorporated in the statement. *First Nat. Bank v. Crosby*, 179 Pa. 63, 36 Atl. 155.

"No suitor is bound to attach to his statement a copy of the multiplication table, a table of logarithms or a copy of life tables." *United Security, Life Ins. & Trust Co. v. Ritchey*, 187 Pa. 173, 40 Atl. 978.

An appraisalment list of property sold need not be attached to a statement declaring on an oral contract of sale. *Fabel v. Mayer*, 14 Pa. Super. 139.

A statement containing an exact copy of the recognizance sued on and a statement that the record of the forfeiture thereof may be found in "the records in the office of the clerk of said court" sufficiently refers to the record. *Com. v. Meeser*, 19 Pa. Super. 1.

A copy of the account using numbers to designate and describe the articles sold is sufficient. *Terriberry v. Broude*, 173 Pa. 48, 33 Atl. 699.

Reference to the record of an instrument recorded in the county is sufficient. *Siegel v. Haines & Co.*, 15 Pa. Co. Ct. 40.

A reference to the record of a deed has the same effect as attaching a copy of an agreement not of record, and dispenses with the necessity of

not necessarily excuse the pleader from stating the facts upon which his action is predicated,⁶⁹ and does not preclude him from doing so.⁷⁰

The remedy for failure to comply with the statute is generally by motion, and demurrer will not lie,⁷¹ though a contrary rule prevails in Indiana.⁷²

In some states, if the whole instrument is not set out, the court may require a copy or the original to be filed on motion.⁷³

attaching such copy. *Winderlich v. Sadler*, 189 Pa. 469, 42 Atl. 109.

A reference to records of a court in the same county is sufficient. *Rathfon v. Locher*, 215 Pa. 571, 64 Atl. 790.

But where the record is that of another county, the whole record must be set out. *Campbell v. Pittsburgh & W. R. Co.*, 137 Pa. 574, 20 Atl. 949.

Must be a correct and complete copy. *Freeman Bros. v. Refowich*, 20 Pa. Co. Ct. 17.

Where it appears upon the face of the statement and a copy of the contract filed therewith that it is not a complete copy or full statement of the contract on which the action is founded, a demurrer will be sustained. *Fehl's Exrx. v. Phoenix Mut. Life Ins. Co.*, 14 Pa. Co. Ct. 183.

If the defect is discoverable by mere inspection the court should refuse to enter summary judgment against defendant for want of a sufficient affidavit of defense. *White v. Sperling*, 24 Pa. Super. 120.

Failure to comply with the statute may defeat judgment for want of a sufficient affidavit of defense, or may subject plaintiff to rule for more specific statement or to demurrer, but after plea pleaded and issue joined at the trial does not prevent the admission of the original writing in evidence if properly proven at the trial. *Athens Car & Coach Co. v. Elsebree*, 19 Pa. Super. 618.

69. *Post v. Garrow*, 18 Neb. 682, 26 N. W. 580.

Plaintiff must file a statement of his demand as well as a copy of the writing. *Newbold v. Pennock*, 154 Pa. 591, 26 Atl. 606; *Gere v. Unger*, 125 Pa. 644, 17 Atl. 511; *Gould v. Gage*, 118 Pa. 559, 12 Atl. 476.

Filing such copy does not dispense with the necessity of also including in the statement every ingredient of a good cause of action. *Wunderlich v. Sadler*, 189 Pa. 469, 42 Atl. 109;

Newbold v. Pennock, 154 Pa. 591, 26 Atl. 606.

It does not dispense with the necessity of stating in the petition so much of a contract sued on as shows that the plaintiff, by reason of the alleged acts or omissions on his part, and of those on the part of the defendant, is entitled to an action and to relief. "The petition must contain in its own body, and not merely by reference to another paper, a statement of the facts constituting the cause of action." *Hill v. Barrett*, 14 B. Mon. (Ky.) 83.

70. *Post v. Garrow*, 18 Neb. 682, 26 N. W. 580.

71. *State v. Seaboard Air Line Ry.*, 56 Fla. 670, 47 So. 986; *Ryan v. State Bank*, 10 Neb. 524, 7 N. W. 276.

If insufficient the remedy is by motion for a more definite one, or for a bill of particulars. *State v. Seaboard Air Line Ry.*, 56 Fla. 670, 37 So. 306.

But where the parties and the trial court treat it as being properly a part thereof which can be reached by demurrer the supreme court will so consider it on appeal. *State v. Seaboard Air Line Ry.*, 56 Fla. 670, 47 So. 986.

If the allegations of the cause of action made a part of the declaration by apt words are inconsistent with those in the body of the declaration, such allegations neutralize each other, and the declaration is bad on demurrer. *State v. Seaboard Air Line Ry.*, 56 Fla. 670, 47 So. 986.

72. It is ground for demurrer. *Chicago, I. & L. R. Co. v. Reymann (Ind.)*, 73 N. E. 587.

73. *Massachusetts*.—Written instruments, except policies of insurance, shall be declared on by setting out a copy of such part as is relied on, or the legal effect thereof, with proper averments to describe the cause of action. If the whole contract is not set out, a copy or the original, as the court may direct, shall be filed upon the motion of the defendant. If it is necessary

The objection is waived by pleading to the merits,⁷⁴ and cannot be first raised on appeal.⁷⁵

Instruments for the Payment of Money.—Statutes in many states provide that in an action founded on a written instrument for the payment of money only, it shall be sufficient for the party to give a copy of the instrument and to state that there is due to him thereon from the adverse party a certain sum which he claims.⁷⁶

7. Several Counts or Causes of Action.—*a. General Principles.* A count is that part of the declaration or equivalent pleading in which

and the court so orders, the copy so filed shall be part of the record as if oyer had been granted, or a deed declared on according to the common law. No profer or excuse therefor need be inserted in a description. If the instrument relied upon is lost or destroyed, or if it is not within the control of the party who relies on it, the substance thereof, as nearly as may be and the reasons why a copy is not given, shall be stated. *Rev. Laws, 1902, c. 173, §6; Clary v. Thomas, 103 Mass. 44; Murdock v. Caldwell, 8 Allen 309.*

The revenue stamp is not a part of the contract and need not be copied. *Truel v. Moulton, 12 Allen (Mass.) 396.*

Washington.—It shall not be necessary for a party to set forth in a pleading a copy of a written instrument or the items of an account therein alleged, but unless he files a verified copy thereof with the pleadings and serves a copy on the adverse party, he is required to furnish one to the adverse party within ten days after a written demand therefor, or be precluded from giving evidence thereof. *Rem. & Ball. Ann. Codes & St., §284.*

The statute is substantially complied with where a copy of a bond in suit is set forth in the verified complaint, and in such case plaintiff is not required to furnish defendant an additional copy on demand. *Ferry v. King County, 2 Wash. 344, 26 Pac. 539.*

74. State v. Seaboard Air Line Ry., 56 Fla. 670, 47 So. 986, and cases cited.

75. Schofield v. Lafferty, 17 Pa. Super. 8.

76. Neb.—Comp. St., 1911, §6700; Stubendorf v. Sonnenschein, 11 Neb. 235, 9 N. W. 91. N. Y.—Code Civ. Proc., §534. N. D.—Rev. Codes, 1905, §6872. Ohio.—Gen. Code, 1910, §11334;

Sargent v. Steubenville & I. R. Co., 32 Ohio St. 449. Okla.—Comp. Laws, 1909, §5663. S. C.—Code Civ. Proc., §183; Bank v. Fidelity & Casualty Co., 120 Fed. 315. S. D.—Code Civ. Proc., §139; Scott v. Esterbrooks, 6 S. D. 253, 60 N. W. 850. Wis.—Rev. St., 1898, §2675. Wyo.—Comp. St., 1910, §4406; Board of County Comrs. v. Denebrink, 15 Wyo. 342, 89 Pac. 7; Frontier Supply Co. v. Loveland, 15 Wyo. 313, 88 Pac. 651.

The statute relates exclusively to instruments for the payment of money only. *Scottish American Mtg. Co. v. Reeve, 7 N. D. 99, 72 N. W. 1088.*

The statute only applies to "actions for the payment of money only, in which the liability is unconditional and absolutely fixed and expressed in the instrument." *Taylor v. Coon, 79 Wis. 76, 48 N. W. 123; Carrington v. Bayley, 43 Wis. 507.*

Instruments which are not for the unconditional payment of money nor evidence of indebtedness existing at the time of their execution, are not within the statute. *State v. Collins, 82 Ohio St. 240, 92 N. E. 439.*

This provision is limited in its operation exclusively to accounts and writings for the unconditional payment of money only. Generally it is not good pleading to make other written instruments part of the pleading, especially when they are long and would encumber the record and unnecessarily increase the costs. If it is necessary in stating a cause of action for breach of a written contract to substantially set out the whole instrument, it is then proper to copy it into the petition and assign breaches. *Crawford v. Satterfield, 27 Ohio St. 421.*

A petition upon an account for services rendered, in the short form authorized by the statute, must be construed to contain, and by implication

the plaintiff sets forth a distinct cause of action.⁷⁷ In code states counts are sometimes called paragraphs.⁷⁸ Technically speaking, counts are unknown to the Texas practice.⁷⁹ They are not permitted in a statement of claim in Pennsylvania.⁸⁰ The pleading need not contain more than one count for each cause of action,⁸¹ and may contain any number of counts for different causes of action which may properly be joined.⁸²

b. Must be Separately Stated.—Where several causes of action are joined in the same declaration, each must be stated in a separate count,⁸³ and this is equally true under the codes, which generally

allege, all those facts which it would otherwise be necessary to specifically aver in the statement of a sufficient cause of action. *Dykeman v. Johnson* (Ohio), 93 N. E. 626.

Such statutes have been held not to apply to an action to foreclose a mortgage (*Andrews v. Wynn*, 4 S. D. 40, 54 N. W. 1047), or to an action on an indemnity bond (*Taylor v. Coon*, 79 Wis. 76, 48 N. W. 123), or on a guardian's bond (*Carrigan v. Bayley*, 43 Wis. 507).

This mode of pleading is premissive merely, and plaintiff may state the facts in a different form. *Collingwood v. Merchants Bank*, 15 Neb. 118, 17 N. W. 359.

77. *Will's Gould Pl.*, 351; *Andrews Steph. Pl.*, §184; *Cheetham v. Tillotson*, 5 Johns (N. Y.) 430.

78. "The term 'paragraph,' as used in code pleading, means an entire or integral statement of a cause of action. It is the equivalent of 'count' at common law. It may embrace one sentence or many sentences; but, whether one or many, it constitutes a statement of a single cause of action." *Bailey v. Mosher*, 63 Fed. 488, 11 C. C. A. 304.

79. *Mays v. Lewis*, 4 Tex. 38.

80. *Agque v. Philadelphia & F. R. Co.*, 14 Pa. Co. Ct. 199.

81. *Mass. Rev. Laws*, 1902, c. 173, §6, p. 1550.

82. *Will's Gould Pl.*, 353. Which belong to the same division of personal actions. *Mass. Rev. Laws*, 1902, c. 173, §6.

83. *Andrews' Steph. Pl.*, §184, and the following cases: *Ala.*—*Southern Ry. Co. v. McEntire*, 169 Ala. 42, 53 So. 158; *Sloss-Sheffield Steel & Iron Co. v. Mitchell*, 167 Ala. 226, 52 So. 69; *Central of Ga. R. Co. v. Morgan*, 161 Ala. 483, 49 So. 865; *Southern Ry. Co. v. Hanby*, 166 Ala. 641, 52 So. 334;

Alabama Great Southern R. Co. v. Shaban, 116 Ala. 302, 22 So. 509. *Ill.* *Blome v. Wahl-Henius Institute*, 150 Ill. App. 164. *Md.*—*Milske v. Steiner Mantel Co.*, 103 Md. 235, 63 Atl. 471. *Mich.*—*Verlinde v. Michigan Cent. R. Co.*, 165 Mich. 371, 130 N. W. 317.

Cannot declare on an express contract and on a *quantum meruit* in the same count (*Jones v. Holtzen* [Tex. Civ. App.], 141 S. W. 121), even though the statute permits duplicity (*Sloss-Sheffield Steel & Iron Co. v. Smith*, 166 Ala. 437, 52 So. 381).

In *Massachusetts* the statute provides that two causes of action which arise on different contracts shall not be embraced in one count except in the count on a count annexed. *Rev. Laws*, 1902, c. 173, §6, p. 1550.

Different breaches of duty may not be alleged in one count. *Ferguson v. National Shoemakers (Me.)*, 79 Atl. 469; *Dawiski v. Natick Mills (R. I.)*, 78 Atl. 263.

Breaches of common law and statutory duty should be charged in separate counts. *Green v. Michigan Cent. R. Co. (Mich.)*, 133 N. W. 956.

Interest.—It is not improper to seek recovery of interest in a separate count, though it may not be necessary to do so. *Indian River State Bank v. Hartford Fire Ins. Co.*, 46 Fla. 283, 35 So. 228.

Distinguished From Duplicity.—"The distinction between the combining in one count of several distinct causes of action and duplicity must be kept clearly in mind. That distinction was aptly stated in *Higson v. Thompson*, 8 U. C. Q. B. 561, 562, where the court said: 'Duplicity in a count consists in supporting the same claim on several distinct grounds, not in laying several injuries in one count.' A declaration, therefore, is not bad for du-

provide that each must be separately stated,⁸⁴ or separately stated and numbered.⁸⁵

plieity because more than one cause of action is set forth in one count, provided not more than one independent and sufficient ground is therein alleged in support of a single demand or right of recovery." *Peoples Nat. Bank v. Nickerson*, 106 Me. 502, 76 Atl. 937.

84. Cal.—Code Civ. Proc., §427; *City Carpet, etc., Works v. Jones*, 102 Cal. 506, 36 Pac. 841; *McCarty v. Fremont*, 23 Cal. 196; *Buckingham v. Waters*, 14 Cal. 146; *Cameron v. Ah Quong*, 8 Cal. App. 310, 96 Pac. 1025. **Colo.** Code Civ. Proc., §76; *Seyfried v. Knoblauch*, 44 Colo. 86, 96 Pac. 993; *Equitable Securities Co. v. Montrose & D. Canal Co.*, 30 Colo. App. 465, 79 Pac. 747. The statute is imperative, and the court has no discretion in the matter. *Hall v. Cudahy*, 46 Colo. 324, 104 Pac. 415. **Conn.**—Gen. St., 1902, §613; *Craft Refrigerating Mach. Co. v. Quinpiac Brewing Co.*, 63 Conn. 551, 29 Atl. 76. **Idaho.**—Rev. Codes, §4169. **Ia.**—Code, §3559; *Burhaus v. Squires*, 75 Iowa 59, 39 N. W. 181; *Baltzell v. Nosler*, 1 Iowa 588; *Sands v. Wood*, 1 Iowa 263. **Minn.**—Rev. Laws, 1905, §4154. **Mo.**—Must be separately stated, with the relief sought for each cause of action, in such manner that they may be intelligibly distinguished. Rev. St., 1909, §1795; *Scott v. Taylor*, 231 Mo. 654, 132 S. W. 1140; *Flowers v. Smith*, 214 Mo. 98, 112 S. W. 499; *Henderson v. Dickey*, 50 Mo. 161; *Finell v. Metropolitan St. Ry. Co.*, 159 Mo. App. 522, 141 S. W. 451; *Peters v. St. Louis & S. F. R. Co.*, 150 Mo. App. 721, 131 S. W. 917; *Burgher v. Wabash R. Co.*, 139 Mo. App. 62, 120 S. W. 673; *Blackmer Pipe Co. v. Mobile & O. R. Co.*, 137 Mo. App. 479, 119 S. W. 1. **N. C.**—Rev., 1905, §469; *Blackmore v. Winders*, 144 N. C. 212, 56 S. E. 874. **N. D.**—Rev. Codes, 1905, §6877. **Ore.**—L. O. L., §94.

"Whether the complaint states more than one cause of action is to be determined, not by its form, nor by the numbering and labeling of its different paragraphs by the pleader, but by the facts alleged therein." *Dewing v. Dewing*, 112 Minn. 316, 127 N. W. 1051.

85. Ark.—Kirby's Dig., §6092. **Ind.** *Burns' Ann. St.*, 1908, §343; *Abernathy v. Allen*, 132 Ind. 84, 31 N. E. 534.

Kan.—The court may in his discretion require them to be. Gen. St., 1909, §5715; *Spillman v. Union Portland Cement Co.*, 81 Kan. 775, 106 Pac. 1087; *Burdick v. Carbondale Inv. Co.*, 71 Kan. 121, 80 Pac. 40. **Ky.**—Civ. Code, 1906, §1113; *Meek v. McCall*, 80 Ky. 371. **Mont.**—Rev. Codes, §6533; *Galvin v. O'Gorman*, 40 Mont. 391, 106 Pac. 887. **Neb.**—Comp. St., 1911, §6667; *Haurigan v. Chicago & N. W. R. Co.*, 80 Neb. 132, 113 N. W. 983; *Yates v. Jones Nat. Bank*, 74 Neb. 734, 105 N. W. 287; *Building & Loan Assn. v. Cameron*, 48 Neb. 124, 66 N. W. 1109; *Exter Nat. Bank v. Orchard*, 43 Neb. 579, 61 N. W. 833; *Schuyler Nat. Bank v. Bollong*, 24 Neb. 821, 40 N. W. 411; *Bailey v. Mosher*, 63 Fed. 488, 11 C. C. A. 304. **N. Y.**—Code Civ. Proc., §483; *Payne v. New York, S. & W. R. Co.*, 201 N. Y. 436, 95 N. E. 19, reversing 141 App. Div. 833, 125 N. Y. Supp. 1011; *Deigel v. Magee*, 132 N. Y. Supp. 665; *Crosby v. Otis Elevator Co.*, 126 N. Y. Supp. 204; *Burkan v. Musical Courier Co.*, 125 N. Y. Supp. 1059; *Payne v. New York & S. W. R. Co.*, 125 N. Y. Supp. 1011; *Kaulbach v. Knickerbocker Trust Co.*, 139 App. Div. 566, 124 N. Y. Supp. 286; *Uss v. Crane Co.*, 123 N. Y. Supp. 94; *Lyon v. Friedlander*, 116 N. Y. Supp. 569; *Carr v. Kimball*, 114 N. Y. Supp. 300; *Moore Bros. Glass Co. v. Drevet Mfg. Co.*, 154 Fed. 737. **Ohio.** Gen. Code, 1910, §11308; *Wilcox v. McCoy*, 21 Ohio St. 655; *Shepherd v. Baltimore & O. R. Co.*, 130 U. S. 426, 9 Sup. Ct. 598, 32 L. ed. 970. **Okla.** Comp. Laws, 1909, §5628. **S. C.**—Code Civ. Proc., §188; *Iseman v. McMillan*, 36 S. C. 27, 15 S. E. 336; *Hammond v. Port Royal & A. R. Co.*, 15 S. C. 10; *Childers v. Verner*, 12 S. C. 1. **S. D.**—Code Civ. Proc., §144; *Nichols & Shepard Co. v. Horstad*, 130 N. W. 776. **Utah.**—Comp. Laws, 1907, §2960; *Johnston v. Meaghr*, 14 Utah 426, 47 Pac. 861. **Wash.**—Rem. & Ball. Ann. Codes & St., §296. **Wis.**—St., 1893, §2647; *Seering v. Black*, 140 Wis. 413, 122 N. W. 1055. **Wyo.**—Comp. St., 1910, §4380; *Miskimmons v. Moore*, 10 Wyo. 41, 65 Pac. 1000; *Kearney Stone Works v. McPherson*, 5 Wyo. 178, 38 Pac. 920.

The statute applies equally though

In some states the requirement of a separate statement is regarded as merely formal,⁸⁶ and the overruling of a motion to require it is deemed harmless,⁸⁷ at least unless prejudice clearly appears.⁸⁸ In others the defect is deemed substantial and the overruling of a motion to require a separate statement is reversible error.⁸⁹

Several Items, Grounds of Recovery, or Distinct Facts Constituting One Cause of Action.—The rule does not require each item constituting a cause of action,⁹⁰ or each ground of recovery⁹¹ to be separately stated.

Several distinct facts supporting a single demand may be pleaded

the action is in equity. *Hockersmith v. Ferguson*, 51 Wash. 256, 98 Pac. 670.

Causes of action should be stated and numbered distinctly, as, for example "The First Cause of Action; The Second Cause of Action," etc., rather than by merely numbering them consecutively and thus leaving it doubtful whether the pleader intended to number causes of action or merely to number paragraphs. *Toledo Gas-Light & Coke Co. v. Toledo*, 10 Ohio C. C. (N. S.) 490.

Failure to comply with this provision does not defeat the right of the defendant to demur where several causes of action are improperly joined, nor will a failure to move to correct the complaint in this respect defeat the effect of such a demurrer. *Goldberg v. Utley*, 60 N. Y. 427.

In **New Jersey** the statement of the second cause of action must be prefixed with the words "second count," and so on for the others, and the several paragraphs of each must be separately numbered. Laws 1912, c. 231, Schedule A, §36, p. 391.

The federal courts will be governed by the state practice in this regard in actions at law. *Moore Bros. Glass Co. v. Drevet Mfg. Co.*, 154 Fed. 737.

86. This requirement is a mere matter of practice over which the trial court has control, and unless it appears that the party will or may be deprived of some legal right by the action of the court, it must be regarded as formal and not substantial. An order overruling such a motion is not appealable. *Goldberg v. Utley*, 60 N. Y. 427.

87. *Richwine v. Presbyterian Church*, 135 Ind. 80, 34 N. E. 737; *Mansfield v. Shipp*, 128 Ind. 55, 27 N. E. 427; *Wabash, St. L. & P. R. Co. v. Rooker*, 90 Ind. 581; *Pierce v. Walton*, 20 Ind.

App. 66, 50 N. E. 309; *Shaw v. Ayers*, 17 Ind. App. 614, 47 N. E. 235.

88. *Bear v. Knowles*, 36 Ohio St. 43.

It is not ground for reversal where the record shows that all the questions involved were clearly and fully presented to the jury by the instructions, and the special findings show that each separate fact was clearly understood and answered without confusion or misapprehension. *Spillman v. Union Portland Cement Co.*, 81 Kan. 775, 106 Pac. 1087.

89. Defendant has an absolute statutory right to insist that this provision shall be observed. *National Fuel Co. v. Green*, 50 Colo. 307, 115 Pac. 709; *Hall v. Omaha*, 16 Colo. 324, 104 Pac. 415; *Building & Loan Assn. v. Cameron*, 48 Neb. 124, 66 N. W. 1109; *Schuyler Nat. Bank v. Bollong*, 24 Neb. 821, 40 N. W. 411.

90. *Bartram v. Ohio & B. S. R. Co.*, 141 Ky. 100, 132 S. W. 188.

Two or more notes may be embraced in the same count. *Ragan v. Day*, 46 Iowa 239; *Merritt v. Nihart*, 11 Iowa 57.

In *Godfrey v. Buckmaster*, 2 Ill. 447, it was held not to be improper to declare on six notes, which were identical with each other, in one count.

In an action to recover a penalty for a continuous offense, the penalty being fixed at so much for each day's continuance, it is not necessary to declare in separate counts for each day's penalty, but all may be grouped in a single count. *Toledo, St. L. & K. C. R. Co. v. Stephenson*, 131 Ind. 203, 30 N. E. 1082.

91. May declare on a contract and on a *quantum meruit* in a single count. *Robinson v. American Linseed Co.*, 147 Fed. 885.

in one count,⁹² as may several distinct acts which are not inconsistent and which all point to the same injury or wrong.⁹³ It has also been held that the different grounds of a general *indebitatus assumpsit*,⁹⁴ and several distinct parcels of land in an action of ejectment,⁹⁵ or to quiet title,⁹⁶ may be combined in one count. In states where duplicity in pleading is permissible, a single count may contain several distinct and independent averments, each of itself stating a cause of action, provided the cause of action is the same in all.⁹⁷

Several breaches of contract may ordinarily be assigned in one count,⁹⁸

92. *United Surety Co. v. Summers*, 110 Md. 95, 72 Atl. 775.

Any number of facts constituting a single cause of action. *Munn v. Cook*, 8 N. Y. Supp. 685, 21 Abb. N. C. 314; *Boyce v. Brown*, 7 Barb. (N. Y.) 80.

"There can be but one demand to each cause of action, but as many matters or facts as are necessary to support that demand, not only may, but must be set out in one count." *Platt v. Jones*, 59 Me. 232, 242.

Mere diversity of facts will not make a count double, but any number of circumstances or defaults may be alleged, if, taken together they amount to one connected cause or relate to one ground of recovery. *Braunstein v. People's Ry. Co. (Del.)*, 77 Atl. 738.

93. Separate breaches of duty, where they are consistent and are related, coexistent acts, tending to effect a single complete result. *Green v. Michigan Cent. R. Co. (Mich.)*, 133 N. W. 228.

Plaintiff may, in a single count, ascribe the injury suffered to concurrent, coalescing breaches of duty under two or more subdivisions of the employer's liability act, but in such case must allege and prove that such breaches jointly caused the injury. *Louisville & N. R. Co. v. Fitzgerald*, 161 Ala. 397, 49 So. 860; *Armstrong v. Montgomery St. Ry.*, 123 Ala. 246, 26 So. 349.

As a failure to construct cattle-guards and a failure to keep them in repair after they were constructed. *Atlanta & B. A. L. R. Co. v. Brown*, 155 Ala. 607, 48 So. 73.

Several acts of negligence. *U. S. J. W. Bishop Co. v. Shelhorse*, 141 Fed. 643. *D. C.*—*Flynn v. Staples*, 34 App. Cas. 92. *Ind.*—*Lake Shore & M. S. R. Co. v. Meyers*, 98 N. E. 654; *Knickerbocker Ice Co. v. Gray*, 171 Ind. 325, 84 N. E. 311; *Merica v.*

Ft. Wayne & W. V. T. Co. (Ind. App.), 97 N. E. 192, and cases cited; *Pittsburg, C., C. & St. L. R. Co. v. German Ins. Co.*, 44 Ind. App. 268, 87 N. E. 995. *Ia.*—*Hammer v. Chicago, R. I. & P. R. Co.*, 61 Iowa 56, 15 N. W. 597. *Ky.*—*Fagg's Admr. v. Louisville & N. R. Co.*, 111 Ky. 30, 63 S. W. 580. *Mo.*—*Richardson v. St. Louis H. R. Co.*, 223 Mo. 325, 123 S. W. 22; *Thompson v. Keyes-Marshall Bros. Livery Co.*, 214 Mo. 487, 113 S. W. 1128.

Several acts of negligence some of which create a liability only under the common law and some only under the statute. *Payne v. New York, S. & W. R. Co.*, 201 N. Y. 436, 95 N. E. 19, reversing 141 App. Div. 833, 125 N. Y. Supp. 1011.

94. *Hamblay v. Southmayd*, 14 N. J. L. 544.

95. *Hotchkiss v. Butter*, 18 Conn. 287.

96. In *Pennie v. Hildreth*, 81 Cal. 127, 22 Pac. 398, it was held that where plaintiff sought to quiet title to several contiguous tracts, as to each of which the adverse claimants were the same, he should not have pleaded for each of the tracts in separate counts, but should have included them all in one count.

97. They must be stated conjunctively. Proof of any one of them constituting a cause of action will be sufficient. *Sloss-Sheffield Steel & Iron Co. v. Smith*, 166 Ala. 437, 52 So. 38.

The federal courts will follow the state practice in this regard. *J. W. Bishop Co. v. Shelhorse*, 141 Fed. 643.

See the title "Duplicity."

98. *Ala.*—*Sloss Iron & Steel Co. v. Macon County*, 111 Ala. 554, 20 So. 400. *Ind.*—*Smiley v. Dewese*, 1 Ind. App. 211, 27 N. E. 505. *Md.*—*Canton Nat. Bank v. American Bonding & Trust Co.*, 111 Md. 41, 73 Atl. 684.

but in such case they should be separately assigned,⁵⁰ and each assignment must be sufficient in itself.¹

c. *Right To State a Single Cause of Action in Several Counts.*—Under the common law system of pleading a single cause of action may be stated in different form or different language in different counts of the declaration to meet different phases of the evidence which may be adduced at the trial,² and in many code states³ this rule still prevails

Mass.—Rev. Laws, 1902, c. 173, §6, p. 1550; *Saco Brick Co. v. Eustis Mfg. Co.*, 207 Mass. 312, 93 N. E. 629. **Wis.** *Nichol v. Alexander*, 28 Wis. 118; *Fisk v. Tank*, 12 Wis. 276.

Though they afford different elements of recovery or damage. *Pryor v. Kansas City*, 153 Mo. 135, 54 S. W. 499; *Brown & Son Contracting Co. v. Bambrick Bros. Const. Co.*, 150 Mo. App. 505, 131 S. W. 134.

99. **Ala.**—*Sloss Iron & Steel Co. v. Macon County*, 111 Ala. 554, 20 So. 400. **Ark.**—*State v. Rives*, 12 Ark. 721. **Ind.**—*Smiley v. Deweese*, 1 Ind. App. 211, 27 N. E. 505.

1. Cannot be aided by reference to other breaches. *Canton Nat. Bank v. American Bonding & Trust Co.*, 111 Md. 41, 73 Atl. 684.

2. *Andrews Steph. Pl.*, §186, and the following cases: **Del.**—*Perry v. Stayton*, 82 Atl. 87. **Mass.**—*Farquhar v. Farquhar*, 194 Mass. 400, 80 N. E. 654; *Massachusetts Mut. Life Ins. Co. v. Green*, 185 Mass. 306, 70 N. E. 202. **Mich.**—*Carbary v. Detroit United Ry.*, 157 Mich. 683, 122 N. W. 367; *Velt-house of Alderink*, 153 Mich. 217, 117 N. W. 76.

One may allege in the alternative, and in separate counts, different grounds of recovery, and may recover if he proves either. Express contract and *quantum meruit*. *Jones v. Holtzen* (Tex. Civ. App.), 141 S. W. 121; *Morrison v. Bartlett* (Tex. Civ. App.), 131 S. W. 1146; *Broussard v. South Texas Rice Co.* (Tex. Civ. App.), 120 S. W. 587.

That it is alleged that all the counts are for the same cause of action does not render the declaration bad. *Massachusetts Mut. Life Ins. Co. v. Green*, 185 Mass. 306, 70 N. E. 202.

Different acts of negligence causing one injury, provided they are not inconsistent. *Green v. Michigan Cent. R. Co.* (Mich.), 133 N. W. 956.

In Massachusetts, if it is doubtful

to which division a cause of action belongs, a count in contract may be joined with a count in tort, with an averment that both are for the same cause of action. Rev. Laws, c. 173, §6, subd. 6.

One induced to buy goods by fraudulent representations may join a count for the tort and a count in contract to recover the price, where he is in doubt as to the legal effect of his evidence. *Teague v. Irwin*, 134 Mass. 303.

A count in tort for the conversion of property on which plaintiff claimed a lien, and one in contract on an implied promise to pay the amount of the lien. *New Haven & N. Co. v. Campbell*, 128 Mass. 104.

Different grounds of liability under the employers' liability act. *Beauregard v. Webb Granite & Const. Co.*, 160 Mass. 201, 35 N. E. 555.

3. **Ala.**—*Southern Ry. Co. v. McEntire*, 169 Ala. 42, 53 So. 158. **Ariz.** *Willard v. Carrigan*, 8 Ariz. 70, 68 Pac. 538. **Cal.**—*Remy v. Olds*, 34 Pac. 216; *Wilson v. Smith*, 61 Cal. 209; *Van Lue v. Wahrlich-Cornett Co.*, 12 Cal. App. 749, 108 Pac. 717. **Colo.**—*Cripple Creek Min. Co. v. Brabant*, 37 Colo. 423, 87 Pac. 794; *Vindicator Consol. Gold Mining Co. v. Firstbrook*, 36 Colo. 498, 86 Pac. 313; *Leonard v. Roberts*, 20 Colo. 88, 36 Pac. 880; *Cramer v. Oppenstein*, 16 Colo. 504, 27 Pac. 716. **Ind.**—*Cleveland, C., C. & St. L. R. Co. v. Gossett*, 172 Ind. 525, 87 N. E. 723; *Daly v. Gubbins*, 35 Ind. App. 86, 73 N. E. 833; *Snyder v. Snyder*, 25 Ind. 399. **Ia.**—*Cawker City Bank v. Jennings*, 89 Iowa 230, 56 N. W. 494; *Sadler v. Almstead*, 79 Iowa 121, 44 N. W. 292; *Van Brunt & Co. v. Mather*, 48 Iowa 503; *Pearson v. Milwaukee & St. P. R. Co.*, 45 Iowa 497. **Kan.**—*Wiley v. Locke*, 81 Kan. 143, 105 Pac. 11; *Van Arsdsale-Osborne Brokerage Co. v. Foster*, 79 Kan. 669, 100 Pac. 480; *Berry v. Craig*, 76 Kan. 345, 91 Pac.

though in others it is held to be inconsistent with the code spirit.⁴

d. Count or Cause of Action Must be Complete in Itself.—Each count or cause of action is, in effect, a separate declaration or complaint,⁵ and must allege all the facts essential to maintain the cause of action therein set forth.⁶

It has been held that one averment of a request and refusal to pay is sufficient for any number of counts in assumpsit.⁷

913; *Edwards v. Hartshorn*, 72 Kan. 19, 82 Pac. 520. **Mo.**—*Rinard v. Omaha, K. C. & E. R. Co.*, 164 Mo. 270, 64 S. W. 124; *Brinkman v. Hunter*, 73 Mo. 172; *Landers v. Quiney, O. & K. C. R. Co.*, 114 Mo. App. 655, 90 S. W. 117, 134 Mo. App. 80, 114 S. W. 534; *Waechter v. St. Louis & M. R. R. Co.*, 113 Mo. App. 270, 88 S. W. 147. **N. Y.** *Reilly v. Steinhardt*, 58 Misc. 471, 111 N. Y. Supp. 472; *Rothchild v. Grand Trunk R. Co.*, 10 N. Y. Supp. 36. **Wis.** *Whitney v. Chicago & N. W. R. Co.*, 27 Wis. 327.

Gross and ordinary negligence. *Astin v. Chicago, M. & St. P. R. Co.*, 143 Wis. 477, 128 N. W. 265.

Charging liability of defendant under the state and the federal employer's liability acts. *Luken v. Lake Shore & M. S. R. Co.*, 154 Ill. App. 550.

"A complaint which consists of one count only, in which the sum claimed is variant or contradictory, is obnoxious to demurrer; but when it consists of two or more counts, the different counts may vary the descriptive allegations of the cause of action. *Andrews v. Flack & Wales*, 88 Ala. 294, 6 So. 907.

Whether an election will be required is discretionary. *Manders v. Craft*, 3 Colo. App. 236, 32 Pac. 836.

A statement in the petition that the counts relate to the same cause of action is unnecessary, but will not vitiate the pleading. *Pearson v. Milwaukee & St. P. R. Co.*, 45 Iowa 497.

4. *Gabrielson v. Hague Box & Lumb Co.*, 55 Wash. 342, 104 Pac. 635. See also *Holm v. Chicago, M. & St. P. R. Co.*, 59 Wash. 293, 109 Pac. 799, where it is held that he may plead in the alternative in such case.

5. **Ala.**—*Karthans v. Nashville, C. & St. L. R. Co.*, 140 Ala. 433, 37 So. 268. **Colo.**—*Equitable Securities Co. v. Montrose & D. Canal Co.*, 20 Colo. App. 465, 79 Pac. 747. **Ind.**

Abernathy v. Allen, 132 Ind. 84, 31 N. E. 534.

6. **Ala.**—*Sloss-Sheffield Iron & Steel Co. v. Smith*, 166 Ala. 437, 52 So. 38. **Colo.**—*Equitable Securities Co. v. Montrose & D. Canal Co.*, 20 Colo. App. 465, 79 Pac. 747. **Kan.**—*Stewart v. Balderston*, 10 Kan. 131. **Mont.** *Murray v. City of Butte*, 35 Mont. 161, 88 Pac. 789. **Neb.**—*Schuyler Nat. Bank v. Bollong*, 24 Neb. 821, 40 N. W. 411. **N. Y.**—*People v. Koster*, 97 N. Y. Supp. 29; *Moore Bros. Glass Co. v. Drevet Mfg. Co.*, 154 Fed. 737.

The several counts of a declaration are regarded as its several parts or sections, and are considered as distinct as though contained in separate declarations. *Robinson v. Drummond*, 24 Ala. 174; *Mardis' Admrs. v. Shackelford*, 6 Ala. 433.

A paragraph containing nothing more than a mere conclusion based on facts pleaded in another paragraph is properly stricken. *Cooper v. French*, 52 Iowa 531, 3 N. W. 538.

A count under a particular subdivision of a statute must state the facts which constitute plaintiff's cause of action under that subdivision. *Alabama Great Southern R. Co. v. Cardwell (Ala.)*, 55 So. 185.

"A count, under our code system, in order to be good against an appropriate demurrer, must contain a logical statement of the cause of action. It must state all the facts which constitute plaintiff's right, and his injury, and the consequent damages, and must state them with certainty, precision and brevity. A general statement of facts which permits of almost any proof to sustain it is objectionable." *Alabama Great Southern R. Co. v. Cardwell (Ala.)*, 55 So. 185.

The federal courts will follow the state practice in this regard. *Moore Bros. Glass Co. v. Drevet Mfg. Co.*, 154 Fed. 737.

7. *Rider v. Robbins*, 13 Mass. 284.

Each count must be complete in itself,⁸ and must stand or fall on its own allegations.⁹ It cannot be aided¹⁰ nor impaired¹¹ by averments in other counts or causes of action.

8. **Cal.**—*Reading v. Reading*, 96 Cal. 4, 30 Pac. 803; *Green v. Clifford*, 94 Cal. 49, 29 Pac. 331; *Cameron v. Ah Quong*, 8 Cal. App. 310, 96 Pac. 1025. **Colo.**—*Equitable Securities Co. v. Montrose & Delta Canal Co.*, 20 Colo. App. 465, 79 Pac. 747. **Ind.**—*Abernathy v. Allen*, 132 Ind. 84, 31 N. E. 534; *McCarman v. Cochran*, 57 Ind. 166; *Daly v. Gubbins*, 35 Ind. App. 86, 73 N. E. 833. **Ia.**—Code, §3559. **Kan.**—*Riverside Township v. Bailey*, 82 Kan. 429, 108 Pac. 796; *Leavenworth, N. & S. R. Co. v. Wilkins*, 45 Kan. 674, 26 Pac. 16; *Stewart v. Balderston*, 10 Kan. 131. **Ky.**—*Louisville & N. R. Co. v. Adams*, 148 Ky. 513, 147 S. W. 384; *Dailey v. O'Brien*, 96 S. W. 521. **Md.**—*Pearce v. Watkins*, 68 Md. 534, 13 Atl. 376. **Mo.**—*Graves v. St. Louis, M. & S. E. R. Co.*, 133 Mo. App. 91, 112 S. W. 736; *Boeckler v. Missouri Pac. R. Co.*, 10 Mo. App. 448. **Mont.**—*Power & Bro. v. Turner*, 37 Mont. 521, 97 Pac. 950; *Murray v. City of Butte*, 35 Mont. 161, 88 Pac. 789; *McKay v. McDougal*, 19 Mont. 488, 48 Pac. 988. **Wis.**—*Sabin v. Austin*, 19 Wis. 421; *Curtis v. Moore*, 15 Wis. 134. **Wyo.**—*Ramsey v. Johnson*, 7 Wyo. 392, 52 Pac. 1084.

The rule does not obtain where one cause of action has been mistakenly set forth as two in different counts, but in such case, after judgment, the entire pleading should be construed in aid of the verdict as setting up a single cause of action, irrespective of the intended division. *Brown & Son Contracting Co. v. Bambrick Bros. Const. Co.*, 150 Mo. App. 505, 131 S. W. 134.

9. **Ia.**—Code, §3559. **S. C.**—*Wright v. Willoughby*, 79 S. C. 438, 60 S. E. 971; *Threat v. Brewer Mining Co.*, 49 S. C. 95, 26 S. E. 970; *Iseman v. McMillan*, 36 S. C. 27, 15 S. E. 336; *Hammond v. Port Royal & A. R. Co.*, 15 S. C. 10. **Wis.**—*Bronson v. Markey*, 53 Wis. 98, 10 N. W. 166.

The allegations in one count cannot be imported into another unless that is done in terms. *Farquhar v. Farquhar*, 194 Mass. 400, 80 N. E. 654.

An exhibit annexed to one count is no part of another count which does

not refer to it or incorporate it. *Merrill v. Post Pub. Co.*, 197 Mass. 185, 83 N. E. 419; *Farquhar v. Farquhar*, 194 Mass. 400, 80 N. E. 400. See the title "Exhibits."

10. **Ala.**—*Mardis' Admrs. v. Shackelford*, 6 Ala. 433. **Cal.**—*Hopkins v. Contra Costa County*, 106 Cal. 566, 39 Pac. 933; *Green v. Clifford*, 94 Cal. 49, 29 Pac. 331; *Haskell v. Haskell*, 54 Cal. 262; *Cameron v. Ah Quong*, 8 Cal. App. 310, 96 Pac. 1025. **Ga.**—*Watters v. Hertz*, 135 Ga. 804, 70 S. E. 338. **Ind.**—*Abernathy v. Allen*, 132 Ind. 84, 31 N. E. 534; *McCarman v. Cochran*, 57 Ind. 166; *Daly v. Gubbins*, 35 Ind. App. 86, 73 N. E. 833. **Kan.**—*Riverside Township v. Bailey*, 82 Kan. 429, 108 Pac. 796; *Leavenworth, N. & S. R. Co. v. Wilkins*, 45 Kan. 674, 26 Pac. 16. **Mo.**—*Graves v. St. Louis, M. & S. E. R. Co.*, 133 Mo. App. 91, 112 S. W. 736; *Boeckler v. Missouri Pac. R. Co.*, 10 Mo. App. 448. **Mont.**—*Power & Bro. v. Turner*, 37 Mont. 521, 97 Pac. 950; *Murray v. City of Butte*, 35 Mont. 161, 88 Pac. 789. **N. Y.**—*Dedrick v. Mallery*, 127 N. Y. Supp. 1023. **S. C.**—*Wright v. Willoughby*, 79 S. C. 438, 60 S. E. 971; *Threat v. Brewer Mining Co.*, 49 S. C. 95, 26 S. E. 970; *Hammond v. Port Royal & A. R. Co.*, 15 S. C. 10.

Unless the pleading, though in form containing two counts, in substance and in fact contains but one. *Train v. Emerson*, 137 Ga. 730, S. E. 241.

11. *Watters v. Hertz*, 135 Ga. 804, 70 S. E. 338.

A count which states a good cause of action is not demurrable because of deficiencies in another count. *Bronson v. Markey*, 53 Wis. 98, 10 N. W. 166.

"The question whether allegations are irrelevant and redundant must be determined by reference alone to the cause of action in which such allegations are set forth." *Berry v. E. L. Moore Co.*, 69 S. C. 317, 48 S. E. 249.

"An admission in one count cannot be used to destroy the statement of another cause of action in a separate count." *Spaulding v. Saltiel*, 18

Reference to Other Counts.—As a general rule matter of inducement in one count or cause of action,¹² or matters common to all of them¹³ may be incorporated into and made a part of a subsequent count or cause of action by reference, though the contrary is true in some

Colo. 86, 31 Pac. 486; *Equitable Securities Co. v. Montrose & D. Canal Co.*, 20 Colo. App. 465, 79 Pac. 747.

The rule does not apply where the pleading, though in form containing two counts, in substance and in fact contains but one. *Train v. Emerson*, 137 Ga. 739, 74 S. E. 241.

12. **Mo.**—*Waechter v. St. Louis & M. R. R. Co.*, 113 Mo. App. 270, 88 S. W. 147. **Okla.**—See *Schoner v. Allen*, 25 Okla. 22, 105 Pac. 191. **Tex.** *Morrison v. Bartlett* (Tex. Civ. App.), 131 S. W. 1146. **Wyo.**—*Ramsey v. Johnson*, 7 Wyo. 392, 52 Pac. 1684.

Introductory matter. *Hefferlin v. Karlman*, 29 Mont. 139, 74 Pac. 413; *McKay v. McDougal*, 19 Mont. 488, 48 Pac. 988.

Only allegations introductory or by way of inducement may be so adopted, and not the allegation of the substantive facts constituting the cause of action. *Power & Bro. v. Turner*, 37 Mont. 321, 97 Pac. 950; *Murray v. City of Butte*, 35 Mont. 161, 88 Pac. 789; *McKay v. McDougal*, 19 Mont. 488, 48 Pac. 988; *Abendroth v. Boardley*, 27 Wis. 555; *Curtis v. Moore*, 15 Wis. 134.

Matters of mere inducement and not of the gravamen of the action stated in the first count may be referred to in subsequent ones. *Equitable Securities Co. v. Montrose & Delta Canal Co.*, 20 Colo. App. 465, 79 Pac. 747.

13. **Ala.**—*Anniston Electric & Gas Co. v. Elwell*, 144 Ala. 317, 42 So. 45; *Mardis' Admrs. v. Shackelford*, 6 Ala. 433. **Cal.**—*Hopkins v. Contra Costa County*, 106 Cal. 566, 39 Pac. 933; *Treweek v. Howard*, 105 Cal. 434, 39 Pac. 20; *Reading v. Reading*, 96 Cal. 4, 30 Pac. 803; *Green v. Clifford*, 94 Cal. 49, 29 Pac. 331; *Haskell v. Haskell*, 54 Cal. 263; *Cameron v. Ah Quong*, 8 Cal. App. 310, 96 Pac. 1025. **Kan.**—*Riverside Township v. Bailey*, 82 Kan. 429, 108 Pac. 796; *Burdick v. Carbondale Inv. Co.*, 71 Kan. 121, 80 Pac. 40; *Leavenworth, N. & S. R. Co. v. Wilkins*, 45 Kan. 674, 26 Pac. 16; *Stewart v. Balderston*, 10 Kan. 131. **Mass.**—*Merrill v. Post Pub. Co.*, 197

Mass. 185, 83 N. E. 419; *Farquhar v. Farquhar*, 194 Mass. 400, 80 N. E. 654; *Dorr v. McKinney*, 9 Allen 359. **Minn.** *Realty Revenue Guaranty Co. v. Farm, Stock & Home Pub. Co.*, 79 Minn. 465, 82 N. W. 857. **Mo.**—*Bricker v. Missouri Pac. R. Co.*, 83 Mo. 391; *Graves v. St. Louis, M. & S. E. R. Co.*, 133 Mo. App. 91, 112 S. W. 736; *Boeckler v. Missouri Pac. R. Co.*, 10 Mo. App. 448.

"It is not only permissible according to the precedents, but often proper, in order to avoid unnecessary repetition and prolixity, that one count should refer specifically to another." *Mattingly v. Houston*, 167 Ala. 167, 52 So. 78. See to the same effect *Robinson v. Drummond*, 24 Ala. 174.

"There is nothing in our rules of pleading which requires or encourages the needless repetition of allegations which are so referred to as to be plainly understood. Good pleading requires reasonable certainty as to the pleader's meaning, but there is no especial legal advantage in a multitude of words." *Ayres v. Toulmin*, 74 Mich. 44, 41 N. W. 855.

A contract sufficiently stated in the first count need not be repeated in subsequent ones, but it is sufficient to declare that it is the same as set forth in the first count. *United Surety Co. v. Summers*, 110 Md. 95, 72 Atl. 775.

Description of the property in trespass. *Fellows v. Chipman*, 26 R. I. 196, 58 Atl. 662.

Matters in the commencement of the complaint which are applicable to all of the counts, such as allegations showing that certain of the parties are married to certain other parties for the purpose of showing that they are properly joined. *Abendroth v. Boardley*, 27 Wis. 555.

Scope of Reference.—The court must take references from one count to another as it finds them though they render the count in which they appear unintelligible and are the result of inadvertence. *Charlie's Transfer Co. v. Malone*, 159 Ala. 325, 48 So. 705.

In case it is uncertain how much is

states.¹⁴ In such case the matter so incorporated may be considered though the count referred to is subsequently abandoned,¹⁵ or stricken out,¹⁶ or held bad on demurrer.¹⁷

e. *Withdrawal and Refiling of Counts.*— Ordinarily counts may be withdrawn¹⁸ and new counts filed by way of amendment.¹⁹

The withdrawal of a count is, in effect, an amendment striking it out.²⁰ It is not a retraxit, or tantamount thereto,²¹ nor does it necessarily amount to a dismissal of the plaintiff's entire cause of action.²² A count which has been withdrawn may generally be refiled by leave of court.²³

f. *Raising and Waiver of Objections.*— The objection that several causes of action are joined in a single count is ground for special demurrer in some states,²⁴ while in others the remedy is by motion,²⁵

included in the reference, the remedy is by motion, rather than by demurrer or dismissal at the trial. *Babcock v. Anson*, 106 N. Y. Supp. 642.

14. *Cooper v. Portner Brewing Co.*, 112 Ga. 894, 38 S. E. 91; *Dailey v. O'Brien* (Ky.), 96 S. W. 521.

15. *Robinson v. Drummond*, 24 Ala. 174.

16. *Shaughnessy v. Holt*, 236 Ill. 485, 86 N. E. 256.

17. *Anniston Electric & Gas Co. v. Elwell*, 144 Ala. 317, 42 So. 45; *Morrison v. Spears*, 8 Ala. 93.

18. *Southern R. Co. v. McIntire*, 169 Ala. 42, 53 So. 158.

19. *Southern R. Co. v. McIntire*, 169 Ala. 42, 53 So. 158.

20. *Southern R. Co. v. McIntire*, 169 Ala. 42, 53 So. 158.

21. *Southern R. Co. v. McIntire*, 169 Ala. 42, 53 So. 158. See the title "Retraxit."

22. *Southern R. Co. v. McIntire*, 169 Ala. 42, 53 So. 158. See the title "Dismissal and Nonsuit."

23. *Southern R. Co. v. McIntire*, 169 Ala. 42, 53 So. 158.

24. *Downs v. Hawley*, 112 Mass. 237.

As against a general demurrer plaintiff can insist on both and recover if he proves either. *Harris v. Wilcox*, 7 Ga. App. 121, 66 S. E. 380.

25. By motion to require a separate statement. *Cal.*—*City Carpet, etc., Works v. Jones*, 102 Cal. 506, 36 Pac. 841. *Colo.*—*Hall v. Cudahy*, 46 Colo. 324, 104 Pac. 415. *Neb.*—*Exeter Nat. Bank v. Orchard*, 43 Neb. 579, 61 N. W. 833. *N. Y.*—*Commercial Bank v. Pfeiffer*, 108 N. Y. 242, 15 N. E. 311; *Bass v. Comstock*, 38 N. Y. 21; *Lyon*

v. Friedlander, 116 N. Y. Supp. 569. *Wis.*—*Nichol v. Alexander*, 28 Wis. 118. *Wyo.*—*Kearney Stone Works v. McPherson*, 5 Wyo. 178, 38 Pac. 920.

By motion to require them to be separately stated, rather than by a motion to strike out parts of the pleading. *Richardson v. Carbon Hill Coal Co.*, 10 Wash. 648, 39 Pac. 95.

By motion to make the complaint more definite and certain by separately stating them. The objection is not reached by a motion to withdraw from the jury's consideration the evidence in relation to some of them. *Galvin v. O'Gorman*, 40 Mont. 391, 106 Pac. 887.

By motion to require a separate statement or an election. *Welborn v. Dixon*, 70 S. C. 108, 49 S. E. 232; *Cartin v. South Bound R. Co.*, 43 S. C. 221, 20 S. E. 979.

By motion to require the plaintiff to elect one and to strike out the other. *Jordan v. St. Louis Transit Co.*, 202 Mo. 426, 101 S. W. 11.

By motion to strike out the pleading. *Boelk v. Nolan*, 56 Ore. 229, 107 Pac. 689; *State v. Portland Gen. Elec. Co.*, 52 Ore. 502, 95 Pac. 722, 98 Pac. 160.

It is not ground for motion to dismiss or for judgment on the pleadings. *Watson v. San Francisco & H. B. R. Co.*, 50 Cal. 523.

The plaintiff should be required to separately state them. The court has no right, in such case, to ignore all the causes of action but one and determine the case on the sufficiency of the proofs as to that alone. *Page v. Page*, 43 Wash. 293, 86 Pac. 582.

and demurrer will not lie.²⁶ It cannot be taken advantage of by objection to the introduction of any evidence.²⁷ In passing on such a motion the sufficiency of the allegations with respect to any cause of action attempted to be set forth is not involved.²⁸ Failure to comply with an order directing a separate statement may be ground for striking out the pleading.²⁹

The objection is waived unless seasonably raised,³⁰ or by pleading to the merits,³¹ and is not available after judgment.³²

X. CONCLUSION.—At common law there were various forms of conclusion, depending on the nature and form of the action.³³

26. Cal.—*Astill v. South Yuba Water Co.*, 146 Cal. 55, 79 Pac. 594; *City Carpet, etc., Works v. Jones*, 102 Cal. 506, 36 Pac. 841. N. Y.—*Bass v. Comstock*, 38 N. Y. 21. S. C.—*Welborn v. Dixon*, 70 S. C. 108, 49 S. E. 232. Wis.—*Gunderson v. Thomas*, 87 Wis. 406, 58 N. W. 750; *Nichol v. Alexander*, 28 Wis. 118. Wyo.—*Kearney Stone Works v. McPherson*, 5 Wyo. 173, 28 Pac. 920.

Unless the failure to state them separately renders the complaint ambiguous, unintelligible, or uncertain. *Jacob v. Lorenz*, 98 Cal. 332, 33 Pac. 119.

A failure to separately state causes of action is not a misjoinder. *Bass v. Comstock*, 38 N. Y. 21.

27. *Wills v. Atchison, T. & S. F. R. Co.*, 133 Mo. App. 625, 113 S. W. 713; *Graves v. St. Louis, M. & S. E. R. Co.*, 133 Mo. App. 91, 112 S. W. 736.

28. *Benedict v. Thain*, 134 N. Y. Supp. 720; *Astoria Silk Works v. Plymouth Rubber Co.*, 110 N. Y. Supp. 175.

29. If plaintiff fails to comply with an order to separately state, his complaint should be stricken from the files. *Hall v. Cudahy*, 46 Colo. 324, 104 Pac. 415.

30. *Welborn v. Dixon*, 70 S. C. 108, 49 S. E. 232; *Cartin v. South Bound R. Co.*, 43 S. C. 221, 20 S. E. 979, 49 Am. St. Rep. 829.

Unless presented before the trial. *Gearity v. Strasbourger*, 118 N. Y. Supp. 257.

Where no motion to require separate statement is made. *Shepherd v. Baltimore & O. R. Co.*, 130 U. S. 426, 9 Sup. Ct. 593, 32 L. ed. 970.

The defect is waived unless taken advantage of by motion, and in such case the complaint must be treated as one cause of suit. *State v. Portland*

Gen. Elec., 52 Ore. 502, 95 Pac. 722, 98 Pac. 160.

It cannot be raised during the taking of testimony. *Bade v. Hibberd*, 50 Ore. 501, 93 Pac. 364.

Unless taken by demurrer. *Downs v. Hawley*, 112 Mass. 237.

31. *Paddock v. Simes*, 102 Mo. 226, 14 S. W. 746; *Christal v. Craig*, 80 Mo. 367; *Finnell v. Metropolitan St. Ry. Co.*, 159 Mo. App. 522, 141 S. W. 451.

Where the general issue is filed, plaintiff may prove either of two causes of action alleged in a single count. *Guianios v. De Camp Coal Mining Co.*, 147 Ill. App. 243; *East St. Louis C. R. Co. v. Reames*, 75 Ill. App. 28.

32. Failure to comply with the statute does not render the complaint fatally defective. It is sufficient to support a judgment, and should be treated as sufficient when not properly objected to. *Page v. Page*, 43 Wash. 293, 86 Pac. 582.

Declaring on two bonds in one count, if error, is not available after default and judgment. *International Hotel Co. v. Flynn*, 141 Ill. App. 532.

33. For various forms of conclusions see 1 Chit. Pl., 413; *Reed v. Inhabitants of Northfield*, 13 Pick. (Mass.) 94.

"In declaring on the common counts in an action of debt 'the usual conclusion in each count by reason whereof, etc., an action hath accrued, etc., is unnecessary, and the usual breach at the end will suffice.' 1 Saunders on Plead. and Ev. 497, side p. 405; *Gibb. Debt*, 414." *Somerville v. Grim*, 17 W. Va. 801.

In an action of debt on two bonds or two promissory notes it is unnecessary to add to each count the usual conclusion. *Somerville v. Grim*, 17 W. Va. 803.

Under the codes and practice acts of the various states no formal conclusion is necessary³⁴ other than the prayer for relief.

In Louisiana the code provides that the petition must end by conclusions analogous to the nature of the action to which the plaintiff has resorted.³⁵

XI. PRAYER FOR RELIEF.—A. NECESSITY FOR PRAYER AND EFFECT OF ITS OMISSION.—The codes generally provide that the complaint shall contain a demand for the relief to which plaintiff considers himself entitled.³⁷

Effect of Omission.—In some states it is held that, if the complaint contains no prayer for relief, the court has no power to grant any.³⁸

A declaration based on a penal statute was required to conclude with the words "against the form of the statute" in such case made and provided. *State v. Owsley*, 17 Mont. 94, 42 Pac. 105.

The use of those words is not necessary in a statutory action on the case to recover damages merely. *Reed v. Inhabitants of Northfield*, 13 Pick. (Mass.) 94.

34. In Maryland the statute provides that it shall not be necessary to state any formal conclusion to any declaration. Pub. Gen. Laws, art. 75, §4; *Wilms v. White*, 26 Md. 380.

A complaint based on a penal statute need not conclude with the words "against the form of the statute" in such case made and provided. *State v. Owsley*, 17 Mont. 94, 42 Pac. 105.

35. See XI, *infra*.

36. La. Code Pr., art. 172.

37. Ark.—Kirby's Dig., §6091. Cal. Code Civ. Proc., §426; *Johnson v. Polhemus*, 99 Cal. 240, 33 Pac. 908. Colo. Code, 1910, §55. Conn.—Gen. St., 1902, §607. Ga.—Petition must set forth the plaintiff's demand. Code, 1895, §4960. See *Booth v. State*, 131 Ga. 750, 63 S. E. 502. Idaho.—Rev. Codes, §4168. Ind.—Burns' Ann. St., 1908, §343. Ia. Code, §3559. Kan.—Gen. St., 1909, §5685; *Hiatt v. Parker*, 29 Kan. 765. Ky.—Must demand the specific relief to which the plaintiff considers himself entitled; and may contain a general prayer for any other relief to which plaintiff may appear entitled. Civ. Code, 1906, §90; *Louisville & N. R. Co. v. Adams*, 147 S. W. 384; *Miller v. Allen*, 104 Ky. 114, 46 S. W. 523;

Bowman v. Ray, 25 Ky. L. Rep. 2131, 50 S. W. 519. Minn.—Rev. Laws, 1905, §4127. Mo.—Rev. St., 1909, §1794; *Rush v. Brown*, 101 Mo. 586, 14 S. W. 735; *Bieh v. Vaughn*, 140 Mo. App. 619, 120 S. W. 618; *Vogelsong v. St. Louis Wood Fibre Plaster Co.*, 147 Mo. App. 578, 126 S. W. 804. Mont.—Rev. Code, 1907, §6532; *Donovan v. McDevitt*, 36 Mont. 61, 92 Pac. 49. Neb. Comp. St., 1911, §6666. Nev.—Comp. Laws, §3134. N. Y.—Code Civ. Proc., §481; *Consolidated Rubber Tire Co. v. Firestone Tire & Rubber Co.*, 120 N. Y. Supp. 128; *Simmons v. Blake*, 20 Haw. Pr. 484. N. C.—Rev., 1905 §467. N. D. Rev. Codes, 1905, §9852. Ohio.—Gen. Code, 1910, §11,305; *Giddings v. Barney*, 31 Ohio St. 80. Okla.—Comp. Laws, 1909, §5627. Ore.—L. O. L., §67. S. C.—Code Civ. Proc., §163. S. D.—Code Civ. Proc., §119. Tex. The nature of the relief which he requests of the court. *Sayle's Civ. St.*, art. 1191; *City of Houston v. Thomas Emery's Sons*, 76 Tex. 282, 13 S. W. 264; *Jordan v. Massey* (Tex. Civ. App.), 134 S. W. 804. The prayer is an essential part of the petition. *Burks v. Burks* (Tex. Civ. App.), 141 S. W. 337. Utah.—Comp. Laws, 1907, §2960. Wash.—Rem. & Ball. Ann. Codes & St., §258. Wis.—St., 1893, §2646; *Johns v. Northwestern Mut. Relief Assn.*, 87 Wis. 111, 58 N. W. 76. Wyo. Comp. St., 1910, §4379.

See N. J. Laws 1912, c. 231. Schedule A, §35, p. 390.

38. *Bowman v. Ray*, 21 Ky. L. Rep. 2131, 80 S. W. 516.

Where none is prayed. *Southern R. Co. v. State*, 116 Ga. 276, 42 S. E. 508.

As a rule, however, the omission of a prayer is not regarded as a fatal defect,³⁹ and will not affect the jurisdiction of the court.⁴⁰ Where omitted, it may ordinarily be supplied by amendment.⁴¹

B. RIGHT TO DEMAND DIFFERENT KINDS OF RELIEF.—Several demands for relief may be united in a single complaint.⁴² A complaint setting forth but one cause of action may ask for different relief against different defendants according as they are connected with such cause of action.⁴³

Prayer in the Alternative.—In some states relief may be prayed in the alternative,⁴⁴ while in others a contrary rule prevails.⁴⁵

C. FORM AND SUFFICIENCY.—As a rule no particular form of prayer is required, it being sufficient to clearly indicate the relief de-

39. *Presson v. Boone*, 108 N. C. 78, 12 S. E. 897.

In a suit upon account for money advanced, in view of the statute requiring the court to disregard defects not affecting the substantial rights of the adverse party. *Sannoner v. Jacobson & Co.*, 17 Ark. 31, 14 S. W. 458.

Where, upon the facts stated, it is clearly apparent to what judgment plaintiff would be entitled upon establishing such facts by competent evidence, the omission of the prayer is not fatal to the action, but is a mere irregularity curable by amendment. *Scott v. Vulcan Iron Works Co. (Okla.)*, 122 Pac. 186.

Is not ground for objection to the admission of any evidence. *Oklahoma Gas & Electric Co. v. Lukert*, 16 Okla. 397, 84 Pac. 1078.

That no judgment is asked is only matter of form, and is not ground for demurrer where a cause of action is stated. *Lowry v. Dutton*, 28 Ind. 473.

Does not render it subject to a demurrer for want of facts. *Donovan v. McDevitt (Mont.)*, 92 Pac. 49; *Fox v. Graves*, 46 Neb. 812, 65 N. W. 887; *Balle v. Moseley*, 13 S. C. 439.

40. *Eldon Ice & Fuel Co. v. Van Hooser (Mo. App.)*, 147 S. W. 161.

41. *Eldon Ice & Fuel Co. v. Van Hooser (Mo. App.)*, 147 S. W. 161.

42. May pray for an injunction and damages in an action based on a nuisance. *Emory v. Hazard Powder Co.*, 22 S. C. 476.

43. *Security Loan & Trust Co. v. Mattern*, 171 Ill. 128, 68 Pac. 482.

44. *Conn.*—*Craft Refrigerating Mach. Co. v. Quinnipiac Brewing Co.*, 63 Conn. 551, 29 Atl. 76. *Kan.*—*Hiatt v. Parker*, 29 Kan. 765. *Tex.*—*McIlhenny Co. v. Todd*, 71 Tex. 400, 9 S. W. 445;

Grabenheimer v. Blum, 63 Tex. 369; *Edgar v. Galveston City Co.*, 46 Tex. 421; *Merchants' & Farmers' Nat. Bank v. Johnson*, 49 Tex. Civ. App. 242, 108 S. W. 491.

Plaintiff may claim alternative relief based upon an alternative construction or ascertainment of his cause of action. Laws 1912, c. 231, Schedule A, §37, p. 391.

If plaintiff is not certain as to the specific relief to which he is entitled. See *Worth v. Kniekerbocker Trust Co.*, 152 N. C. 242, 67 S. E. 590.

For the recovery of property or its value. *Lillard v. Brannin & Brand*, 91 Ky. 511, 16 S. W. 349.

May pray for specific performance, or, if that is denied, for damages. *Mitchell v. Sheppard*, 13 Tex. 484; *Konnerup v. Frandsen*, 8 Wash. 551, 36 Pac. 493.

In a suit for specific performance of a contract for the sale of land, plaintiff may pray for compensation for his improvements if specific performance is refused. *Boze v. Davis' Admrs.*, 14 Tex. 331.

Where plaintiff is entitled to recover under the allegations preceding his first prayer, alternative prayers for other relief in case he was not so entitled to recover will be disregarded. *Hutcheson v. International & G. N. R. Co.*, 102 Tex. 471, 119 S. W. 85.

45. It is not a compliance with the code provision requiring the complaint to contain a demand for the judgment to which plaintiff supposes himself entitled, and may render the complaint subject to a motion to make more definite and certain. *Johns v. Northwestern Mut. Relief Assn.*, 87 Wis. 111, 58 N. W. 76.

sired.⁴⁶ In some states it is specifically provided that if the recovery of money or damages be demanded, the amount thereof shall be stated,⁴⁷ and if interest thereon be claimed, the date from which interest is to be computed.⁴⁸

Where There Are Several Counts.—In the absence of a statutory provision to the contrary,⁴⁹ a single prayer for judgment is ordinarily sufficient though the complaint contains several counts.⁵⁰ But there

46. "If there be in the complaint language showing the limits of plaintiff's claim, so that the defendant may not be misled, such an allegation serves the same practical purpose as a formal prayer for judgment, and is sufficient." *Pearce v. Butte Electric Ry. Co.*, 41 Mont. 304, 109 Pac. 275.

That the specific appropriate relief sought is not stated in the conclusion of the complaint is not ground for demurrer. *Acker v. McCullough*, 50 Ind. 447.

The allegation of facts entitling a party to affirmative relief is equivalent to a formal demand for such relief, or a general prayer in equity. *Parker v. Norfolk & C. R. Co.*, 119 N. C. 677, 25 S. E. 722.

"That, by reason of the premises plaintiff has been injured and damaged in the sum of two thousand (\$2,000) dollars, and his costs herein necessarily incurred," is sufficient. *Pearce v. Butte Electric Ry. Co.*, 41 Mont. 304, 109 Pac. 275.

An averment in conclusion that an injury was to the damage of plaintiff in a specified sum is sufficient. *Louisville, N. A. & C. R. Co. v. Smith*, 58 Ind. 575.

A complaint concluding "to the said plaintiffs' damages of three thousand dollars, and therefore they bring this suit," is not subject to the objection that it will not support a judgment because no relief is asked. *Tuolumne County Water Co. v. Columbia & Stanislaus Water Co.*, 10 Cal. 193.

Where complaint alleges a promise by a promissory note to pay a specified sum, and demands judgment for said sum and interest, the prayer is sufficiently specific. *Eaton v. Burns*, 31 Ind. 390.

See Florida Gen. St., 1906, §1448.

47. Cal.—Code Civ. Proc., §426; *Johnson v. Polhemus*, 99 Cal. 240, 33 Pac. 908. Colo.—Code, 1910, §55. Idaho.—Rev. Codes, §4168. Ind. Burns' Ann. St., 1908, §343. Ia.—Code,

§3559. Kan.—Gen. St., 1909, §5685; *Hiatt v. Parker*, 29 Kan. 765. Minn. Rev. Laws, 1905, §1127. Mont.—Rev. Code, 1907, §6532. Neb.—Comp. St., 1911, §6666. Nev.—Comp. Laws, §3134. N. C.—Rev., 1905, §167. N. D.—Rev. Codes, 1905, §6852. Ohio.—Gen. Code, 1910, §11,305. Okla.—Comp. Laws, 1909, §5627. Ore.—Lord's Laws, §67. S. D.—Code Civ. Proc., §119. Utah. Comp. Laws, 1907, §2960. Wash. Rem. & Ball. Anno. Codes & St., §258. Wis.—St., 1898, §2646. Wyo.—Comp. St., 1910, §4379.

Missouri.—The amount thereof, or such facts as will enable the defendant and the court to ascertain the amount demanded. Rev. St., 1909, §1794; *Rush v. Brown*, 101 Mo. 586, 14 S. W. 735; *Bick v. Vaughn*, 140 Mo. App. 619, 126 S. W. 618; *Vogel-song v. St. Louis Wood Fibre Plaster Co.*, 147 Mo. App. 578, 126 S. W. 804.

Failure to do so does not render the petition subject to a demurrer for want of facts. *Hiatt v. Parker*, 29 Kan. 765.

Nor is it ground for objecting to the admission of any evidence. *Oklahoma Gas & Electric Co. v. Lukert*, 16 Okla. 397, 84 Pac. 1076.

48. Kan.—Gen. St., 1909, §5685. Neb.—Comp. St., 1911, §6666. Ohio. Gen. Code, 1910, §11,305. Okla.—Comp. Laws, 1909, §5627. Wyo.—Comp. St., 1910, §4379.

49. In Missouri the statute provides that causes of action must be separately stated, with the relief sought for each cause of action. Rev. St., 1909, §1795.

50. When the same kind of relief is sought in each paragraph. *Louisville & N. R. Co. v. Adams*, 148 Ky. 513, 147 S. W. 384.

One prayer for judgment may include a sum based on all counts seeking a money remedy. Code, §3559; *Peregoy v. Wheeler*, 88 Iowa 732, 55 N. W. 462.

It is not necessary to insert a claim

may be a separate prayer for each count of the complaint.⁵¹

Defects of form in the prayer do not vitiate the pleading.⁵²

D. MUST BE GERMANE TO THE SUIT.—The prayer must be germane to the suit,⁵³ and relief cannot be granted upon it beyond that which the facts alleged authorize.⁵⁴ A prayer going beyond the obvious scheme and purpose of the complaint may be disregarded.⁵⁵ A prayer for general relief will be held to have reference to the relief which the facts alleged would authorize⁵⁶ and which the court has power to grant.⁵⁷

Effect of Unwarranted Prayer.—That a complaint contains a prayer for relief not warranted by the facts alleged does not render it bad.⁵⁸

for damages at the end of each count, but damages for all the causes of action in the several counts may be claimed at the end of the declaration. *American Bonding & T. Co. v. Milstead*, 192 Va. 683, 47 S. E. 853; *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. 53; *Postlewaite v. Wise*, 17 W. Va. 1.

It is not necessary to state the amount of damages claimed at the conclusion of each paragraph, but a statement of the amount demanded, at the conclusion of the complaint, is sufficient. *Spears v. Ward*, 48 Ind. 541; *Malady v. McNary*, 30 Ind. 273.

51. In *Nevada County & Sacramento Canal Co. v. Kidd*, 37 Cal. 282, it was held that a prayer in a particular count was applicable to that count only.

52. *Presson v. Boone*, 108 N. C. 78, 12 S. E. 897.

Are not ground for a demurrer for want of facts. *Balle v. Moseley*, 13 S. C. 433.

The omission of the word "dollars" is a harmless clerical error, and is not ground for a general objection to the introduction of evidence. *Stone v. St. Louis, L. M. & S. R. Co.*, 145 Mo. App. 298, 129 S. W. 1074.

That the prayer in a tort action demands judgment for a specific sum of money in the form proper in an action on contract is not ground for excluding evidence or dismissing the complaint, where defendant is not misled as to the nature of the action and the relief sought. *Hammond v. North Eastern R. Co.*, 6 S. C. 130.

The remedy is by motion to make more definite and certain. *Baker v. Armstrong*, 57 Ind. 189.

A motion for a more specific statement will not lie for any indefiniteness in the prayer or demand for judg-

ment. *J. F. Sieberling Co. v. Dujardin*, 38 Iowa 403.

53. *White v. North Georgia Electric Co.*, 136 Ga. 21, 70 S. E. 639.

If not, it may be eliminated on special demurrer. *White v. North Georgia Electric Co.*, 136 Ga. 21, 70 S. E. 639; *Pierce v. Middle Georgia Land & Lumber Co. (Ga.)*, 61 S. E. 1114.

54. *McIlhenny Co. v. Todd*, 71 Tex. 400, 9 S. W. 445, 10 Am. St. Rep. 753.

A prayer for equitable relief is of no avail unless the petition alleges facts upon which it may properly be granted. *Emanuel v. Barnard*, 71 Neb. 756, 99 N. W. 666.

55. *Hart v. Walton*, 9 Cal. App. 502, 99 Pac. 719.

Plaintiff must recover in the right in which he sues and upon the facts stated in his pleadings as the basis of such right, regardless of his prayer for relief. "A prayer for relief inconsistent with the facts stated as a basis for relief is of no value whatever." *Milliken v. Smoot*, 64 Tex. 171.

56. *Burks v. Burks* (Tex. Civ. App.), 141 S. W. 337.

57. Unless the contrary clearly appears from the language used. *Jordan v. Massey* (Tex. Civ. App.), 134 S. W. 804.

58. **U. S.**—*Erie City Iron Works v. Thomas*, 139 Fed. 995. **Cal.**—*Millsap v. Balfour*, 154 Cal. 303, 97 Pac. 668; *Bailey v. Dale*, 71 Cal. 34, 11 Pac. 804. **Ga.**—*Pierce v. Middle Georgia Land & Lumber Co.*, 61 S. E. 1114. **Ind.**—*Lovely v. Speisshoffer*, 85 Ind. 454; *Jessup v. Jessup*, 7 Ind. App. 573, 34 N. E. 1017. **Kan.**—*Updegraff v. Lucas*, 76 Kan. 450, 92 Pac. 680, 94 Pac. 121; *Hiatt v. Parker*, 29 Kan. 765. **N. Y.** *Wetmore v. Porter*, 92 N. Y. 76; *Pearce*

E. IS NOT PART OF THE CAUSE OF ACTION.—The prayer is no part of the statement of the cause of action,⁵⁹ and cannot aid in making

v. Knapp, 127 N. Y. Supp. 1100. **N. C.** *Presson v. Boone*, 108 N. C. 78, 12 S. E. 897.

It is only matter of form, and is not ground for demurrer where a cause of action is stated (*Goodall v. Mopley*, 45 Ind. 355), nor for objection to the introduction of any evidence (*Woodford v. Kelley*, 18 S. D. 615, 101 N. W. 1069).

Where the facts stated entitle plaintiff to any relief, a demurrer for want of facts will be overruled though they do not entitle him to the particular relief demanded. *Schenectady Contr. Co. v. Schenectady R. Co.*, 94 N. Y. Supp. 401; *Parker v. Pullman & Co.*, 36 App. Div. 208, 56 N. Y. Supp. 734; *Mackey v. Auer*, 8 Hun (N. Y.) 180.

The complaint will not be dismissed because it prays for a judgment to which plaintiff is not entitled. *Emery v. Pease*, 20 N. Y. 62.

"In an action for breach of contract an erroneous demand for relief, or a demand for damages predicated on an erroneous theory, does not deprive plaintiff of the relief to which he is entitled under the facts pleaded." *Williams v. Connors*, 53 App. Div. 599, 66 N. Y. Supp. 11.

If a justice of the peace has jurisdiction to grant any relief upon the facts alleged, it is immaterial that the complaint demands relief which the justice has no jurisdiction to grant. *Holden v. Warren*, 118 N. C. 326, 24 S. E. 770.

Wrong Theory.—That the prayer demands judgment on a wrong theory of the case does not render the petition demurrable. *Walker v. Fleming*, 37 Kan. 171, 14 Pac. 470.

Where the complaint states a good cause of action it will not be dismissed on demurrer because legal instead of equitable relief is demanded (*Kingston v. Walters*, 14 N. M. 368, 93 Pac. 700; *Mordecai v. Seignious*, 53 S. C. 95, 30 S. E. 717), nor because equitable rather than legal relief is demanded (*Donovan v. McDevitt*, 36 Mont. 61, 92 Pac. 49).

That damages are claimed by an incorrect measure is not reached by general demurrer. *Beidler v. Sanitary Dist.*, 211 Ill. 628, 71 N. E. 1118.

An erroneous claim for damages or an improper demand for relief does not render the complaint demurrable. *Hudson v. Archer*, 4 S. D. 128, 55 N. W. 1099.

It is immaterial that plaintiff does not demand the precise damages to which he is entitled, or that he mistakes the true rule of damages. *Colrick v. Swinburne*, 105 N. Y. 503, 12 N. E. 427.

That Plaintiff Asks For More Relief Than He Is Entitled To.—**Ga.**—*A. B. Cohn & Co. v. Brown*, 7 Ga. App. 395, 66 S. E. 1038. **Minn.**—*Minneapolis R. L. & M. R. Co. v. Brown*, 99 Minn. 384, 109 N. W. 817. **N. Y.**—*Sisson v. Barnum*, 118 N. Y. Supp. 664; *Woelf v. Barnes*, 46 Misc. 169, 93 N. Y. Supp. 219. **Wash.**—*Morrison v. Berlin*, 37 Wash. 600, 79 Pac. 1114; *Howard v. Seattle Nat. Bank*, 10 Wash. 280, 38 Pac. 1040, 39 Pac. 98.

A demand for greater or different relief than the facts alleged warrants does not render the complaint demurrable. *Hiles v. Johnson*, 67 Wis. 517, 30 N. W. 721; *Scheibe v. Kennedy*, 64 Wis. 564, 25 N. W. 646; *Tewksbury v. Schulenberg*, 41 Wis. 584.

Plaintiff may recover the relief to which the complaint shows he is entitled. *Golden Valley Cattle Co. v. Johnstone*, 21 N. D. 97, 128 N. W. 690; *Randall v. Johnstone*, 20 N. D. 493, 128 N. W. 687.

In New Jersey a demand for relief which the allegations of the complaint do not sustain may be objected to on motion or in the answering pleading, although the allegations may entitle the plaintiff to some other relief. *Laws* 1912, c. 231, Schedule A, §34, p. 390.

59. **Kan.**—*Rochester v. Wells Fargo & Co. Express*, 123 Pac. 729; *Updegraff v. Lucas*, 76 Kan. 456, 93 Pac. 630, 94 Pac. 121; *Smith v. Smith*, 67 Kan. 841, 73 Pac. 56; *Hiatt v. Parker*, 29 Kan. 765. **Ky.**—*Louisville & N. R. Co. v. Adams*, 148 Ky. 513, 147 S. W. 384. **Mont.**—*Leggat v. Palmer*, 39 Mont. 302, 102 Pac. 327; *Donovan v. McDevitt*, 36 Mont. 61, 92 Pac. 49. **Neb.**—*Fox v. Graves*, 46 Neb. 812, 65 N. W. 887. **N. Y.**—*Frick v. Freudenthal*, 90 N. Y. Supp. 344. **Ohio.**—*Culver v. Rodgers*, 33 Ohio St. 537. **S. C.**

out a case otherwise defectively stated,⁶⁰ or be considered in determining whether a cause of action is stated,⁶¹ or whether several causes of action are improperly joined,⁶² or whether more than one cause of action is stated,⁶³ or give character to the cause of action,⁶⁴ or be looked

Fairy v. Kennedy, 68 S. C. 250, 47 S. E. 138; *McMakin v. Fowler*, 34 S. C. 281, 13 S. E. 534; *Levi v. Legg*, 23 S. C. 282; *Balle v. Moseley*, 13 S. C. 439. Wis.—*North Side Loan & Bldg. Soc. v. Nakielski*, 127 Wis. 539, 106 N. W. 1097.

It is not a part of the pleading in the sense that it can be regarded as an allegation. *Northern Pac. R. Co. v. Myers-Parr Mill Co.*, 54 Wash. 447, 103 Pac. 453.

It is doubtful whether the pleader is bound or estopped by his prayer. *Smith v. Kimball*, 36 Kan. 474, 13 Pac. 801.

60. *Arrington v. Liscom*, 34 Cal. 365, 375; *Levi v. Legg*, 23 S. C. 282.

61. *Laekawanna Coal & Iron Co. v. Long*, 231 Mo. 605, 133 S. W. 35; *Randall v. Johnstone*, 20 N. D. 493, 128 N. W. 687.

"The right to sustain the action upon the facts alleged does not depend upon the prayer for judgment." *Winsted Bank v. Webb*, 39 N. Y. 325.

62. Whether they are such as can be joined. *Worth v. Knickerbocker Trust Co.*, 152 N. C. 242, 67 S. E. 590.

63. *Golden Valley Land & Cattle Co. v. Johnstone*, 21 N. D. 97, 128 N. W. 690; *Randall v. Johnstone*, 20 N. D. 493, 128 N. W. 687.

On the question of whether the complaint states more than one cause of action, it is immaterial how many forms of relief are asked. *Pollitz v. Wabash R. Co.*, 127 N. Y. Supp. 782.

That plaintiff asks for unnecessary or improper relief does not of itself show that more than one cause of action is stated. *Seering v. Black*, 140 Wis. 413, 122 N. W. 1055.

Where the facts pleaded show a single cause of action, the prayer cannot operate to make two. *South Bend Chilled Plow Co. v. George C. Cribb Co.*, 105 Wis. 443, 81 N. W. 675.

A mere prayer for relief cannot make a complaint multifarious. *Hiles v. Johnson*, 67 Wis. 517, 30 N. W. 721.

"In testing a complaint to determine whether it is single or double as regards primary rights, the different ob-

jects in view by the pleader, as indicated by the prayer for relief, are not controlling. They are of no significance whatever except to aid in construing the allegations of the pleader and in clearing up obscurities that may exist, as to whether he intended to state facts showing a violation of distinct primary rights, or not. When there is no obscurity in that regard, the statement of facts upon which the prayer for relief is based alone speaks, and if the language shows presentation for adjudication of a single controversy, it cannot be enlarged by what follows in the prayer for relief even though it be appropriate to several distinct causes of action." *South Bend Chilled Plow Co. v. George C. Cribb Co.*, 105 Wis. 443, 81 N. W. 675.

64. *Minneapolis, R. L. & M. R. Co. v. Brown*, 99 Minn. 384, 109 N. W. 817; *McMakin v. Fowler*, 34 S. C. 281, 13 S. E. 534.

The prayer cannot control the legal effect of the facts alleged in the charging part of the petition. *Wilks v. Kreis* (Tex. Civ. App.), 134 S. W. 838.

It may be considered in determining the nature of the action, but is not controlling and may be disregarded when inconsistent with the nature of the cause of action clearly shown by the rest of the pleading. *Sweeney v. United Underwriters' Co.*, 25 S. D. 1, 124 N. W. 1107.

"It is the statement of facts, and not the prayer contained in the petition, which gives character to the action as being one in which the parties are or are not entitled to a jury trial, or an appeal." *Corry v. Gaynor*, 21 Ohio St. 277.

Whether the action is local or transitory and the question of jurisdiction to try it is to be determined, not by the remedy requested, but by what the facts alleged in the complaint entitle the plaintiff to receive. *Smith v. Allen*, 18 Wash. 1, 50 Pac. 783.

Whether Legal or Equitable.—It is not decisive of the legal or equitable character of the action. *O'Brien v. Fitzgerald*, 143 N. Y. 377, 38 N. E.

to in support of the judgment;⁶⁵ nor is it conclusive on the question whether an amended pleading states a different cause of action than that set up in the original.⁶⁶ It may, however, indicate the object which the plaintiff seeks to accomplish,⁶⁷ and be considered in determining the cause of action intended to be stated,⁶⁸ and the subject-

371; *Bell v. Merrifield*, 109 N. Y. 202, 16 N. E. 55; *Williams v. Slote*, 70 N. Y. 601; *Kuntz v. Schmugg*, 90 N. Y. Supp. 933; *Zeiser v. Cohn*, 44 Misc. 462, 90 N. Y. Supp. 66; *Marie v. Garrison*, 13 Abb. N. C. (N. Y.) 210, 317.

That the complaint contains a prayer for equitable relief does not make the action one in equity, where no facts are stated warranting such relief. *Fischer v. Laack*, 76 Wis. 313, 45 N. W. 104.

Where the complaint contains no averments showing any right to equitable relief, the case is not of equitable cognizance though there is a prayer for injunction. *Fischer v. Laack*, 76 Wis. 313, 45 N. W. 104.

65. An amendment to the prayer alone will not authorize a judgment for a sum greater than that shown to be due by the allegations of the complaint. *Leggat v. Palmer*, 39 Mont. 302, 102 Pac. 327.

66. *Fairy v. Kennedy*, 68 S. C. 250, 47 S. E. 138.

It is not conclusive on the question whether an amended petition changes the cause of action first stated that it closes with a prayer materially different from that of the original petition, where the two pleadings are otherwise alike. *Bick v. Dixon*, 148 Mo. App. 703, 129 S. W. 254.

67. *Henry Lochte Co. v. Lefebvre*, 124 La. 244, 50 So. 26.

The theory of the pleading. *Borror v. Carrier*, 34 Ind. App. 353, 73 N. E. 123.

The theory of the pleader and the specific purpose of the suit. *Wishek v. Becker*, 10 N. D. 63, 84 N. W. 590.

It may show what kind of a case the plaintiff supposes he has made, and the kind of relief to which he conceives himself entitled. *Arrington v. Liscom*, 34 Cal. 365, 375.

Though it does not limit or measure the right of recovery, it may be considered in determining the relief actually sought by the pleader. *Rochester v. Wells Fargo & Co. Express* (Kan.), 123 Pac. 729.

It indicates the particular adjudication which plaintiff wishes the court to make, and fixes a limit beyond which the court is not authorized to go in making its judicial award. *Jordan v. Massey* (Tex. Civ. App.), 134 S. W. 804.

The purpose of the statutory provision requiring a demand for relief is to appraise the opposite party of the precise nature of the demand in order that he may come prepared to meet it, and defendant has a right to suppose that the case will be tried on the theory indicated by the facts as stated and the relief demanded. *Nevada County & Sacramento Canal Co. v. Kidd*, 37 Cal. 282.

68. The nature of the action. *Elias v. Schweyer*, 27 App. Div. 69, 50 N. Y. Supp. 180; *Sweeney v. United Underwriters' Co.*, 25 S. D. 1, 124 N. W. 1107.

The character of the proceeding and the relief that may be accorded. *Bick v. Dixon*, 148 Mo. App. 703, 129 S. W. 254.

Where the complaint is ambiguous, it may be resorted to for the purpose of ascertaining his intention, but it cannot control the nature of the action as against a clearly expressed intention to the contrary. *Frick v. Freudenthal*, 90 N. Y. Supp. 344.

Where the facts alleged leave doubt as to the cause of action the pleader intended to present. *North Side Loan & Bldg. Soc. v. Nakielski*, 127 Wis. 539, 106 N. W. 1097; *Topping v. Parish*, 96 Wis. 378, 71 N. W. 367; *Gillett v. Treganza*, 13 Wis. 472.

It may be looked to to determine the nature of the action only where there is an actual doubt on the facts set forth or the statements made. *North Side Loan & Bldg. Soc. v. Nakielski*, 127 Wis. 539, 106 N. W. 1097; *Bailey v. Aetna Ins. Co.*, 77 Wis. 336, 46 N. W. 440.

Where the facts alleged may constitute two or more causes of action, and authorize different judgments, the prayer may determine the nature of

matter in controversy,⁶⁹ and may limit the relief which may be granted.⁷⁰

Allegations of fact in a prayer will be given the same force and effect as though they appeared in the body of the pleading.⁷¹

F. AMENDMENT.—The prayer may ordinarily be amended,⁷² and its omission supplied by amendment.⁷³

XII. SIGNATURE.—The pleading must be signed by the plaintiff or his attorney.⁷⁴

the action. *Nevada County & Sacramento Canal Co. v. Kidd*, 37 Cal. 282.

“Where the facts stated entitle the plaintiff to elect between two remedies, to either of which the facts show him to be entitled, the prayer may determine the character of the action, because it is itself an election.” *Corry v. Gaynor*, 21 Ohio St. 277.

Whether It Is At Law or in Equity. *Minn.—First Div. St. P. & P. R. Co. v. Rice*, 25 Minn. 281. *N. Y.—Cody v. First Nat. Bank*, 63 App. Div. 199, 71 N. Y. Supp. 277; *Swart v. Boughton*, 35 Hun 281. *Ore.—Thompson v. Hibbs*, 45 Ore. 141, 76 Pac. 778.

Where the facts stated would support an action either at law or in equity. *O'Brien v. Fitzgerald*, 143 N. Y. 377, 38 N. E. 371; *Zeiser v. Cohn*, 44 Misc. 462, 90 N. Y. Supp. 66.

Where a petition states facts sufficient to entitle plaintiff to both legal and equitable relief, and prays relief, a part of which only can be had at law, but all of which can be had in equity, the pleader will be held to have intended to invoke the chancery, and not the common-law, powers of the court. *Ames v. Ames*, 75 Neb. 473, 106 N. W. 134.

69. *Jordan v. Massey* (Tex. Civ. App.), 134 S. W. 804.

70. It is an essential part of the petition and will determine the character of the order or decree which the court is called upon to render. *Jordan v. Massey* (Tex. Civ. App.), 134 S. W. 804.

“Though mere matter of form is not regarded, yet, when the plaintiff by the prayer of the petition asks a particular or special relief, which is consistent with the case stated, and there is no prayer for general relief, the special prayer must be regarded as evidencing the nature and object of the suit, and in this respect as giving character to it; and the plaintiff will not

in general be entitled to a different relief from that which he asked, for the presumption is that the plaintiff best knows the nature of his case and the injury he has sustained.” *Hogan v. Kellum*, 13 Tex. 399, quoted and followed in *City of Houston v. Emery*, 76 Tex. 282, 13 S. W. 264.

See the title “Judgments.”

71. *First Nat. Bank v. Robinson* (Tex. Civ. App.), 124 S. W. 177.

72. *Newman v. Covenant Mut. Ins. Assn.*, 76 Iowa 56, 40 N. W. 87.

So as to demand other and different relief consistent with the cause of action pleaded. *Donovan v. McDevitt*, 36 Mont. 61, 92 Pac. 49; *North Side Loan & Bldg. Soc. v. Nakielski*, 127 Wis. 539, 106 N. W. 1097.

It is not error to permit a trial amendment so as to ask for an accounting and general relief instead of a money judgment. *Walsh v. McKeen*, 75 Cal. 519, 17 Pac. 678.

To Conform the Relief to the Facts Proved.—*Culver v. Rodgers*, 33 Ohio St. 537.

The court has discretionary power to permit an amendment to conform to the proofs, but should not allow an amendment after verdict so as to demand relief covering issues not litigated. *Nevada County & Sacramento Canal Co. v. Kidd*, 37 Cal. 282.

73. See X, A, *supra*.

74. *Ala.—Code*, 1907, §5327; *Browder v. Gaston & Wellborn*, 30 Ala. 677. *Cal.—Code Civ. Proc.*, §446; *Dixey v. Pollock*, 8 Cal. 570; *Canadian Bank of Commerce v. Leale*, 14 Cal. App. 307, 111 Pac. 759. *Ga.—Code*, 1895, §4960. *Ind.—Burns’ Ann. St.*, 1908, §364. *Ky. Voorheis v. Eiting*, 15 Ky. L. Rep. 161, 22 S. W. 80. *La.—Code Prac.*, art. 172. *Minn.—Rev. Laws*, 1905, §4142. *Neb. Comp. St.*, 1911, §6685; *In re Estate of Graff*, 86 Neb. 535, 125 N. W. 1091. *Nev.—Comp. St.*, §3146. *N. Y.—By the attorney.* *Code*

Signature by an attorney in fact has been held to be insufficient,⁷⁵ but is expressly permitted by statute in Louisiana.⁷⁶

A signature in the partnership name of the attorneys is sufficient.⁷⁷

Form of Signature.—It has been held to be sufficient if the attorney's name is printed at the end of the pleading,⁷⁸ or is stamped thereon with a rubber stamp.⁷⁹

Place of Signature.—Failure to sign at the customary place is not jurisdictional.⁸⁰ Signing a verification at the end of the pleading has been held to be sufficient.⁸¹

Civ. Proc., §520. N. D.—Rev. Codes, 1905, §6866. Okla.—Comp. Laws, 1909, §5647. Pa.—Act May 25, 1887, §3 (P. L. 271), 3 Purdon's Dig. 3624; Kelly v. Herb, 147 Pa. 563, 23 Atl. 889. S. C.—Code Civ. Proc., §177. S. D.—Code Civ. Proc., §133. Tex. Sayle's Civ. St., art. 1182. Utah. Comp. Laws, 1907, §2983; West Mountain Lime & Stone Co. v. Danley, 111 Pac. 647. Wash.—Rem. & Ball. Ann. Codes & St., §231. Wis.—Rev. St., 1898, §2664. Wyo.—Comp. St., 1910, §4422.

Not necessary in justices' courts. Montgomery v. Superior Court, 68 Cal. 407, 9 Pac. 720.

Action By the State.—The statute applies to the complaint in an action by the state. State v. Chadwick, 10 Ore. 423.

Copies of the instrument sued on which are required to be attached to the plaintiff's statement "must either be signed by the plaintiff or his attorney, or it must be stated in the statement of claim that true copies are hereto attached and made part of this statement, so as to make them part of the signed statement." International Sav. & Trust Co. v. Printz, 32 Pa. Co. Ct. 611.

A statement is insufficient where, though it is signed, a copy of the instrument sued on on the back of such statement is not. Medler v. Wadlinger, 12 Pa. Co. Ct. 473.

In an action by a bank the fact that the signature of plaintiff's cashier to the statement of claim was not followed by the word "cashier" was held not to be ground for reversing a judgment where such signature was followed by a scroll recognized among banks as the equivalent of the word "cashier." Brooks v. Merchants Nat. Bank, 125 Pa. 394, 17 Atl. 418.

Authority of Attorney.—That an attorney has been appointed and continues signed as judge does not preclude him from signing a statement as plaintiff's attorney before he takes the oath of office and assumes the duties thereof. That the statement is filed after he assumes such duties is immaterial. Kelly v. Herb, 147 Pa. 563, 23 Atl. 889.

Where the complaint in an action by the state is signed by an attorney having no authority to institute the suit, the effect is the same as though there was no signature and the objection is waived by answering and proceeding to trial on the merits. Stato v. Chadwick, 10 Ore. 423.

75. The statute refers to attorneys at law only. Kelly v. Herb, 147 Pa. 563, 23 Atl. 889.

76. Code Pr., art. 172.

77. Zimmerman v. Wead, 18 Ill. 304.

78. Is not ground for striking out the judgment roll. Hancock v. Bowman, 49 Cal. 413.

79. Streff v. Colteaux, 64 Ill. App. 179.

80. In re Estate of Graff, 86 Neb. 535, 125 N. W. 1091.

81. In re Estate of Graff, 86 Neb. 535, 125 N. W. 1091; Barrett v. Joslynn, 9 Misc. 407, 29 N. Y. Supp. 1070; Harrison v. Wright, 1 N. Y. St. 736.

The statute is complied with where the verification is signed by an officer of the plaintiff corporation. West Mountain Lime & Stone Co. v. Danley (Utah), 111 Pac. 647.

Where the verification is signed, and no attempt is made to take advantage of the defect by motion to strike or otherwise, the judgment will not be reversed. Conn v. Rhodes, 26 Ohio St. 644.

Not Part of the Pleading.—The subscription is no part of the pleading.⁸²

Effect of Failure To Sign.—It is generally held that a failure to sign is not jurisdictional and does not vitiate the pleading, but is merely an irregularity⁸³ which is curable by amendment,⁸⁴ and is waived if not taken advantage of in the proper manner and at the proper time.⁸⁵

The remedy for failure to sign is generally by motion to strike out the pleading.⁸⁶

XIII. VERIFICATION.—This subject is fully treated in a separate article.⁸⁷

XIV. FILING AND SERVICE.—The pleading must be filed⁸⁸ and served⁸⁹ within the time prescribed by law.

82. *State v. Chadwick*, 10 Ore. 423.

83. Cal.—*Dixey v. Pollock*, 8 Cal. 570; *Canadian Bank of Commerce v. Leale*, 14 Cal. App. 307, 111 Pac. 759. See also *Smith v. Dorn*, 96 Cal. 73, 30 Pac. 1024. Ky.—See *Carr v. Calvert's Admr.*, 31 Ky. L. Rep. 303, 102 S. W. 282. S. C.—*Clemson Agricultural College v. Pickens*, 42 S. C. 511, 20 S. E. 401.

Failure to sign an amended declaration is not ground for arresting the judgment, where the name of plaintiff's attorney is of record and signed to the original declaration and the amended declaration in its introductory part gives the name of the plaintiff "by his attorney," and defendant pleads generally without objection. *Huling v. Florida Sav. Bank*, 19 Fla. 695.

84. Cal.—*Dixey v. Pollock*, 8 Cal. 570; *Canadian Bank of Commerce v. Leale*, 14 Cal. App. 307, 111 Pac. 759. Ind.—*Sims v. Dame*, 113 Ind. 127, 15 N. E. 217. Kan.—*Manspeaker v. Bank of Topeka*, 4 Kan. App. 768, 46 Pac. 1012. Tex.—*Boren v. Billington*, 82 Tex. 137, 18 S. W. 101. Utah.—*West Mountain Lime & Stone Co. v. Danley*, 111 Pac. 447. Va.—*Mahmyre v. Smyth*, 105 Va. 736, 62 S. E. 930.

In *Smith v. Doran*, 96 Cal. 73, 30 Pac. 1024, the refusal to permit defendant to answer or demur after the complaint had been signed at the trial was held not to be prejudicial, where he was permitted to file an amended answer at the close of plaintiff's evidence, and the case was tried thereon. The court intimated, but did not decide, that the addition of the signature was not such an amendment as would entitle defendant to plead anew.

85. *West Mountain Lime & Stone Co. v. Danley* (Utah), 111 Pac. 647.

If not taken by rule. *Voorheis v. Eiting*, 15 Ky. L. Rep. 161, 22 S. W. 80.

By answering and going to trial on the merits. *State v. Chadwick*, 10 Ore. 423.

It cannot be taken advantage of for the first time on appeal. *Louisville, N. A. & C. R. Co. v. Peck*, 99 Ind. 68; *Lowry v. Dutton*, 28 Ind. 473; *In re Estate of Graff*, 86 Neb. 535, 125 N. W. 1091.

86. It is not ground for dismissing the action. *Fritz v. Barnes*, 6 Neb. 435.

Not by motion to quash the summons. *Sims v. Dane*, 113 Ind. 127, 15 N. E. 217.

87. See the title "Verification."

88. See the statutes of the various states, and *Young v. Young*, 18 Minn. 90; N. J. Pr. Act, §§93, 99, 100; Pamph. L. 1903, 284, et seq.; *Wolf v. Watson Stillman Co.*, 79 N. J. L. 284, 75 Atl. 436; *Zeek v. Rockaway Rolling Mill*, 79 N. J. L. 123, 74 Atl. 442.

The declaration must be filed within a year after the return of the writ. *Wolf v. Watson Stillman Co.*, 79 N. J. L. 284, 75 Atl. 436.

An application for additional time is too late when made after the expiration of the year from the return of the summons within which it should have been filed. *Wolf v. Watson Stillman Co.*, 79 N. J. L. 284, 75 Atl. 436.

In Pennsylvania the statement of claim must be filed of record before it is served. *Medler v. Wadlinger*, 12 Pa. Co. Ct. 473.

89. See the statutes of the various states.

The endorsement upon the complaint by the clerk of the fact of its filing is merely evidence of that fact,⁹⁰ but not the exclusive evidence thereof.⁹¹ Failure to make such an endorsement is a mere clerical omission and does not invalidate the judgment.⁹²

Clerical errors in the copy served will not vitiate the pleading.⁹³

XV. GENERAL OBSERVATIONS.—Difficulties of Getting "Facts in Plain and Concise Language."—The requirement of the facts constituting plaintiff's cause of action in plain and concise language without repetition, with an explicit claim of damages, is somewhat delusive in its simplicity. Abstract right is pure demandableness with nothing demanded. Pure right is as practically hard to find as pure time or pure space. The common law system began with its specific actions and the definite idea of correcting some definite line of wrong by means of each one of them.⁹⁴

Equity as a body of supplementary remedies proceeded in recognition of property rights which were in need of some form of equitable assistance and we have accordingly the bill of peace, the bill of interpleader, bill of *quia timet*, bills for injunction against waste, trespass and nuisance, etc.,⁹⁵ not as separate and abstract grounds of action like those under the common law writs, but more or less defined classes of bills. At common law and in equity there was thus a subdivision of the rights which made them easier to grasp than when they are all thrown into and brought under one phrase, a cause of action.

Rights and Remedies Remain Unchanged.—The rights themselves are assumed to be unchanged, and remedies not altered.⁹⁶

Are Still Called Legal and Equitable.—The rights and remedies are still properly denominated legal or equitable as the case may be.⁹⁷

Plaintiff's statement of claim must be served. Service before filing is a nullity. *Medler v. Wadlinger*, 12 Pa. Co. Ct. 473.

90. *Betancourt v. Eberlin*, 71 Ala. 461.

91. "When there is no countervailing evidence, and the complaint is found with the original file of the papers in the cause, from which it must be transcribed when the final record is made up, forming part of it, the fact of filing is shown satisfactorily." *Betancourt v. Eberlin*, 71 Ala. 461.

92. *Betancourt v. Eberlin*, 71 Ala. 461.

93. Will not render the complaint demurrable. *Hall v. Marvin*, 126 N. Y. Supp. 206, and cases cited.

94. See Street's *Foundations of Legal Liability*, III, 29.

95. Keener's *Cases on Equity*, chapter headings. And see Vol. I of this series, "Introduction."

96. *Ind.*—*Matlock v. Todd*, 25 Ind.

128. *Mo.*—*Meyers v. Field*, 37 Mo. 434. *Neb.*—*Hopkins v. Washington Co.*, 56 Neb. 596, 77 N. W. 53. *N. Y.* *Cole v. Reynolds*, 18 N. Y. 74. *Ohio.* *Kloun v. Bradstreet*, 7 Ohio St. 322; *Lamson v. Pfaff*, 1 Handy 449. *Wis.* *Dickson v. Cole*, 34 Wis. 621.

97. *Pomeroy's Code Rem.*, 4th ed., p. 12, citing *Anderson v. War Eagle Min. Co.*, 8 Idaho 789, 72 Pac. 671.

Only the action is a "civil action" and its "forms" abolished. "Action shall mean a civil proceeding commenced by a writ or in such other manner as may be prescribed by the rules of court, and shall not include a criminal proceeding by the crown." Eng. Judicature Act, 1873, §100.

The Change Is in Doing Away With Terms.—The change consists in doing away with the classification by forms of writs and of allegations and in the freer joinder of both parties and causes of action. *Dak.*—*Gress v. Evans*, 1 Dak. 371. *Ind.*—*Troost v. Davis*,

General "Cause of Action" Harder to Identify Than a Specific One. A cause of action in general is evidently harder to analyze and identify than one in ejectment, debt, account, covenant, detinue, trover, assumpsit, replevin, trespass, trespass on the case, or for rescission or reformation or for foreclosure in equity. The actual rights and remedies remaining the same as we have seen, are still properly described by the same names as when each had its own form of writ and of declaration which must "correspond with the process."⁹⁸ This latter requirement, of course, is gone, as the complaint either precedes or accompanies summons, and the genuine original writ under the king's great seal and designed to confer jurisdiction is wholly a thing of the past. For the exhibition of the right itself which we now call "cause of action," perhaps no method would be more effectual than to take up the leading forms of action as is done in the old books on pleading and show what was necessary to entitle a plaintiff to bring each of them. The pleader might rest assured that if his statement brought him within the substance of one of the old forms of action it would be sufficient. Accomplished code practitioners frequently test their facts in a law action by first deciding what form they would take at common law and then putting them in substance as they would be in that action. A recommendation of a similar operation under the present procedure in England is given by Mr. Odgers,⁹⁹ though he does not attempt to carry it out himself. A more direct application of the code will be attempted here.

Long before the forms of actions were abolished, a subdivision of the rights involved into delictual and contractual had become familiar.¹

Personal, Proprietary, Contractual and Delictual Rights.—Proceeding on the basis of rights we shall include a third class of proprietary ones, since there are included under "civil actions" those which are brought for the ascertainment of doubtful as well as of disputed rights.²

Necessary Allegations, Those Required To Develop the Right and Wrong. The allegations of the statement of the cause of action should then include all the material, that is, the necessary, facts to show, first, a right proprietary or personal, contractual or delictual and its inherence in the plaintiff or plaintiffs; second, a wrong against that right, or a risk of its failure; third, responsibility for such wrong on the part of the defendant or defendants, or at least necessity for bringing

31 Ind. 34. **Ia.**—*Kramer v. Rehman*, 9 Iowa 114. **Ky.**—*Garret v. Gault*, 13 B. Mon. 378. **Mo.**—*Rogers v. Peniston*, 16 Mo. 432. **Nev.**—*Crosier v. McLaughlin*, 1 Nev. 348. **N. Y.**—*N. Y. Cent. Ins. Co. v. Nat. Protection Ins. Co.*, 14 N. Y. 85; *Crary v. Goodman*, 12 N. Y. 266. **Ohio.**—*Chinn v. Trustees*, 32 Ohio St. 236. **S. D.**—*Sykes v. First Nat. Bank*, 2 S. D. 242, 49 N. W. 1158. **Wis.**—*Mowry v. Hill*, 11 Wis. 146. See *supra*.

98. *Chit. Pl.*, 16 Am. ed. 1, 341. And see the title "Cause of Action."

99. *Odger's Pl.* p. 191.

1. *Chit. Pl.*, 16 Am. ed. 1, *110. *Just. Inst.* IV, Title VI.

2. *Pomeroy's Eq.*, Vol. III, §1156. **Cal.**—*Toland v. Earl*, 129 Cal. 148, 61 Pac. 914, 79 Am. St. Rep. 400; *Rosenberg v. Frank*, 58 Cal. 387. **Ill.**—*Mansfield v. Mansfield*, 203 Ill. 92, 67 N. E. 497. **Me.**—*Baldwin v. Bean*, 59 Me. 481. **Mo.**—*First Baptist Ch. v. Robberson*, 71 Mo. 326. **N. J.**—*Hoagland v. Cooper*, 65 N. J. Eq. 407, 56 Atl. 705. **N. Y.**—*Bliven v. Seymour*, 88 N. Y. 469.

each of them before the court for the full vindication and establishment of plaintiff's rights; fourth, the amount of damages or extent of harm or injury claimed. All fair intendments, however, are in favor of the pleader and frequently he is safer to put his case in general terms rather than attempt a detailed statement.³

Material Facts and Not Evidence of Them.—What shall be deemed fact and what evidence of fact which is not to be stated is one of the prime difficulties of the code pleader. The common law permitted the pleading of contracts, agreements and instruments according to their legal effect.⁴ The requirement by the code of the facts constituting plaintiff's cause of action might be thought sufficient to do away with such a method of pleading, even without the specific provision for copies which is found in most of the codes.

Pleading by Common Counts and By Legal Effect Permitted.—If the sole object is to inform the court and the adversary of plaintiff's claims, a pleading according to legal effect claimed, or by a common count, would seem to do so more briefly and clearly than a plea in *habe verba* or of detailed facts and transactions. And the use of the common counts is still frequent.

Immaterial, Evidentiary and Operative Facts Hard To Separate.—In legal as in scientific investigations, one principal difficulty is to separate the vital facts from the connected but unimportant ones. In legal disputes the facts that bestow or take away rights are alone essential. They are usually imbedded in a mass of details which have no effect one way or the other upon the rights in dispute. If these wholly inconclusive matters can be separated from those bearing legal consequences, the attention of court, counsel and parties can be concentrated upon the latter and hope of a successful termination of the contest may be indulged. The single issue of the common law pleader was more of an ideal than a reality, at least after the Statute of 4th Anne,⁵ and probably before, but the constant holding up of such an ideal tended to help towards the definiteness necessary to success in disengaging the real elements of the controversy.

Difficulty Increased Under the Code.—This result is now sought to be reached by the requirement of the material facts, and of these in a summary form,⁶ and of these only.⁷ These "material" facts are also the "ultimate facts" of Dr. Hammond,⁸ the operative facts of Mr.

3. *Canton Nat. Bank v. Am. Bonding & Trust Co.*, 111 Md. 41, 73 Atl. 684, holds bad a declaration under the Maryland code which attempted in a suit against a cashier's surety who was to answer for the cashier's acts amounting to larceny, to set out in detail the facts constituting the larceny claimed, because certain necessary elements of larceny were omitted. The court indicates that a general allegation of larceny of the funds would have been good, as was held in the case of *Am. Bonding & Trust Co. v. Milwaukee Harvester Co.*, 91 Md. 733, 48 Atl. 72.

4. *Chit. Pl.*, I, 312.

5. *Tidd's Pr.*, Vol. I, 608.

6. *Order XIX R. 4. Yearly Prac. Sup. Ct. (Eng.)*, 1912, p. 224.

7. *Order XIX R.*, 4, above.

8. *Hammond's Blackstone*, III, pp. 187, 415.

Phillips,⁹ and are evidently those carrying appreciable consequences to the rights under dispute.

Technical Terms of the Common Law Still Needed and Used.—That the allegations of these facts may be full enough to carry the necessary information and exact enough to furnish a basis for the use of evidence and also a record showing what is *res adjudicata* as a result, and at the same time concise enough to answer the code requirements, a command of the technical terms of the common law pleader is necessary as well as permission to use very general ones except where the requirements of adequate information as to the matter of the dispute call for a more detailed statement, as for instance, the use of general allegations of ownership unless special circumstances make the facts as to the origin of the ownership material.¹⁰ The real issue being only as to title, if defendant has not been misled to his prejudice, a variance of proof from title alleged is not deemed material.¹¹

Immaterial, Evidentiary and Operative Facts Explained.—The facts connected with legal contentions may then be divided into: First, the connected but wholly immaterial ones which have no bearing in any way upon the rights of the parties and merely help to furnish picturesque details which a lay narrator might elaborate upon; second, the merely evidentiary facts which do not of themselves cause or control the investiture or divestiture of rights, but which may be used to show the existence of the "material," "ultimate" or "operative" facts which do so control rights; third, the class of facts which, as soon as they are sufficiently established, the law makes effective to control rights. These last are the ones which the pleader must put in his complaint.

Our system tends to turn the allegation of them into general formulae which statutory and court rules seek to make definite and clear, sometimes reducing them to a common count or a mere endorsement of the nature of the claim upon a summons to be heard without further pleading, as we have seen. Especially is this last true of commercial cases.¹²

9. Phil. Code Pl., §145.

10. Pledge & Son v. Pomfret, 74 L. J. Ch. 357.

Planet, etc., Co. v. St. Louis, etc., R. Co., 112 Mo. 616, 22 S. W. 919, holds that mere allegation of ownership in fee of land to which injury is threatened is sufficient in that respect where plaintiff is asking injunction, but petition held deniable as asking only for equitable relief and showing existence of facts giving an adequate legal remedy. It cites as to naked allegation of ownership. See, Keer v. Simmons, 82 Mo. 269; Murphy v. Pratt, 42 Mo. 247.

11. Ziegler v. Creditors, 49 La. Ann. 144, 21 So. 666.

12. "In actions transferred to the commercial list the practice as to pleadings is fully dealt with in Mr. Theobald Mathew's Practice of the Commercial Court. . . . The delivery of pleadings is dispensed with wherever possible, and if pleadings are necessary at all they are extremely brief and concise and are called 'points of claim' and 'points of defense.'" Yearly Prac. Sup. Ct., 1912, p. 220, note.

English Rules as to Statements. The English rules as to statements of claim are summarized in the Yearly Practice of the Sup. Court for 1912, Vol. I, p. 225, as follows: "All necessary particulars must be stated in

Difference Between Operative Facts and Conclusions of Law.—The difficulty in distinguishing the merely “evidentiary” facts which are not to be pleaded from the “operative” facts which are, is even augmented when we go to the other side and attempt to distinguish these “operative” facts from conclusions of law. The difficulty is of the same nature. It arises in the one case from the circumstance that often the operative fact is proved directly and the evidence is therefore identical with the pleading, the fact stated being at once “evidentiary” and “operative.” A good example of this is the case in which the allegations of defendant’s knowledge that the libel inserted in the paper at London would be reproduced in other editions in France and other countries was retained in the complaint together with the fact that it

the pleadings. (Order XIX Rule 6.) The performance of conditions precedent need not be alleged but non-performance of any condition precedent if relied on must be pleaded. (O. XIX R. 14.) Documents need not be set out at length unless the precise words are material. (O. XIX R. 21.) Malice, fraudulent intention or other condition of mind may be alleged as a fact without setting out the circumstances from which the same is to be implied. (O. XIX R. 22.) Notice may be alleged as a fact. (O. XIX R. 23.) Implied contracts or relations between persons may be alleged as a fact. (O. XIX R. 24.) Matters of fact which the law presumes in favor of a party or as to which the burden of proof lies upon the other side need not be pleaded unless first denied. (O. XIX R. 25.)” To this must be added the requirement by O. XIX R. 4 of a summary statement of the material facts, and these only, on which the party relies for his claim but not of the evidence of such facts to be divided into paragraphs and numbered when necessary, numbers of amounts and dates to be expressed in figures and not words.

Decisions Construing English Rules. The most notable thing about the rules thus summarized is that legal relations are treated as matters of fact. A great gain in both clearness and brevity is thereby reached if all the persons concerned can so recognize and carry them. The pleading of legal relations and conditions as facts seems to be held in England to be perfectly good as against a demurrer. *Phillips v Phillips*, L. R. 4 Q. B. D. 127. In this case a general allegation that plaintiff was entitled to and the owner of land by virtue of certain

wills and conveyances which were not set out nor their legal effects stated, was held good against demurrer but subject to a motion for a fuller statement. In *Darbyshire v Leigh* L. R. (1896), 1 Q. B. Div. 554, plaintiff set up briefly that the purport of the will under which he claimed was to give him an estate in fee simple. Held good as against defendant’s application for a fuller statement. Lord Bramwell in *Phillips v Phillips*, above, had declared: “I never heard that the effect of written instruments was a matter of fact. It is not a matter of fact; the proper course for the plaintiff to have adopted would have been to set forth the purport of the document and then the document could be looked at and the question decided.” In *Rassam v Budge*, L. R. (1893) 1 Q. B. Div. 571, an answer in slander admitting the saying of a part of the words, affirming that those were true, and denying the rest, was stricken out because not bearing upon the right of recovery for the specific words alleged.

In *Murray v Epsom Local Board*, L. R. (1897) 1 Ch. Div. 35, allegations in the statement of claim that a member of the public board had used personal influence for his own private advantage to prevent maintenance by the board of posts to protect a foot-way, the removal of which was sought to be enjoined, were stricken out. The issue was whether or not the posts were removable as an obstruction to the public right of way, and any reasons for the board member’s action were immaterial if the action itself was lawful. In *In re Rica Gold Washing Co.*, L. R. (1879), 11 Ch. Div. 36, petition by shareholder to wind up company which alleged spreading of a

was so reproduced.¹³ These facts were at once evidence of malice and a part of the wrong itself which conferred on plaintiff his right of recuperation.

While we may and should exclude from pleading all merely "evidentiary" facts, the circumstance that they are also "evidentiary" is no ground for excluding "operative" facts. It is the same in taking evidence. Facts that really go towards showing the existence of the "operative" facts relied on and therefore pleaded are not excluded because they carry with them picturesque details that have no bearing on rights. The merely picturesque details, however, should be thrown out, especially where, as is often the case, they obscure or distract attention from the really "evidentiary" ones.

The liability that "operative" facts and conclusions of law may turn out to be the same thing, or to indistinguishably include each other, is even greater. As Judge Searls remarks: "Sanity, or insanity, guilt, innocence, fraud and negligence are all facts. . . . We have no doubt that the terms 'title' and 'owner' considered in the abstract are facts and may be found as such."¹⁴ In that case the court holds the conclusion of the trial court, that the defendant as a result of certain conveyances was owner in fee simple of the lands in dispute, to be a conclusion of law because authoritatively declared by the law upon the facts developed. The fact of ownership would, Judge Searls thinks, be a fact if established by mere deduction from proofs shown; but the law not intervening to draw the conclusion, it would in that case not be a "conclusion of law."

To be told that instruments are to be pleaded "according to legal effect" and that conclusions of law are not to be stated is certainly confusing. To draw with Lord Bramwell a distinction between the "effect" and the "purport" of an instrument¹⁵ is not easy. To say with Judge Searls that ownership is a fact and may be stated as one if shown merely by facts, but is a conclusion of law if authoritatively pronounced by the law speaking through its tribunal, may seem to be distinguishing without a difference, but it is not so. The same result may be reached, and if the plaintiff is in the right it will be;

false prospectus with fraudulent purpose in promoting the company but without specification of facts in regard to which it was false and without express allegation of inducement to purchase shares by means of it, held to allege no actionable fraud.

In *Whitney v. Moignard*, L. R. (1890), 24 Q. B. Div. 630, allegation that defendant knew the libel for which action was brought would be repeated in other editions of the paper in France and other countries, and that it was so repeated, was held to be proper allegation of a part of the wrong and not merely evidence of malice. The court refused to strike it

out. In *Knowles v. Roberts*, L. R. Ch. Div. 263, on motion various allegations were stricken from plaintiff's statement of claim in an action brought to enforce the terms of an agreement to compromise a former action because they related to matters embraced in and which settled by the agreement, consequently had nothing to do with issues in an action to enforce that agreement.

13. *Whitney v. Moignard*, L. R. (1890), 24 Q. B. Div. 630.

14. *Levins v. Rovegno*, 71 Cal. 273, 12 Pac. 161.

15. *Phillips v. Phillips*, L. R. (1878), Q. B. Div. 127-130.

but in the one case it will be asserted merely as a fact, in the other it will be reached and stated as the authoritative conclusion of the law. If the pleader asserts it as a fact, he evidently does so in reliance upon the ancient proposition that where facts tend to indefiniteness and multiplicity a general allegation is allowed.¹⁶

General Allegations of Legal Relations Usually Good Against Demurrer. Of course, the pleader who does that subjects himself to liability of being required to make his complaint more definite, but he ought to be, and unless he violates some well established rule such as that fraud must be shown by facts, not in general terms, he usually is safe from a general demurrer, as in *Phillips v. Phillips*, *supra*.

Not Good Against Motion if Dispute Turns On Their Conclusive Facts. Equally, of course, if the dispute relates precisely to the operative facts themselves that are essential to the creation of the asserted legal relation or situation, an assertion of it in general terms will be insufficient. It will be as to such facts either a mere "conclusion of law" or an argumentative allegation and will be permitted only where it has become the established method, as, for instance, in the case of an allegation that defendant took and converted the property in dispute to his own use.

Suggestions for Drawing Complaints.—Attention to a few simple precepts almost universally disregarded by pleaders in commencing actions would go very far to simplify the proceedings and improve the results of litigation.

First. Avoid relative and participial constructions. Do not use a relative pronoun unless its antecedent is absolutely clear beyond any perverse ingenuity to disconnect it. Do not use "having" and "being" to commence clauses. Better omit all such clauses unless they are vital, and in that case give them a separate sentence.

Second. Use "said ——" instead of "he," or "it" unless it is simply impossible to misplace the reference of the pronoun or to raise a question as to what is included in its antecedent.

Third. Clearness will be greatly aided if you commence with the first of the "operative" facts that make up your cause of action, state it directly and not inferentially or argumentatively, and so continue down through them in the order of their occurrence till the last necessary one is reached. Then stop.

Fourth. Use the prepared forms as an aid to your own analysis of your cause of action, but never as a substitute for such analysis. Use it as an expression or a help to the expression of that analysis and of your own ideas, not in place of those ideas.

Fifth. Exclude from your complaint or petition everything but those "operative" facts which the law will recognize as establishing your cause of action. Whatever is more than that is too much. The evidence which comes in merely to show the existence of your "oper-

16. To avoid prolixity. *Mints v. Cott*, 141 Ind. 267, 39 N. E. 451, 50 Bethill. Cro. Eliz. 749, 78 Eng. Reprint Am. St. Rep. 329; *Equitable Ins. Co.* 981; *Andrews Steph. Pl.*, §223; 5th ed. *v. Stout*, 135 Ind. 444, 33 N. E. 623; p. 393; *Chicago, etc. R. Co. v. Wol-* *Greenleaf Ev.*, Vol. I, §93.

ative" facts has no more place in your statement than has the law which will give you the remedy if those facts entitle you to it.

Sixth. Be sure, however, that you get in all of those necessary "operative" facts and each one fully enough to be clear and certain. Brevity is a great virtue in petitions, chiefly because it usually tends towards clearness, and the ridding of the dispute of connected but inconclusive matters. Clearness, itself, however, is much more important and should never be sacrificed to obtain brevity. The latter quality is to be obtained by rejecting the needless, not by obscuring the essential.

XVI. FORMS.—Statutes in some states prescribe forms of declarations or complaints in different kinds of actions,¹⁷ and provide that pleadings which substantially conform thereto are sufficient.¹⁸ Such forms have the force of law.¹⁹

17. Ala.—Code, 1907, §5382. See *Adler & Co. v. Pruitt*, 169 Ala. 213, 53 So. 315, in which certain of these forms are criticised. **Fla.**—Gen. St., 1906, §1450. *Conversion. Leon v. Kerison*, 47 Fla. 178, 36 So. 173. **N. J.** Laws 1912, c. 231, Schedule B, pp. 401, *et seq.* **Tenn.**—Shannon's Code, §4609.

The Florida statute provides that "Every declaration shall commence as follows, or to like effect: (Venue 'A B by E F, his attorney (or in person) sues C B' for (here state the cause of action). And shall conclude as follows, or to the like effect: 'And the plaintiff claims \$—— or (if the action is brought to recover specific goods), 'the plaintiff claims a return of said goods or their value and \$—— for their detention.' " Gen. St., 1906, §1448. Md. Pub. Gen. Laws, art. 75, §24; *Lapp v. Stanton*, 81 Atl. 675 (trespass by cattle).

Personal injury to a passenger on a railroad due to negligence. *Philadelphia, B. & W. R. Co. v. Allen*, 102 Md. 110, 62 Atl. 245; *Jeter v. Schwind Quarry Co.*, 97 Md. 696, 55 Atl. 366.

Deprivation of right of access. *Offutt v. County Comrs.*, 94 Md. 115, 50 Atl. 419.

Agreement to pay the debt of another. *Bowen v. Tipton*, 64 Md. 275, 1 Atl. 861.

Conversion. *Crocker v. Hopps*, 78 Md. 260, 28 Atl. 99.

Common Counts.—On the money counts the words "for money payable by the defendant to the plaintiff," are essential. *Pearce v. Watkins*, 86 Md. 534, 13 Atl. 376; *Merryman v. Rider*, 34 Md. 98.

The above rule applies only to the *indebitatus* counts, and not where an instrument sued on and the averments of the *narr.* show that the debt was a money debt, and that it was due before the commencement of the suit. *Tradesmen's Nat. Bank v. Green*, 57 Md. 602.

18. Alabama.—Code, 1907, §5322; *Adler & Co. v. Pruitt*, 169 Ala. 213, 53 So. 315; *Adams Mach. Co. v. Turner*, 162 Ala. 351, 50 So. 308; *Brooklyn Life Ins. Co. v. Bledsoe*, 52 Ala. 538; *Pike v. Elliott*, 36 Ala. 69; *Crimm's Admrs. v. Crawford*, 29 Ala. 623; *Pickens v. Oliver*, 29 Ala. 528.

The omission of an essential part of the form invalidates the pleading. *Smythe v. Dothan Foundry & Mach. Co.*, 166 Ala. 253, 52 So. 398.

The common counts may be pleaded in the form prescribed by the statute, though the statutory form would not have been sufficient at common law. *Merrill v. Worthington*, 155 Ala. 281, 46 So. 477.

Maryland.—The pleading is not rendered erroneous or irregular by a departure from the statutory forms, so long as substance is expressed. Pub. Gen. Laws, art. 75, §24; *Lapp v. Stanton* (Md.), 81 Atl. 675.

Tennessee.—Shannon's Code, §4609. **Will Support a Judgment By Default.**—*Brooklyn Life Ins. Co. v. Bledsoe*, 52 Ala. 538; *Letondal v. Huguenin*, 26 Ala. 552.

19. Adler & Co. v. Pruitt, 169 Ala. 213, 53 So. 315; *Brooklyn Life Ins. Co. v. Bledsoe*, 52 Ala. 538; *Crimm's Admrs. v. Crawford*, 29 Ala. 623.

A few jurisdictions in this country officially print accredited forms either adopted under the rules of courts or with the approval of those tribunals. The Connecticut practice book has one hundred and fifty-three pages of such forms of complaint (Conn. Pr. B., p. 287-4404; the Maryland statutes, has a somewhat shorter collection of approved "declarations" (Md. Gen. Laws, Vol. II., p. 1638), and the revised statutes of Missouri (Vol. III, p. 3750-3767), has about as many pages of "petitions" as Maryland has of "declarations." The English yearly practice of the supreme court for the year 1912 has in appendix C (Vol. II, pp. 1951-1967), referred to and provided for in order XIX rule 5, eighteen pages of such approved forms of "Statements of Claim." A selection from these is appended.

FORMS OF STATEMENTS OF CLAIM TO BE USED PURSUANT TO ORDER XIX,

RULE 5.

In the High Court of Justice,

— Division.

Writ issued the — of — 19—

Between A. B. — Plaintiff,

and

C. D. — Defendant.

Statement of Claim.

The plaintiff, etc. —.

(or)

The plaintiff's claim is, etc. —.

(To be filled up in manner exemplified in the following forms.)

The plaintiff claims (as in following forms)

(Signed) —

Delivered the —

(Date to be on face of pleading.)

Foreclosure

1. The plaintiff is mortgagee of lands belonging to the defendant.

2. The following are the particulars of the mortgage:—

(a) (Date and names of mortgagor and mortgagee.)

(b) (Sum secured.)

(c) (Rate of interest.)

(d) (Property subject to mortgage.)

(e) (Amount now due.)

(If plaintiff's title is a derivative title, state shortly the assignments under which he claims.)

(If the plaintiff is mortgagee in possession add):

3. The plaintiff took possession of the

mortgaged property on the — day of —, and is ready to account as mortgagee in possession from that time.

The plaintiff claims payment, or, in default, sale or foreclosure (and possession).

(Signed) —

Delivered —.

Redemption.

1. The plaintiff is mortgagor of lands, of which the defendant is mortgagee.

2. The following are the particulars of the mortgage:

(a) (Date.)

(b) (Sum secured.)

(c) (Rate of interest.)

(d) (Property subject to mortgage.)

(If the plaintiff's title is derivative, state shortly the deeds under which he claims.)

(If the defendant is mortgagee in possession add):

3. The defendant has taken possession (or had received the rents) of the mortgaged property.

The plaintiff claims to redeem the said premises, and to have the same reconveyed to him (and to have possession thereof).

(Signed) —

Delivered —.

Actions for Breach of Contract or Duty Arising Out of Contract.

(Buyer against seller of goods for not delivering.)

1. The plaintiff has suffered damage by breach of contract for sale and delivery by the defendant to the plaintiff 100 tons of Scotch pig iron at £5 per ton to be delivered on rail at Middlesbrough on the —.

2. The defendant did not deliver any (or, — tons, as the case may be) of the said iron.

Particulars of damage:—

Loss of profit at £1. per ton on 100 tons, — £100.

The plaintiff claims £100.

(Signed) —

Delivered —.

(Buyer against seller of goods for delivering them inferior to contract.)

1. The plaintiff has suffered damage by breach of a contract between the plaintiff and the defendant for sale and delivery of 100 sacks of flour known as seconds at 35s. per sack.

2. 80 sacks delivered were inferior to seconds and 20 sacks were not delivered.

Particulars of damage:—

80 sacks at 4s.	£16
20 at 5s.	5
	£21

The plaintiff claims £21.

(Signed) _____

Delivered _____

(Passenger against railway company for negligence.)

The plaintiff has suffered damage from the defendant's negligence in carrying the plaintiff as a passenger by railway from London to Brighton, causing personal injuries to the plaintiff, in a collision near Hayward's Heath on the _____ 19__.

Particulars of expenses, etc:—

	£	s.	d.
Loss of 15 weeks' salary as clerk at £2 per week	30	0	0
Dr. Smith	10	10	0
Nurse for 6 weeks....	3	0	0
	£43	10	0

The plaintiff claims £500.

(Signed) _____

Delivered _____

(Landlord against tenant for breach of covenant to repair.)

1. By a repairing covenant contained in a lease under seal from the plaintiff to the defendant, dated the _____, of a house No. 401, Piccadilly, seven years from the _____, the defendant covenanted to keep the premises in such repair and condition as therein mentioned.
2. The premises were during the term out of such repair as was required by the covenant.
3. They were yielded up out of such repair at the expiration of the term.
4. Particulars of dilapidations were delivered to the defendant's solicitor on the _____ of _____ 19__ and exceed three folios.

The plaintiff claims £_____.

(Signed) _____

Delivered _____

(Breach of Promise).

1. The plaintiff has suffered damage by breach of promise by the defendant to marry her on the _____ of _____ (or, within a reason-

able time, which elapsed before action) (, on the death of A. B., which happened before action.)

2. The defendant refused to marry the plaintiff on the _____ of _____ (or, within a reasonable time) (or, on the death of A. B.)

Particulars of special damage.

(As the case may be, if any.)

The plaintiff claims £_____.

(Signed) _____

Delivered _____

Actions claiming Injunctions, Damages, or Declarations founded on Wrongs.

(Conversion of Goods.)

The plaintiff has suffered damage by the defendant wrongfully depriving the plaintiff of two casks of oil by refusing to give them up on demand (or, throwing them overboard out of a boat in the London Docks, etc.)

(If any special damage is claimed,

add):—

Particulars (fill them in).

The plaintiff claims £100.

(Signed) _____

Delivered _____

(Detinue)

The defendant detained from the plaintiff the plaintiff's goods and chattels, that is to say, a horse, harness and gig.

The plaintiff claims a return of the said goods and chattels or their value, and £10 for their detention.

(Signed) _____

Delivered _____

(Negligent Driving)

The plaintiff has suffered damage from personal injuries to the plaintiff and damages to his carriage, caused by the defendant or his servant on the _____, negligently driving a horse and cart in Fleet Street.

Particulars of expense, etc:—

	£	s.	d.
Charges of Mr. Smith, surgeon	10	10	0
Charges of Mr. Jones, coachmaker	14	5	6
	£24	15	6

The plaintiff claims £150.

(Signed) _____

Delivered _____

(Injunction, etc., for infringement of patent.)

The defendant has infringed the plaintiff's patent, No. 14084,

granted for the term of 14 years, from the ———, for certain improvements in the manufacture of iron and steel, whereof the plaintiff was the first inventor.

The plaintiff claims an injunction to restrain the defendant from further infringement and £100 damages.

Particulars of breaches are delivered herewith.

(Signed) ———

Delivered ———.
(Nuisance by pollution of water.)

1. The plaintiff is the owner (or lessee) and occupier of a farm known as ———, through which there runs a river known as ———.

2. The defendant or persons in his employ pollute the water in the said river by passing into the same the refuse of the defendant's dye works, situate higher up the said river.

The plaintiff claims an injunction to restrain the defendant, his servants and agents, from sending from the said dye works into the said river any matter so as to pollute the waters thereof, or to render them unwholesome or unfit for use, to the injury of the plaintiff, (or, as the case may be.)

The plaintiff will also claim damages in respect of the said nuisance.

(Signed) ———

Delivered ———.
Actions for Recovery of Land, etc.
(Landlord against tenant whose term has expired, etc.)

1. The plaintiff is entitled to the possession of a farm and premises called Church Farm in the parish of St. James, in the county of Surrey, which was let by the plaintiff to the defendant for the term of 3 years from the ———, which term has expired (or, as tenant from year to year from the ———, which said tenancy was duly determined by notice to quit expiring on the ———.)

The plaintiff claims possession and £50 for mesne profits.

(Signed) ———

Delivered ———.
**FORMS OF COMPLAINT FROM
CONNECTICUT PRACTICE BOOK**
(For Several Causes of Action).
First Count.

1. On May 1st, 1879, the plaintiff sold and delivered to the defendant one hundred barrels of flour at a reasonable price, payable on their delivery.

2. The same were reasonably worth \$600.

3. The defendant has not paid the same.

Second Count.

1. On June 1st, 1879, the defendant, by his note of that date, promised to pay the plaintiff \$1,000, thirty days after date, for value received.

2. The defendant has not paid the same.

Third Count.

1. On July 1st, 1878, the defendant hired the plaintiff as a salesman, at a salary of \$800 per year, payable quarterly.

2. From that day until July 1st, 1879, the plaintiff served the defendant as such salesman.

3. The defendant has not paid said salary.

The plaintiff claims \$2,800 damages.
(For an Account, by Way of Equitable Relief).

1. On January 1st, 1878, the plaintiff employed the defendant as his agent to let and collect the rents of a certain block of buildings, known as Roe's block, on the corner of King and Prince streets, in Norwich, during the next year.

2. The defendant afterwards let all the stores and apartments in said block, to divers parties, and collected large sums from them for rent.

3. The defendant has neither paid not accounted to the plaintiff for such sums, and an account and payment were, on February 1st, 1879, demanded and refused.

The plaintiff claims, by way of equitable relief.

1. An account.

2. Judgment for the amount found due on such accounting.

(For an Assault and Battery, with Special Damages).

1. On November 1st, 1878, the defendant assaulted the plaintiff, and beat him with a cane.

2. The plaintiff was then a school-teacher, receiving a salary of \$300 a quarter.

3. Said battery broke his right arm above the elbow, and he was thereby disabled from attending to his busi-

ness for six weeks thereafter, and compelled to pay \$25 for medicines and medical care and attendance.

The plaintiff claims \$1,000 damages. (For the Hire of a Piano, with Damages for not Returning It).

First Count.

1. On May 1st, 1878, the defendant hired of the plaintiff for six months, then next ensuing, one piano, the property of the plaintiff, to be returned to the plaintiff at the expiration of said time, in good condition, reasonable wear expected, for the use of which he promised to pay the plaintiff a reasonable sum.

2. \$50 was a reasonable sum for the hire of the same; which sum, on November 1st, 1878, became due from the defendant to the plaintiff.

3. No part of the same has been paid (except the sum of \$——).

Second Count.

1. All the statements in the first count are made part of this count.

2. The value of the piano so hired by the defendant, as above alleged, was \$500, and the defendant, not regarding his said undertaking to return the same to the plaintiff, has not returned the same, although he was, on November 10th, 1878, requested by the plaintiff so to do.

The plaintiff claims \$600 damages. (For Breach of Promise of Marriage).

1. On June 1st, 1878, in consideration that plaintiff, who was then unmarried, promised, at the request of the defendant, to marry him within a reasonable time, the defendant promised to marry the plaintiff within a reasonable time.

2. The plaintiff, confiding in said promise, has always since remained, and now is ready and willing to marry the defendant.

3. The defendant refuses to marry the plaintiff, although a reasonable time elapsed before this action, and although she, on October 15th, 1878, requested him so to do.

The plaintiff claims \$5,000 damages. (Against a Railroad Company for Personal Injuries).

1. The defendant, on August 10th, 1878, was a common carrier of passengers by railroad, between New Haven and Ansonia.

2. On said day, the plaintiff, (bought of the defendant a ticket entitling him to transportation from New

Haven to Ansonia, and thereupon) entered and became a passenger in one of the cars of the defendant, on said railroad.

3. While he was such passenger, near the defendant's station at Derby, a collision, caused by the negligence of the defendant's servants, in not switching the south-bound train from the main track upon a siding, occurred between said car and another car of the defendant, whereby the plaintiff was greatly injured, and his leg broken.

The plaintiff claims \$2,000 damages. (For a Conversion of Goods).

1. On October 1st, 1878, the defendant had in his possession ten barrels of flour, worth six dollars a barrel, belonging to the plaintiff.

2. On said day the defendant sold said flour, without authority from the plaintiff, and thereby converted the same to his own use.

The plaintiff claims \$80 damages. (On Covenant Against Incumbrances).

1. On May 1st, 1879, the defendant, by deed, conveyed to the plaintiff, in fee simple, a farm in Bethel (or otherwise briefly designate the property, and the estate therein conveyed).

2. Said deed contained a covenant on the part of the defendant, of which the following is a copy: (copy of covenant, or, whereby he covenanted, etc., stating its substance as in preceding forms).

3. At the time of the delivery of said deed the premises were not free from all incumbrance, but on the contrary were subject to the right of dower of one Jane Stiles, widow of John Stiles, the former owner of the premises.

4. On April 1st, 1879, one John Smith recovered a judgment in the Superior Court for Hartford County against the defendant, for \$1,050 damages and \$51.50 costs of suit, a certificate of a judgment lien on account of which was, on April 2d, 1879, recorded in the land records of Bethel, and this judgment, at the time of the delivery of said deed, remained unsatisfied.

5. At the time of the delivery of said deed, the premises were subject to a tax-lien, duly recorded in the land records of Bethel, for a tax of \$50, theretofore duly assessed, charged, and levied upon said premises by said

town, and the officers thereof, which tax was then due and unpaid.

6. By reason thereof the plaintiff was obliged to pay, and did, on July 1st, 1879, pay \$1,200 in extinguishing the right of dower, (or, the lien of the judgment, or, the tax, or all of them) aforesaid.

The plaintiff claims \$1,300 damages. (Ejectment, and for Mesne Profits).

1. On August 1st, 1878, the plaintiff owned and possessed a certain lot of land in Harwinton, bounded north on land of John Doe, and east, south, and west on highway.

2. The defendant, on said day, wrongfully entered on said land, and dispossessed the plaintiff, and still keeps him out of possession, depriving him of the rents and profits.

3. Said rents and profits amount to \$100 a year.

The plaintiff claims,

1. Judgment for the possession of said premises.

2. \$500 damages.

(Foreclosure of Mortgage).

1. On August 1st, 1878, the defendant, John Doe, owed the plaintiff \$1,000, as evidenced by said Doe's note for \$1,000, dated on said day, and payable to the plaintiff or order, one year after date, with interest from date.

2. On said day, by his deed of that date, said Doe, to secure said note, mortgaged to the plaintiff a lot of land in New Haven, bounded north by Chapel street, 100 feet, east by Main street, 150 feet, west by land of John Doe, 150 feet, and south by land of Richard Doe, 100 feet; which deed is conditioned for the payment of said note according to the tenor, and is recorded in New Haven land records, vol. 200, page 100.

3. Said note is still owned by the plaintiff, and is due and wholly unpaid.

4. William Brown, of Milford, claims to have a mortgage of \$500 on said land, and John Stiles, of Guilford, claims to have an attachment lien thereon for \$200; which claims accrued after the plaintiff's mortgage.

5. Said John Doe is now in possession of said premises.

The plaintiff claims:

1. A foreclosure of said mortgage.

2. Possession of the mortgaged premises.

(For Fraud in Sale of Horses).

1. On August 2d, 1879, the plaintiff bargained with the defendant for the purchase of a horse belonging to the defendant, and the defendant, to induce the plaintiff to buy said horse and to pay \$300 therefor, declared to the plaintiff that said horse was sound in wind and limb, and free from any defect whatever.

2. The plaintiff believing said statements to be true and induced thereby, bought said horse and paid \$300 to the defendant therefor.

3. The defendant made said statements, knowing them to be false, with intent thereby to induce the plaintiff to make said purchase and to defraud him.

4. Said horse was in fact unsound, and then, and for a long time before, had an incurable disease called the glanders.

5. Said horse is unfit for use and of little value, and the plaintiff has expended \$50 in feeding and taking care of said horse, and in endeavoring to cure him of said disease.

The plaintiff claims \$400 damages.

(To Annul a Contract, For Fraud).

1. On June 1st, 1877, the plaintiff was the owner of a farm in Haddam (briefly describing it).

2. The plaintiff was then old, infirm, and blind, and by reason thereof incapacitated from attending properly to business.

3. The defendant, on that day, fraudulently taking advantage of the plaintiff's incapacity, procured his signature to a certain writing, without paying him any consideration therefor, which writing he falsely and fraudulently represented to be a subscription to the Farmer's Magazine for one year.

4. The plaintiff on July 1st, 1879, applied to the defendant for information as to the contents of said writing; but he refused to give him any information concerning it.

5. The plaintiff is informed and believes and therefore avers that said writing is a deed of said farm or some interest therein, to the defendant; and that he intends to use the same for his own benefit, and to the prejudice of the plaintiff.

The plaintiff claims,

1. Judgment that said writing is void;

2. That the defendant produce the

same, and deliver it up to be canceled;

3. That he be enjoined against making any conveyance of any title, which he may claim under the same. (For an Injunction To Restrain a Nuisance by Noise).

1. The plaintiff owns and, since the year 1870, has owned and resided in the house known as No. 100 Main Street, in Hartford.

2. The defendant in May, 1879, owned a lot of land on said street, adjoining the plaintiff's said homestead lot, and erected thereon a brick factory, known as No. 102 Main street, and put a steam trip-hammer therein, and has ever since owned and operated said factory for manufacturing purposes, and in so doing has used said trip-hammer, almost daily.

3. The use of said trip-hammer makes so loud a noise as to render it impossible, while it is being operated, to hear ordinary conversation in the plaintiff's house, and causes great discomfort to him and his family.

4. The plaintiff on June 1st, 1879, notified the defendant that such use of said trip-hammer was a nuisance, for said reasons, and requested him to discontinue its use, but the defendant refused so to do.

The plaintiff claims an injunction to restrain the defendant from any such use of said trip-hammer in said factory.

(On a Judgment).

1. On May 1st, 1879, the plaintiff recovered a judgment against the defendant before the Superior Court in and for the County of Hartford, for \$1,050.50 damages and \$52.50 costs of suit.

2. Said judgment remained wholly unsatisfied (or, said judgment has been satisfied in part only, to wit: to the extent of \$500).

The plaintiff claims (\$800) damages. (Libel, With Special Damage).

1. The plaintiff is, and for more than ten years last past has been a merchant, engaged in the wholesale dry goods business, in Bridgeport.

2. On December 10th, 1878, the defendant published in a newspaper called the Bridgeport Times the following words concerning the plaintiff: "John Smith of this city has modestly retired to foreign lands. It is said that creditors, to the amount of \$50,000, are anxiously seeking his address."

3. The defendant meant thereby that the plaintiff had absconded to avoid his creditors, and with intent to defraud them.

4. Said publication was false and malicious.

5. Said publication was read by several of the plaintiff's customers, and led them to decline to enter into certain business engagements with the plaintiff, which they otherwise would have entered into, whereby the plaintiff suffered heavy pecuniary loss.

The plaintiff claims \$5,000 damages. (Against a Physician For Malpractice).

1. The plaintiff, in May, 1878, employed the defendant, being a physician, as such, to attend him and cure him of a fever from which he then suffered, for compensation to be paid therefor, and for that purpose the defendant undertook, as a physician, to attend and care for the plaintiff.

2. The defendant then entered upon such employment, but did not use due and proper care or skill in endeavoring to cure the plaintiff of said fever, in this: that the defendant, at an early stage of the plaintiff's malady, bled the plaintiff to a profuse and immoderate extent, taking from him twenty ounces of blood, the same being an excessive and injurious quantity, and which the defendant, if he had used proper care and skill, would not have taken; and, also in this: that the defendant, on the fourteen days next following, unskillfully and negligently administered to the plaintiff five grains of mercury every six hours during that time; the same being excessive and injurious doses, and which the defendant, if he had used due and proper care and skill, would not have administered to the plaintiff.

3. By reason of the premises, the plaintiff was injured in his health and constitution, suffered great pain, was weakened in body, and was obliged to, and did expend \$1,000, in endeavoring to be cured of said sickness, which was prolonged and increased by said unskillful and improper conduct of the defendant.

The plaintiff claims \$1,200 damages. (For Money Had and Received).

1. On January 1st, 1877, the defendant received \$500 from one James Brown, of said Hartford, to be paid to the plaintiff, on demand.

2. On January 10th, 1877, the plaintiff

iff demanded said sum of the defendant, who refused to pay it, and it remains unpaid.

The plaintiff claims \$600 damages. (Against a Tailor, For Spoiling a Garment).

1. The defendant for more than one year last past has been a tailor, and has followed that business and trade.

2. On May 5th, 1879, the plaintiff delivered to the defendant, as such tailor, two yards of broadcloth of the value of \$10, to be made into a coat by the defendant for the plaintiff, for reward, and the defendant received said cloth for that purpose.

3. The defendant afterwards, in violation of his duty, unskillfully and negligently made said coat, and by reason of the unskillfulness and negligence of the defendant, the same was

wholly unfit for the plaintiff, so that he could not wear it; he means whereof he has wholly lost said cloth delivered to the defendant as aforesaid.

The plaintiff claims \$12 damages.

RULES UNDER THE CONNECTICUT PRACTICE ACT.

The forms accompanying these rules may be used as precedents in all cases to which they are applicable; subject to the right of the party to amend, and of the court to order fuller or more particular statements, under Gen. Stat. sec. 614.

* (Note) As stated in the prefatory note (p. VI), these forms are designed to guide, not to hamper the profession, and the only necessary rule of pleading is to give, in appropriate paragraphs, a plain and concise statement of the material facts.

DECREES

By H. W. HUMBLE,

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I. DEFINITIONS. — **A. IN GENERAL.** — A decree is the judgment or sentence of a court,¹ particularly of a court of equity.² In statutes, the word judgment is sometimes construed to include decrees.³ Frequently the term is used in a sufficiently comprehensive sense to include all forms of judicial determinations; such, for example, as the adjudication on condemnation proceedings.⁴

In defining the various kinds of decrees, it must be remembered that a single decree may be partly of one character and partly of another;⁵ for example, it may be partly final and partly interlocutory.⁶

B. CONSENT DECREES. — A consent decree is a contract made between the parties and entered by the court. It has been declared not to be, in a strict legal sense, a judicial decree.⁷

C. DECREES ON DEFAULT. — A decree on default is one entered against a party, either plaintiff or defendant, upon his failure to appear. According to the English practice, such a decree, in its inception, would frequently take the form of a decree *nisi*, to be made absolute after a certain period of time upon the failure of the party in default to appear.⁸

1. *Loyd v. Hicks*, 31 Ga. 140.

2. *Vance's Heirs v. Rockwell*, 3 Colo. 240, 243; *Shirley v. Birch*, 16 Ore. 1, 18 Pac. 344.

"A decree is a sentence or order of the court pronounced on hearing and understanding all the points in issue, and determining the right of all the parties to the suit according to equity and good conscience." Danl. Ch. Pl. & Pr. (6th ed.) 986.

A decree is the conclusion of law from the pleadings and proofs. *Kenevek Co. v. Schlansky*, 47 W. Va. 287, 34 S. E. 773.

The nature of the decree "is to be governed by the essence of what is done and not by the appellation given to it." *Potter v. Beal*, 50 Fed. 860, 2 C. C. A. 60, 5 U. S. App. 49.

3. *Cal.*—*Thompson v. White*, 63 Cal. 505. *Ky.*—*Hughes v. Shreve*, 3 Metc. 547, 548. *Mont.*—*Raymond v. Blaugrass*, 36 Mont. 449, 93 Pac. 648.

4. *Donnelly v. City of Brooklyn*, 7 N. Y. Supp. 49, 26 N. Y. St. 27.

5. *People v. Church*, 2 Lans. (N. Y.) 459.

6. *Adams v. Sayre*, 76 Ala. 509; *Cochran v. Miller*, 74 Ala. 50; *Story v. Hawkins*, 8 Dana (Ky.) 12.

A decree cannot be in part final, and in part interlocutory, in the same cause, for and against the same parties who remain in court. *Ryan's Admr. v. McLeod*, 32 Gratt. (Va.) 367.

7. *Hohendel v. Steele*, 141 Ill. App.

1218, judgment affirmed, 237 Ill. 229, 86 N. E. 717.

In the following cases, wherein the question arose, the decree at bar was held not to be a consent decree. *Ala.* *Lee v. Lee*, 77 Ala. 412. *Ill.*—*The Fair v. City of Chicago*, 135 Ill. App. 258. *La.*—*Luria v. Cote Blanche Co.*, 114 La. 385, 38 So. 279, dismissed, *Seannell v. Cote Blanche Co.*, 202 U. S. 624, 26 Sup. Ct. 744, 50 L. ed. 1176. *W. Va.* *Hall v. Taylor*, 18 W. Va. 544.

That the report of a master in chancery was confirmed by the court, the attorneys of the appellant being present and making no objection, is not a sufficient showing that the decree was entered by consent of parties. *Hershee v. Hershey*, 15 Iowa 185.

That is not a consent decree which is rendered by the court of its own motion. *Burney's Heirs v. Ludeling*, 41 La. Ann. 627, 6 So. 248.

Endorsement on a decree by counsel in these words: "Submitted to us," is insufficient alone to entitle the decree to be regarded as a consent decree. *Gibson v. Burgess*, 82 Va. 650.

An agreement to suspend execution is not a decree obtained by consent. *Rigby v. Lefevre*, 58 Miss. 639.

Compromise Decree. — The term "compromise decree" as used in *Wilson v. Schaefer*, 107 Tenn. 300, 64 S. W. 208, appears to mean a consent decree embracing the terms of a compromise.

8. See the title "Default."

D. **DECREES PRO CONFESSO.** — When a party duly served has failed to plead within a certain period, the allegations of the bill are considered as having been confessed to be true by him. An entry to this effect is accordingly made. Such entry is called a decree *pro confesso*.⁹ Such a decree is but one form of interlocutory decree.¹⁰

E. **FINAL DECREES.** — A final decree is one which ends the cause, so that no further action of the court in the cause is necessary, save in the enforcement thereof.¹¹

In *Robertson v. Miller*, 3 N. J. Eq. 451, this question is discussed. The court declares that "there is a clear distinction between a decree *nisi* for default, according to the English practice, and a final decree after an order that the bill be taken *pro confesso* and reference to a master to take an account, according to our practice. The one is considered the decree of the party, the other the decree of the court. *Carew v. Johnson*, 2 Sch. and Lef. 300. Applications to open the one are treated with indulgence by the court, for obvious reasons, and are generally opened on the usual terms. Attempts to set aside the other are more strictly scrutinized."

9. The authorities on this question are collected in a subsequent section of this article. See *infra*, III.

10. *Alexander v. Quigley's Exrs.*, 2 Duv. (Ky.) 399.

11. Fla.—*State v. White*, 40 Fla. 297, 24 So. 160. Ky.—*Larue v. Larue*, 2 Litt. 258. N. C.—*Flemming v. Roberts*, 84 N. C. 532. Va.—*Battaille v. Maryland Insane Hospital*, 76 Va. 63; *Ryan's Admr. v. McLeod*, 32 Gratt. 367; *Tennent's Heirs v. Pattons*, 6 Leigh 196.

Merely calling a decree a "final decree" does not make it such. *Ward v. Funsten*, 86 Va. 359, 10 S. E. 415.

To determine whether a decree is final or interlocutory, the court must look to the pleadings in the case, the purpose of the judgment and the words in which it was expressed. Except for fraud, this is the limit of the inquiry. What the record says is not to be contradicted by anything outside of the record. *Mead v. Christian*, 50 Ala. 561.

A decree dismissing a cross-bill alone is not final. It disposes of a proceeding simply incidental to the principal matter in litigation. *Ayres v. Carver*, 17 How. (U. S.) 591, 15 L. ed. 179.

A decree in a patent suit, making

the injunction prayed for perpetual, with a reference to a master to ascertain the damages, is not a final decree. *Reeves v. Keystone Bridge Co.*, 2 Ban. & A. 2561, 20 Fed. Cas. No. 11,661.

A decree is final when it concludes the whole matter in the cause, and when the term at which it was pronounced has expired, and must be so considered as against the whole world. *Keatts v. Rector*, 1 Ark. 391.

A decree, which disposes of the matters in issue between the parties and gives all the consequential directions necessary to carry it into execution, is a final decree; but if such consequential directions be not given, though the decree may adjudicate as to the interest or right in controversy, it is not final. *Ex parte Crittenden*, 10 Ark. 335.

A final decree is that which is made when all the material facts in a cause have been ascertained, so as to enable the court of chancery to understand and decide on the merits of the case. *Jaques v. Methodist Episcopal Church*, 17 Johns. (N. Y.) 548.

A decree is not final, although it declares the principles on which the court means to act in all its future doings in the cause, unless it also adjudicates upon, and fixes, the rights of parties so that it can be carried into effect without further inquiry as to their rights and liabilities. *Patterson v. Hopkins*, 23 Mich. 541.

In *Huston v. Ditto*, 20 Md. 305, a distinction is made between final and effective judgments and judgments final but not effective.

A decree of dismissal is a final judgment unless otherwise ordered. *New Eng. & Mtg. Sec. Co. v. Davis*, 122 Ala. 555, 25 So. 42.

A decree may be final as to one defendant, though the case be still pending as to other defendants. *Royall v. Johnson*, 1 Rand. (Va.) 421.

A decree may be final although it may direct a further reference to the master provided no further decree of the court is necessary,¹² or it may direct commissioners to perform certain ministerial duties and still retain the character of a final decree.¹³

A decree of dismissal with costs must be final. *Pace v. Ficklin*, 76 Va. 292.

A failure to adjudicate upon the question of costs does not affect the character of the decree as a final one. *Peterson v. Vann*, 83 N. C. 118.

In *Merle v. Andrews*, 4 Tex. 200, the decree was held final, though a distinct matter was reserved for further consideration.

Every order or decree made in a chancery case which decides upon and settles the rights of the parties, as to any particular matter, is so far final. *Banton v. Campbell's Heirs*, 2 Dana (Ky.) 421.

12. *Ala.*—*Cochran v. Miller*, 74 Ala. 50; *Walker v. Hallett*, 1 Ala. 379. *Miss.*—*Cook v. Bay*, 4 How. 485. *N. Y.* *Mills v. Hoag*, 7 Paige 18, 31 Am. Dec. 271.

13. *Ky.*—*Larue v. Larue*, 2 Litt. 258. *Miss.*—*Cromwell v. Craft*, 47 Miss. 44. *Tex.*—*McFarland v. Hall's Heirs*, 17 Tex. 676; *Cannon v. Hemphill*, 7 Tex. 184. *Va.*—*Harvey v. Branson*, 1 Leigh 108.

A decree declaring that as to certain matters the parties are at liberty to apply to the court as they may be advised, "is still a final decree, and, when signed and enrolled, may be pleaded in bar to another suit for the same matter. The effect of the reservation is to permit persons having an interest under it to apply to the court touching such interest, in a summary way, without the necessity of again setting the cause down." *Danl. Ch. Pl. & Pr.* (6th ed.) 996.

In the following cases, wherein the question arose, the decree was declared to be final: *U. S.*—*Petersburg Sav. & Ins. Co. v. Dellatorre*, 70 Fed. 643, 17 C. C. A. 310, 30 U. S. App. 504; *Hoffman v. Pearson*, 50 Fed. 484, 1 C. C. A. 535, 8 U. S. App. 19. *Del.* *Cochran v. Couper*, 2 Del. Ch. 27. *Ill.* *Crane v. Stafford*, 217 Ill. 21, 75 N. E. 424; *Warren v. McCarthy*, 25 Ill. 95; *Rice v. Dougherty*, 148 Ill. App. 368. *Ind.*—*Murdock v. Holland's Heirs*, 3 Blackf. 114. *Ky.*—*Tuggle v. Gilbert*, 1 Duv. 340; *Thompson v. Peebles*, 6

Dana 387; *Field v. Ross*, 1 T. B. Mon. 133 (question of validity of service on absent defendant is no cause for opening the decree against him). *Md.* *Barroll v. Foreman*, 88 Md. 188, 40 Atl. 883; *Pfeaff v. Jones*, 50 Md. 263; *Contee v. Dawson*, 2 Bland 264. *Mass.* *Lakin v. Lawrence*, 195 Mass. 27, 80 N. E. 578. *Miss.*—*Humphreys v. Stafford*, 71 Miss. 135, 13 So. 865; *Dibrell v. Carlisle*, 51 Miss. 785. *N. J.*—*Morton v. Beach*, 56 N. J. Eq. 791, 41 Atl. 214; *Gray v. Cook*, 24 How. Pr. 432; *Travis v. Waters*, 1 Johns. Ct. 85. *S. C.*—*Haskell v. Raoul*, 1 McCord 22. *Tenn.*—*Johnson v. Tomlinson*, 13 Lea 604; *Cain v. Jennings*, 1 Tenn. Cas. 131. *Va.*—*Stout v. Stout*, 104 Va. 480, 51 S. E. 833; *Serles v. Cromer*, 88 Va. 426, 13 S. E. 859; *Thomson v. Brooke*, 76 Va. 160; *Battaile v. Maryland Hospital for Insane*, 76 Va. 63; *Davis v. Crews*, 1 Gratt. 407. *W. Va.*—*Fluharty v. Mills*, 49 W. Va. 446, 38 S. E. 521; *Rader v. Adamson*, 37 W. Va. 582, 16 S. E. 808; *Dick v. Robinson*, 19 W. Va. 159; *McKinney v. Kirk*, 9 W. Va. 26.

In the following cases, wherein the question arose, the decree in question was held to be not final: *U. S.*—*Iowa v. Illinois*, 151 U. S. 238, 14 Sup. Ct. 333, 38 L. ed. 145; *Ogilvie v. Knox Ins. Co.*, 2 Black 539, 17 L. ed. 349; *Maas v. Lonstorf*, 166 Fed. 41, 91 C. C. A. 627; *Knox v. Columbia Liberty I. Co.*, 42 Fed. 378; *Coates v. Muse*, 1 Brock. 529, 5 Fed. Cas. No. 2,916; *Whitmire v. United States*, 44 Ct. Cl. 453. *Ala.*—*Bledsoe v. Jones*, 145 Ala. 685, 40 So. 111; *Ex parte McLendon*, 33 Ala. 276. *Md.*—*Ridgely v. Bond*, 18 Md. 433. *N. M.*—*Bent v. Miranda*, 8 N. M. 78, 42 Pac. 91. *N. Y.*—*Kane v. Whittick*, 8 Wend. 219; *Stone v. Morgan*, 10 Paige 615. *Ohio.*—*Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634. *S. C.* *Barrett v. James*, 30 S. C. 329, 9 S. E. 263. *Tenn.*—*Epperson v. Robertson*, 91 Tenn. 407, 19 S. W. 230. *Va.*—*Cunneil's Admr's v. Dixon's Admr.*, 101 Va. 174, 43 S. E. 340; *Spoer v. Tilson*, 97 Va. 279, 33 S. E. 609; *Repass v. Moore*, 96 Va. 147, 30 S. E. 458; *Yates' Admr. v. Wilson*, 86 Va. 625, 10 S. E.

F. INTERLOCUTORY DECREES.—"Interlocutory decree" is the term used in contradistinction to "final decree." An interlocutory decree is one which is not final but leaves something to be done to afford completely the relief contemplated.¹⁴

976; *Welsh v. Solenberger*, 85 Va. 441, 8 S. E. 91; *Chapman v. Armistead*, 4 Munf. 382. **W. Va.**—*Pickens v. Daniels*, 58 W. Va. 327, 52 S. E. 215.

14. *Wright v. Strother*, 76 Va. 857.

The decree is called an interlocutory decree "when the consideration of the particular question to be determined, or the further consideration of the cause generally, is reserved till a future hearing." *Danl. Ch. Pl. & Pr.* (6th ed.) 986.

"In strictness, a decree is interlocutory until it is signed and enrolled (*Gilb. For. Rom.* 183; *Wyatt's P. R.* 154); but the term is more generally applied to decrees in which some inquiry as to matter, either of law or of fact, is directed, preparatory to a final decision." *Danl. Ch. Pl. & Pr.* (6th ed.) 987, note.

A decree, though deciding the right to the property in controversy, and awarding the costs of suit, is still only interlocutory, if commissioners be appointed to carry it into effect, and the court have yet to act upon their report. Neither does it cease to be interlocutory, in consequence of an order that the defendant be attached for failing to comply with it. *Mackey v. Bell*, 2 Munf. (Va.) 523.

In *Cooke v. Gilpin*, 1 Rob. (Va.) 22, is contained an elaborate discussion of the distinction between interlocutory and final decrees.

A decree which passes upon the whole subject in issue so as to be final in its nature, is not converted into an interlocutory decree by the addition thereto of an order suspending the decree as to the amount of an item of the account involved in the cause, until the decision of another suit, brought by another party against both the plaintiffs and defendants in the first suit, in which the amount of that item is claimed by the plaintiff. *Fleming v. Bolling*, 8 Gratt. (Va.) 292.

A decree which declares the rights of the parties merely, and directs an account in conformity therewith, but reserves the consequential directions and the question of costs until the coming in of the master's report, is an

interlocutory decree, from which an appeal must be brought within fifteen days after notice of the entering of such decree. The decree is not final where the party in whose favor it is made cannot obtain any benefit therefrom without again setting the cause down for hearing upon the equity reserved, on the coming in of and confirmation of the report of the master to whom a reference is made to ascertain facts necessary to be ascertained before the case can be finally disposed of by the court, or which the chancellor thinks proper to have ascertained before he grants any relief to the complainant. But if the decree not only settles the rights of the parties, but also gives all the consequential directions, necessary to a final disposition of the cause, upon the mere confirmation of the report of the master by a common order in the register's office, it is a final decree. *Johnson v. Everett*, 9 Paige (N. Y.) 636.

In the following cases, wherein the question arose, the decree was held to be interlocutory: **U. S.**—*Doddridge County Oil & Gas Co. v. Smith*, 173 Fed. 386; *Webster v. Oliver Ditson Co.*, 171 Fed. 895; *Blythe v. Hinckley*, 84 Fed. 228. **Cal.**—*Blythe Co. v. Bankers' Inv. Co.*, 147 Cal. 82, 81 Pac. 281; *Thompson v. White*, 76 Cal. 381, 18 Pac. 399. **Conn.**—*Warner v. Tomlinson*, 1 Root 201. **Ill.**—*W. E. Terrey Lumb. Co. v. Mildred Park Amusement Co.*, 143 Ill. App. 202; *Jenkins & Reynolds Co. v. Wells*, 123 Ill. App. 280, order affirmed, *Jenkins & Reynolds Co. v. Baer*, 220 Ill. 452, 77 N. E. 236. **Ky.** *City of Newport v. Longsdale Iron Co.*, 13 Ky. L. Rep. 300. **Md.**—*Owings v. Rhodes*, 65 Md. 408, 9 Atl. 903; *Waring v. Turton*, 44 Md. 535; *Barth v. Rosenfeld*, 36 Md. 604. **S. C.**—*Price v. Nesbit*, 1 Hill Eq. 445. **Va.**—*Noel's Admr. v. Noel's Admr.*, 86 Va. 109, 9 S. E. 584; *Purdie v. Jones*, 32 Gratt. 827; *Goodwin v. Miller*, 2 Munf. 42; *Templeman v. Steptoe*, 1 Munf. 339. **W. Va.** *Camden v. Haymond*, 9 W. Va. 680; *Warren v. Syme*, 7 W. Va. 474.

The decree was held to be not interlocutory in *McKinley v. Irvine*, 13

G. PRO FORMA DECREES.—A decree *pro forma* is one entered without a full hearing in the lower court or without any hearing at all, in order that an appeal thereon may be taken to a higher court.¹⁵

II. LIMITATIONS UPON POWER TO GRANT DECREES.—A. GENERAL STATEMENT.—Although wide discretion resides in the chancellor as to granting of relief and as to the character of the same, there are many well settled limitations upon this authority, to be noted in this section.¹⁶

B. JURISDICTION.—1. Decree Depends Upon Jurisdiction.—It is a fundamental rule that the court must have jurisdiction in order that it may pronounce a decree.¹⁷ When a court acts without jurisdiction, the decree is generally regarded as void, and disobedience to the same is not contempt of court.¹⁸ There is, however, a *prima facie* presumption that the court had jurisdiction.¹⁹

2. Jurisdiction as to Parties.—a. General Rules.—It is well settled that the court can render no decree in favor of a party,²⁰ nor one against a party unless the court has duly acquired and retained jurisdiction over the party in question.²¹ Moreover, the court should

Ala. 681; Lewis v. Outton's Admr., 3 E. Mon. (Ky.) 473.

A decree directing how an account shall be taken is interlocutory. Gaines v. Jones (Ala.), 53 So. 288.

15. The decree was held not to be a *pro forma* decree in Appeal of Ahl, 129 Pa. 26, 18 Atl. 471, 25 W. N. C. 113.

In State v. Wilson, 2 Lea (Tenn.) 204, the court held that a decree *pro forma*, is inadmissible where the record showed that the court below was not advised upon the law of the case, but gave the decree in order that the cause might go to the supreme court for its adjudication of the question submitted.

16. Difficulties to be encountered in stating accounts are no grounds why accounts ought not to be decreed, where the court perceives they are necessary to the rights of the parties, and ends of justice. Bevans v. Sullivan, 4 Gill (Md.) 383.

17. U. S.—Ingersoll v. Coram, 136 Fed. 689. Ill.—Johnson v. Miller, 55 Ill. App. 168. Ky.—Curts v. Hill, 3 Bibb 403.

18. Ruhl v. Ruhl, 24 W. Va. 279.

19. All presumptions must be made in favor of the jurisdiction of courts of general jurisdiction. But when the record shows want of jurisdiction over a given person, the judgment or decree affects not such person. Lamar's Exr. v. Hale, 79 Va. 147.

The judgments and decrees of United

States circuit courts are binding until reversed, though the record does not show jurisdiction. Kennedy v. Georgia State Bank, 8 How. (U. S.) 586, 12 L. ed. 1209.

In Wallen v. Williams, 7 Cranch (U. S.) 602, 3 L. ed. 452, the decree of the lower court was reversed, because the record did not show that the court had jurisdiction.

A decree in a federal court dismissing a bill on the merits will be reversed in the United States supreme court, if the circuit court had not jurisdiction, and a decree of dismissal without prejudice directed. Barney v. Baltimore, 6 Wall. (U. S.) 280, 18 L. ed. 825.

20. Carroll v. Draughon, 154 Ala. 430, 45 So. 919.

"It is an anomaly in practice, to render judgment in favor of a party who is not before the court, and is not represented in any manner in the action. It will be no answer to say that the adjudication will inure to the benefit of the plaintiff." Bachman v. Sepulveda, 39 Cal. 688.

21. U. S.—Myer v. Kuhn, 65 Fed. 705, 13 C. C. A. 298, 25 U. S. App. 174. Fla.—Gibbens v. Pickett, 31 Fla. 147, 12 So. 17. Ga.—Groe v. Field, 13 Ga. 24. Ill.—Bruschke v. Der Nord Chicago Schuetzen Verein, 145 Ill. 433, 34 N. E. 417. Ia.—Brooks v. Cutler, 18 Iowa 433; Dussaume v. Burnett, 5 Iowa 95. Ky.—Chambers v. Warren,

not render a decree unless all proper parties are before it.²²

Where one has not been made a party, he is not affected by the decree, unless by reason of privity of title or estate with one who is a party.²³ The one possible exception to this rule is this, to-wit: where

6 B. Mon. 244; Taylor's Heirs v. Watkins, 4 B. Mon. 561; Coleman's Heirs v. Kenton, 5 J. J. Marsh. 44; Dawson v. Clay's Heirs, 1 J. J. Marsh. 165. Mich.—Walker v. Detroit Transit R. Co., 47 Mich. 338, 11 N. W. 187; Outhwaite v. Porter, 13 Mich. 533. Tenn. Pettit v. Cooper, 9 Lea 21; Banis v. Perry, 1 Lea 37. Va.—McGavock v. Clark, 93 Va. 810, 22 S. E. 864; Fultz v. Brightwell, 77 Va. 742; Moseley v. Coker, 7 Leigh 224; Frazier v. Frazier, 2 Leigh 642. W. Va.—Morgan v. Morgan, 42 W. Va. 542, 26 S. E. 294; Shaffer v. Petty, 30 W. Va. 248, 4 S. E. 278; McCoy v. Allen, 16 W. Va. 724.

A decree requiring that *femes covert*, who are not before the court, shall join in deeds to be made by the husbands, relinquishing their right of dower, is erroneous. Coleman v. Woolley, 3 Dana (Ky.) 486.

Where there was service on some of the defendants, not on others, the decree is not void as to the former, but inoperative as to the latter. Wickliffe v. Dorsey, 1 Dana (Ky.) 462.

If the suit is *in rem* the court has no right to render a decree *in personam*. Graham v. Sublett, 6 J. J. Marsh. (Ky.) 44.

Where the objection is taken that certain persons have not been made parties, the persons objecting must show who they are. Hutton v. Cuthbert, 51 Mich. 229, 16 N. W. 286.

A decree in a suit in which the sole complainant is a fictitious person is a mere nullity and no rights can be acquired thereunder. United States v. Samperyac, 1 Hempst. 118, 27 Fed. Cas. No. 16,216a.

22. U. S.—O'Hara v. MacConnell, 93 U. S. 150, 23 L. ed. 840; Com. v. Penn, 5 Wheat. 424, 5 L. ed. 125; Russell v. Clark, 7 Cranch 69, 3 L. ed. 271. Ky.—Grider v. Payne, 9 Dana 188; Muldrow v. Muldrow, 2 Dana 386; Lee v. Wickliffe, 1 T. B. Mon. 110; Shelton v. Gardner, 5 Litt. 8. N. Y.—Smith v. Howard, 20 How. Pr. 151. Tenn.—Peck v. Peck, 9 Yerg. 301. Va.—Crawford v. McDaniels, 1 Rob. 473. W. Va.—Van Winkle v. Black-

ford, 33 W. Va. 573, 11 S. E. 26; Robinson v. Dix, 18 W. Va. 528; Applegate v. Hinkson, 8 W. Va. 594; Donahue v. Fackler, 8 W. Va. 249.

It is the duty of the complainant to see and know that he has before the court all necessary parties. Hopkins v. Roseclare Lead Co., 72 Ill. 373.

The bill must be dismissed if a decree cannot be made without prejudice to one not a party, when the joinder of such party would leave the court without jurisdiction of the controversy. The rule that a bill in chancery will not be dismissed for want of parties rests on the assumption that the fault may be remedied. Fourth Nat. Bank v. New O. & Carrollton R. Co., 11 Wall. (U. S.) 624, 20 L. ed. 82.

The general rule is that all material parties should be made parties, that there may be a final decree. But this is more or less a matter of discretion. It should be restricted to parties whose interest is involved in the issue, and to be affected by the decree. The relief granted will always be so modified as not to affect the interest of others. Mechanics' Bank v. Seton, 1 Pet. (U. S.) 299, 7 L. ed. 152.

The joinder of unnecessary parties, not capable of being sued in the United States circuit court because citizens of the same state as the complainant does not prevent the court from making a decree against those who are citizens of another state. Carneal v. Banks, 10 Wheat. (U. S.) 181, 6 L. ed. 297.

23. U. S.—Kinney v. Consolidated Virginia Min. Co., 4 Sawy. 382, 14 Fed. Cas. No. 7,827. Ill.—Sill v. Pate, 133 Ill. App. 423, judgment modified, 230 Ill. 39, 82 N. E. 356. Ia.—McReynolds v. McReynolds, 74 Iowa 89, 36 N. W. 903. Ky.—Portwood v. Outtous Admr., 3 B. Mon. 247. Mich.—De Mill v. Port Huron Dry Dock Co., 30 Mich. 38. Ohio.—Este v. Strong, 2 Ohio 401. Pa.—Boyd v. American Carbon-Black Co., 182 Pa. 206, 37 Atl. 937. Tenn. Robertson v. Wilburn, 1 Lea 633. Va. Cronise v. Carper, 80 Va. 678.

Although a decree is not, in form, binding upon persons who are not par-

a party represents a numerous class, the decree may affect all within the class, although not made parties to the suit.²⁴

b. *Parties Non-Residents.*—Contrary to the former equity practice, provision is now made by statute for decrees against persons over whom the court cannot obtain jurisdiction by personal service. Provision is made for service by publication.²⁵

ties, yet it is in effect, if the determination of the question presented by the record necessarily involves the determination of their rights and the validity of their title. So said, where the decree was in favor of the trust estate, the beneficiaries not being before the court. *Goss v. Singleton*, 2 Head (Tenn.) 67.

Crislip v. Cain, 19 W. Va. 438, the court declares that there is a distinction between the action of the court in the cause, which the court has no right to take, unless all the parties are before it, and the action of the court *beyond* the cause. If any of the parties to the suit have died, the cause must be revived, before the court can take any action in the cause. By action of the court *beyond* the cause the court declares it means those measures which are necessary for the execution of a decree, which has been pronounced and which are properly to be regarded as adopted not in but *beyond* the cause as founded on the decree itself without respect to the relief to which the party was primarily entitled upon the merits of the case.

The interests of persons not parties or privies to a suit cannot be *injuriously* affected by the decree, but equity has "power to protect by reservation or limitation in their decrees the rights of individuals who appear to be interested, even though they be not parties to the action." *Buck v. Webb*, 7 Colo. 212, 3 Pac. 211.

Although Equity Rule 47 excuses the plaintiff from the necessity of making persons in interest parties defendant when their joinder would oust the court of jurisdiction, no decree can be made involving the rights of such parties. *Collins Mfg. Co. v. Ferguson & Hutter's Trustee*, 54 Fed. 721; *Hamilton v. Savannah, F. & W. R. Co.*, 49 Fed. 412.

Notwithstanding Equity Rule 47, the United States circuit court cannot make a decree affecting persons not parties to a suit or where the decree

cannot be entered against parties present without affecting those rights. *Hagan v. Walker*, 14 How. (U. S.) 29, 14 L. ed. 312.

24. *Wabash & E. Canal Co. v. Beers*, 2 Black. 448, 17 L. ed. 327; *Rejall v. Greenhood*, 92 Fed. 945, 35 C. C. A. 97.

Where the parties are so numerous that equity cannot join them all, a court of equity will make such a decree as it can without them. *Carey v. Hoxey*, 11 Ga. 645.

It is not necessary that the members of the company named in the bill, but not served with process to appear, should be parties to the suit although the bill as to them should be taken for confessed. *Riggs v. Swann*, 3 Cranch C. C. 183, 20 Fed. Cas. No. 11,831.

Under Federal Equity Rule 48, allowing a few representatives of a class to sue without prejudice to the rights of absent parties, such absent parties may nevertheless be brought in and thus be bound by the decree. *American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 & 3*, 90 Fed. 593.

25. **U. S.**—See *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. ed. 918, *citing* *Pennecrofer v. Neff*, 95 U. S. 714, 24 L. ed. 565. **Ky.**—*Gale v. Clark*, 4 Bibb 415. **Md.**—*Fox v. Reynolds*, 50 Md. 564. **Mich.**—*Coffin v. Ontonagon Circuit Judge*, 140 Mich. 420, 103 N. W. 835, 12 Det. Leg. N. 219. **Miss.**—*Hebron v. Kelly*, 77 Miss. 48, 23 So. 641, 25 So. 877. **Tenn.**—*Metcalf v. Landers*, 3 Baxt. 35. **W. Va.**—*Scott v. Ludington*, 14 W. Va. 337.

By the *lex loci rei sitae*, property belonging to a person who is not within the jurisdiction of the court in which a suit is brought may be made subject to the jurisdiction of such court, so as to render the judgment or decree binding, as a proceeding *in rem*, against the property which is within such jurisdiction; but if the defendant, or party proceeded against, does not reside within the jurisdiction of the

Unknown Heirs.—Proceedings in chancery against unknown heirs are now recognized as lawful.²⁶ Such statutes, are, it is declared, in derogation of the common law and, therefore, must be strictly complied with.²⁷ Several statutes require the party obtaining such relief to give a refunding bond to indemnify the absent party if the decree is proven erroneous within a certain period.²⁸ Other statutes provide

state or the county where the suit is brought and is not served with process and does not appear, the judgment or decree in such suit is purely local; and it has no extra territorial effect or validity, *in personam*, against the defendant. *Bates v. Delavan*, 5 Paige (N. Y.) 299.

The objection, for want of due publication against the absent defendant, may be taken by other defendants who may be affected by the decree against him; and if made in the appellate court will prove fatal, though the absent defendant was not a party to the appeal. *McCoy's Exr. v. McCoy*, 9 W. Va. 443.

A decree in Virginia against one who was a citizen of Kentucky at the institution of the suit, upon constructive service of process only, is void. But such record and decree is evidence of the pendency of the suit in Virginia, and the decree is *prima facie* evidence of the extent of the liability of the co-surety, and of the party sued in Kentucky as co-surety in the administration. *Cobb v. Haynes*, 8 B. Mon. (Ky.) 137.

It is error to decree *in personam* against a non-resident who had no estate within the state, and who was not served with process. *Mattingly's Heirs v. Corbit*, 7 B. Mon. (Ky.) 376; *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 220.

A decree *in personam* against an absent debtor, is entitled to all the respect to which any other decree is entitled, in all collateral controversies. A decree against an absent debtor merges the original cause of action, so far as to enable the plaintiff to rely thereon, in any subsequent proceeding to enforce it, as *prima facie* evidence of the demand it establishes; and to repeal the statute of limitations, except so far as the statute may apply to judgments or decrees. *Rootes v. Tompkins*, 3 Gratt. (Va.) 94.

A decree against absent defendants served in accordance with statute, is

just as effective for local purposes as a decree against a defendant brought in on process. *Mutual Life Ins. Co. v. Pinner*, 43 N. J. Eq. 52, 10 Atl. 184.

Where defendant was improperly proceeded against as absentee he was held entitled to come in and defend upon the payment of such costs as the court should deem reasonable. *Hartwell v. White*, 9 Paige (N. Y.) 368.

26. **Ky.**—*Beasley v. Doty*, 3 Dana 32. **Mo.**—*Gitt v. Watson*, 18 Mo. 274. **Ohio.**—*Sullivant v. Weaver*, 10 Ohio 275.

By statute, "parties unknown" may be served by publication. *Fayette Land Co. v. Louisville & N. R. Co.*, 93 Va. 274, 24 S. E. 1016.

27. **Ala.**—*Cook v. Rogers*, 64 Ala. 406. **Fla.**—*Guaranty Trust & Safe Dep. Co. v. Buddington*, 27 Fla. 215, 9 So. 246, 12 L. R. A. 770. **Ky.**—*Green v. Breckinridge*, 4 T. B. Mon. 541. **N. Y.**—*Brisbane v. Peabody*, 3 How. Pr. 109.

Where the decree recites that notice has been given by publication, the presumption is in favor of such proceedings. *Claybrook v. Wade*, 7 Coldw. (Tenn.) 555.

Recital in decree as to service by publication is conclusive that the order of publication was duly made. *Craig v. Sebrell*, 9 Gratt. (Va.) 131.

The making defendants to a suit in equity of parties residing without the state, upon whom process is not served, and who have only constructive notice by publication in a newspaper, is statutory; it is not according to the ordinary practice of the court, and not within its ordinary jurisdiction. In such cases the final decree cannot be supported unless the record shows not merely a decree *pro confesso* but the facts which show a compliance with the statute in reference to such service. Such statutes, in derogation of the common law must be strictly complied with. *Chilton v. Alabama Gold Life Ins. Co.*, 74 Ala. 290.

28. *Holly v. Bass*, 63 Ala. 387; *Hurt*

that the decree shall not become absolute until after a considerable period of time, and allow the absentee to appear and have the decree set aside during the interim.²⁹ It has been held that persons acquire rights under such decree before it becomes final, subject to the rights of the absent party.³⁰ The original decree is generally allowed to stand until final hearing.³¹

c. *Parties Under Disability*.—Where parties are under disability, the court must appoint a guardian *ad litem* or a similar officer to care for their interests, before a decree can be made against them.³²

v. Blount, 63 Ala. 327; *Beavers v. Davis*, 19 Ala. 82; *Rowland v. Day*, 17 Ala. 681; *Montandon v. Deas*, 14 Ala. 33; *Cowart v. Harrod*, 12 Ala. 265.

If the non-resident appears, although served by publication, such bond need not be given. *Hanson v. Patterson*, 17 Ala. 738.

29. In the following cases these statutes are considered. The period prescribed is specified after several of the cases. **Ala.**—*New England Mtg. Sec. Co. v. Davis*, 122 Ala. 555, 25 So. 42; *Lehman Durr & Co. v. Collins*, 69 Ala. 127 (eighteen months); *Colomb v. Branch Bank of Mobile*, 18 Ala. 454 (three years). **Ark.**—*Porter v. Hanson*, 36 Ark. 591. **Ill.**—*Rissman v. Wierth*, 244 Ill. 95, 91 N. E. 87; *Smith v. Hunter*, 241 Ill. 514, 89 N. E. 686; *Trustees M. E. Church v. Field*, 135 Ill. 112, 25 N. E. 667 (three years); *Sale v. Fike*, 54 Ill. 292 (three years); *Buck v. Beekly*, 45 Ill. 100; *Kinney v. Bauer*, 6 Ill. App. 267. **Ind.**—*Heistand v. Kuns*, 6 Blackf. 95 (one year). **Ky.** *Davis v. Bentley*, 2 Dana 247; *Larue's Heirs v. Larue's Exr.*, 3 J. J. Marsh. 156; *Bleight v. McIlvoy*, 4 T. B. Mon. 142; *Dunlap v. McIlvoy*, 3 Litt. 269. **Mich.**—*St. Louis Hoop & Stave Co. v. Donovan*, 155 Mich. 311, 118 N. W. 989, 15 Det. Leg. N. 1017 (six months); *Coffin v. Ontonagon Circuit Judge*, 140 Mich. 420, 108 N. W. 835, 12 Det. Leg. N. 219. **Miss.**—*Rodney v. Seelye*, 54 Miss. 537; *Head v. Wash*, 31 Miss. 358. **N. J.**—*Consolidated Electric Storage Co. v. Atlantic Trust Co.*, 50 N. J. Eq. 93, 24 Atl. 229. **Tenn.**—*Brown v. Brown*, 86 Tenn. 277, 6 S. W. 869, 7 S. W. 640; *Cain v. Jennings*, 1 Tenn. Ch. 131 (twelve months); *Scovel v. Absten*, 1 Tenn. Ch. 73 (three years). **Va.**—*Rootes v. Tompkins*, 3 Gratt. 98 (seven years); *Platt v. Howland*, 10 Leigh 507; *Ross v. Austin*, 4

Hen. & M. 502; *Horton v. Horton*, 4 *Hen. & M.* 403 (one year). **W. Va.** *Buskirk v. Ferrell*, 51 W. Va. 198, 41 S. E. 123 (five years).

Federal Courts.—In 1854 the United States Supreme Court declared that a federal circuit court could not make a decree which must affect the rights of absent persons, and the 47th rule for equity practice in reference to the non-joinder of parties in no wise affects the rule. *Shields v. Barrow*, 17 How. (U. S.) 130, 15 L. ed. 158. Now, however, by act of congress provision is made for service by publication upon absent defendants in suits to enforce liens, remove encumbrances, and similar cases. Such parties are allowed to appear within one year after final judgment and have the decree set aside. §8, Act of March, 1875, 18 St. at L. 472; 4 Fed. St. Anno., p. 380; *American Freehold Land Mtg. Co. v. Thomas*, 71 Fed. 782, 18 C. C. A. 327, 30 U. S. App. 690.

It is doubtful if such statutes are applicable to final decrees obtained upon returns regular on their faces, but false in fact, in *Harper v. Mangel*, 98 Ill. App. 526.

30. *Southern Bank v. Humphreys*, 47 Ill. 227.

31. *Porter v. Hanson*, 36 Ark. 591; *Southern Bank v. Humphreys*, 47 Ill. 227.

32. **Ga.**—*Groce v. Field*, 13 Ga. 24. **Ky.**—*Downing's Heirs v. Ford*, 9 Dana 391. **Ohio.**—*St. Clair v. Smith*, 3 Ohio 355. **W. Va.**—*McDonald v. McDonald*, 3 W. Va. 676.

Where some of the parties interested under a legal decree are infants, a declaratory decree as to their rights and interests cannot be made. *Danl. Pl. & Pr.* 1001; *Webb v. Byng*, 8 De G., M. & G. 633, 44 Eng. Reprint 534, 2 Jur. (N. S.) 1242; *Bogg v. Midland R. Co.*, L. R. 4 Eq. 310.

d. *Purchasers Pendente Lite*.—Persons who purchase property during the pendency of a suit are bound by decrees that are later entered against those persons from whom they derive title, in the absence of statutory provisions to the contrary.³³ Moreover, a decree may be pronounced in favor of a *pendente lite* purchaser who has not been made a party to the suit.³⁴

C. DECREES AS AFFECTED BY PLEADINGS AND EVIDENCE.—1. **Secundum Allegata et Probata**.—It is a fundamental rule that the decree must be *secundum allegata et probata*.³⁵ Both the allegations in the pleadings and the evidence must support the decree.³⁶ Where the pleadings disclose one cause and the evidence another, relief must be denied entirely.³⁷

2. **As Affected by Pleadings**.—The decree cannot embrace matters not covered by the allegations in the pleadings.³⁸ The same rule ap-

33. *Zane v. Fink*, 18 W. Va. 693.

Such purchaser need not be made a party, nor need he be served with a copy of the decree. *Morton v. Long*, 3 A. K. Marsh. (Ky.) 414.

34. *Dudley v. Barrett*, 66 W. Va. 363, 66 S. E. 507.

35. **Fla.**—*Lyle v. Winn*, 45 Fla. 419, 34 So. 158. **Me.**—*Scudder v. Young*, 25 Me. 153. **N. Y.**—*Thomas v. Austin*, 4 Barb. 265; *Rome Exch. Bank v. Eames*, 4 Abb. Dec. 83.

36. **Del.**—*Cloud v. Whiteman*, 2 Har. 401. **Ill.**—*Heath v. Hurless*, 73 Ill. 323; *Means v. Means*, 42 Ill. 50; *Burger v. Potter*, 32 Ill. 66; *Clinnin v. Raugh*, 88 Ill. App. 371; *Ball v. Serum*, 85 Ill. App. 560; *Johnson v. Foreman*, 16 Ill. App. 632. **Ky.**—*Dickerson v. Morgan*, 8 Dana 130; *Handley v. Young*, 4 Bibb. 376. **La.**—*Handlin v. Dodt*, 110 La. 936, 34 So. 881. **Md.**—*Hilleary v. Hurdle*, 6 Gill 105; *Berry v. Pierson*, 1 Gill 234; *Townshend v. Duncan*, 2 Bland 45. **Mich.**—*Thayer v. Lane*, Walk. Ch. 200. **Miss.**—*Spears v. Cheatham*, 44 Miss. 64; *Green v. McDonald*, 13 Smed. & M. 445; *Lyon v. Sanders*, 23 Miss. 530. **Mo.**—*Dougherty v. Adkins*, 81 Mo. 411. **N. J.**—*Vulcan Detinning Co. v. American Can Co.*, 72 N. J. Eq. 387, 69 Atl. 1103. **N. Y.** *House v. Lockwood*, 137 N. Y. 259, 33 N. E. 595; *Rome Exch. Bank v. Eames*, 4 Abb. Dec. 83; *Stuart v. Mechanics' & F. Bank*, 19 Johns. 496. **N. C.** *Craige v. Craige*, 41 N. C. 191. **Ore.** *Smith v. Butler*, 11 Ore. 46, 4 Pac. 517. **Pa.**—*Updegraff v. Cooke*, 8 Phila. 336, 28 Leg. Int. 412; *Edwards v. Brightly*, 44 Leg. Int. 132, 19 Phila. 251. **S. C.** *Miller v. Furse*, 1 Bailey Eq. 187. **Tex.**

Trammell v. Watson, 25 Tex. (Supp.) 210; *Parker v. Beavers*, 19 Tex. 406.

W. Va.—*Keneweg Co. v. Schilansky*, 47 W. Va. 287, 34 S. E. 773; *Fadely v. Tomlinson*, 41 W. Va. 606, 24 S. E. 645; *Lang v. Smith*, 37 W. Va. 725, 17 S. E. 213.

37. **U. S.**—*Baldwin v. Liverpool & London & Globe Ins. Co.*, 124 Fed. 206, 59 C. C. A. 660; *Britton v. Brewster*, 2 Fed. 160. **Ill.**—*Adams v. Gill*, 158 Ill. 190, 41 N. E. 738. **Ia.**—*Simplot v. Simplot*, 14 Iowa 449. **Mich.**—*Kelly v. Kelly*, 54 Mich. 30, 19 N. W. 580.

38. **U. S.**—*Piatt v. Vattier*, 9 Pet. 405, 9 L. ed. 173; *Carneal v. Banks*, 10 Wheat. 181, 6 L. ed. 297; *Crocket v. Lee*, 7 Wheat. 522, 5 L. ed. 513; *Simms v. Guthrie*, 9 Cranch 19, 3 L. ed. 642; *Stanwood v. Des Moines Sav. Bank*, 178 Fed. 670, 102 C. C. A. 170; *Gage v. J. F. Smyth Merc. Co.*, 160 Fed. 425, 37 C. C. A. 377; *Burke v. Davis*, 81 Fed. 907, 26 C. C. A. 675; *Reed v. Munn*, 148 Fed. 737; *Kinney v. Consolidated Virginia Min. Co.*, 4 Sawy. 382, 14 Fed. Cas. No. 7,827; *Andrews v. Solomon, Pet. C. C.* 356, 1 Fed. Cas. No. 378. **Ala.**—*Freeman v. Pullen*, 130 Ala. 653, 31 So. 451; *First Nat. Bank v. Acme White Lead & Color Co.*, 123 Ala. 344, 26 So. 354; *Copeland v. Kehoe*, 57 Ala. 246; *Flanagan v. State Bank*, 32 Ala. 508; *Langdon v. Roane*, 6 Ala. 518, 41 Am. Dec. 60; *Gibson v. Carson*, 3 Ala. 421; *Mawry v. Mason*, 8 Port. 211; *Bozman v. Draughan*, 3 Stew. 243. **Ark.**—*Henry v. Blackburn*, 32 Ark. 445; *Atkins v. Busby*, 25 Ark. 176; *Moore v. Madden*, 7 Ark. 530, 46 Am. Dec. 298; *Barrague v. Manuel*, 7 Ark. 516. **Cal.**—*Bachman*

plies to a defense not set up in the answer. There must be the proper allegations therein to support the defense.³⁹

A decree to the extent that it is not supported by the pleadings is *coram non iudice* and void,⁴⁰ is not binding in subsequent proceed-

v. Sepulveda, 39 Cal. 688. **Colo.**—Clear Creek, etc., *Min. Co. v. Root*, 1 Colo. 374. **Conn.**—*Skinner v. Bailey*, 7 Conn. 496; *Gaylord v. Couch*, 5 Day 223. **Del.**—*Cloud v. Whiteman*, 2 Del. Ch. 23; *Cloud v. Whiteman*, 2 Har. 401. **D. C.**—*Onutt v. King*, 1 Mae-Arthur 312. **Fla.**—*Briles v. Bradford*, 54 Fla. 501, 44 So. 337. **Ill.**—*James H. Rice Co. v. McJohn*, 244 Ill. 264, 91 N. E. 448; *Gillespie v. Fulton Oil & Gas Co.*, 239 Ill. 326, 88 N. E. 192; *Stearns v. Glos*, 235 Ill. 290, 85 N. E. 335; *Harms v. Jacobs*, 158 Ill. 505, 41 N. E. 1071; *Ohling v. Luitjens*, 32 Ill. 23; *Greene v. Cook*, 29 Ill. 186; *Gold v. Ryan*, 14 Ill. 53; *Adams v. Payson*, 11 Ill. 26; *McKay v. Bissett*, 10 Ill. 499; *Nimmons v. Strycker*, 132 Ill. App. 414; *McGooden v. Bartholie*, 122 Ill. App. 302. **Ind.**—*Young v. Loree*, 2 Ind. 27. **Ia.**—*Simplot v. Simplot*, 14 Iowa 419. **Ky.**—*Smith v. Smith*, 121 S. W. 1002; *Graves v. Graves*, 3 More. 167. **Me.**—*Stover v. Poole*, 67 Me. 217. **Md.**—*Chatterton v. Mason*, 86 Md. 236, 37 Atl. 960; *Ringgold v. Ringgold*, 1 Har. & G. 11, 18 Am. Dec. 250. **Mass.** *Stratton v. Seaverns*, 163 Mass. 73, 39 N. E. 779. **Mich.**—*McMahon v. Rooney*, 93 Mich. 390, 53 N. W. 539; *Walker v. Detroit Transit R. Co.*, 47 Mich. 338, 11 N. W. 187; *Livingston v. Hayes*, 43 Mich. 129, 5 N. W. 78; *Jones v. Wells*, 31 Mich. 170; *Moran v. Palmer*, 13 Mich. 367. **Miss.**—*Phelps v. Commodore*, 1 So. 833; *Salmon v. Smith*, 58 Miss. 399. **Mo.**—*Cox v. Esteb*, 68 Mo. 110; *Ames v. Gilmore*, 59 Mo. 537; *Nultenberger v. Morrison*, 39 Mo. 71; *Evans v. Gibson*, 29 Mo. 223, 77 Am. Dec. 565; *Vasquez v. Ewing*, 24 Mo. 31, 66 Am. Dec. 694. **Neb.** *Wilhelmson v. Bentley*, 27 Neb. 658, 43 N. W. 397. **N. J.**—*Myers v. Steel Mach. Co.*, 67 N. J. Eq. 300, 57 Atl. 1080, *affirmed*, 68 N. J. Eq. 795, 64 Atl. 746; *Consolidated Elec. Storage Co. v. Atlantic Trust Co.*, 50 N. J. Eq. 93, 24 Atl. 229; *Watkins v. Milligan*, 37 N. J. Eq. 435; *Francis v. Bertrand*, 26 N. J. Eq. 213; *Marshall v. Conklin*, 21 N. J. Eq. 546; *Brown v. Bulkley*, 14 N. J. Eq. 451; *Plume v. Small*,

5 N. J. Eq. 460, 650; *Hopper v. Sisco*, 5 N. J. Eq. 343. **N. Y.**—*Bradley v. Aldrich*, 40 N. Y. 504; *Campbell v. Consalus*, 25 N. Y. 613; *Bailey v. Ryder*, 10 N. Y. 363; *James v. McKernon*, 6 Johns. 542; *Tripp v. Vincent*, 3 Barb. Ch. 613; *Livingston v. Freeland*, 3 Barb. Ch. 510; *VanZandt v. New York*, 8 Bosw. 375. **N. C.**—*Howard v. Jones*, 40 N. C. 75; *Russ v. Hawes*, 40 N. C. 18; *Buffalow v. Buffalow*, 37 N. C. 113; *Lindsay v. Etheridge*, 21 N. C. 33. **Pa.**—*Luther v. Luther*, 216 Pa. 1, 64 Atl. 868; *Appeal of Cumberland Val. R. Co.*, 62 Pa. 218. **Tenn.**—*McClung v. Colwell*, 107 Tenn. 592, 64 S. W. 890, 89 Am. St. Rep. 961; *Griffith v. Security Home Bldg. & L. Assn.*, 100 Tenn. 410, 45 S. W. 670; *Harriman Imp. Co. v. McNutt* (Tenn. Ch. App.), 37 S. W. 396. **Vt.**—*White v. Yaw*, 7 Vt. 357. **Va.**—*Swope v. Chambers*, 2 Gratt. 319; *Sheppard v. Starke*, 3 Munf. 29; *Hall v. Hall*, 104 Va. 773, 52 S. E. 557; *Steadman v. Handy*, 102 Va. 382, 46 S. E. 380; *Kent's Admr. v. Kent's Admr.*, 82 Va. 205. **W. Va.**—*Truslow v. Parkersburg Bridge & T. R. Co.*, 61 W. Va. 628, 57 S. E. 51; *Turner v. Stewart*, 51 W. Va. 493, 41 S. E. 924; *Evans v. Kelley*, 49 W. Va. 181, 38 S. E. 497; *Coaldale Min. & Mfg. Co. v. Clark*, 43 W. Va. 84, 27 S. E. 294; *Roberts v. Coleman*, 37 W. Va. 143, 16 S. E. 482; *Armstrong v. Town of Grafton*, 23 W. Va. 50; *Ruffner v. Hewitt*, 14 W. Va. 737; *Burley v. Weller*, 14 W. Va. 264; *Hunter's Exr. v. Hunter*, 10 W. Va. 321. **Wis.**—*Winslow v. Crowell*, 32 Wis. 639.

Interest is recoverable although not alleged to be due. The law gives it as damages. *Warren v. McCarthy*, 25 Ill. 95.

39. *Chandler v. Herrick*, 11 N. J. Eq. 497.

40. **N. J.**—*Jones v. Davenport*, 45 N. J. Eq. 77, 17 Atl. 570; *Reynolds v. Stockton*, 43 N. J. Eq. 211, 10 Atl. 385. **Tenn.**—*Pettit v. Cooper*, 9 Lea 21; *Meredith v. Little*, 6 Lea 517; *Robertson v. Wilburn*, 1 Lea 633. **W. Va.**—*Waldron v. Harvey*, 54 W. Va. 603, 46 S. E. 603, 102 Am. St. Rep. 959.

ings,⁴¹ and may be collaterally attacked.⁴² However, if the court in its decree decides that a certain question was involved and so adjudged, the decree is so far valid.⁴³

In support of decrees a liberal construction is given to this general rule.⁴⁴ Equity does not require the same strictness as a court of law.⁴⁵ The substance rather than the form is looked to in determining the question.⁴⁶

Theory of Case.—Many authorities hold that if the bill is framed for the purpose of obtaining relief on one distinct ground, as for example, fraud, the plaintiff cannot obtain relief on another ground, for example, mistake, although sufficient allegations appear in the complaint to support a decree on the latter ground.⁴⁷ However, a number of authorities hold to the contrary.⁴⁸

41. *Hume v. Commercial Bank*, 1 Lea (Tenn.) 220.

42. *Munday v. Vail*, 34 N. J. L. 418; *Fowler v. Lewis' Admr.*, 36 W. Va. 112, 14 S. E. 447. *Contra*, *Jeannerett v. Radford*, 1 Rich. Eq. Cas. (S. C.) 469, to the effect that a decree cannot be impeached for want of allegations in the bill.

43. *Mayfield v. Stephenson*, 6 Baxt. (Tenn.) 397; *McDaniel v. Goodall*, 2 Coldw. (Tenn.) 391.

44. *Wood v. Brown*, 34 N. Y. 337; *Lumpkin v. Silliman*, 79 Tex. 165, 15 S. W. 231.

It is not necessary to allege usury *in terms*; if the facts appear that is sufficient. *Fanning v. Pritchett*, 6 T. B. Mon (Ky.) 81.

A mere estimate of value in the pleadings is not binding. *Ward's Admr. v. Grayson*, 9 Dana (Ky.) 280.

A mere estimate of quantity of land is not binding. *Traube's Heirs v. North*, 2 A. K. Marsh. (Ky.) 361.

A claim for at least \$100 entitles party to recover \$100. *Neal v. Keel's Exrs.*, 4 T. B. Mon. (Ky.) 162.

45. *Bedford v. Williams*, 5 Coldw. (Tenn.) 202.

46. *Beers v. Botsford*, 13 Conn. 146; *Mahler v. Sanche*, 121 Ill. App. 247.

Conformity to allegations is not sufficient. The facts must be brought to issue. *Elyton Land Co. v. Iron City Steam Bottling Wks.*, 109 Ala. 602, 20 So. 51; *Mason v. Gates*, 90 Ark. 241, 119 S. W. 70.

47. **U. S.**—*McKinney v. Big Horn Basin Develop. Co.*, 167 Fed. 770, 93 C. C. A. 258; *Fisher v. Boody*, 1 Curt. 206, 9 Fed. Cas. No. 4,814. *Ala.* *Strange v. Watson*, 11 Ala. 324; *Bor-*

land v. Phillips, 3 Ala. 718. **Ill.**—*Vennum v. Vennum*, 61 Ill. 331. **N. J.** *Hoyt v. Hoyt*, 27 N. J. Eq. 399. **N. Y.** *McMichael v. Kilmer*, 76 N. Y. 36. **R. I.**—*Tillinghast v. Champlin*, 4 R. I. 173, 67 Am. Dec. 510 (containing an excellent review of the English authorities on this question); *Mt. Vernon Bank v. Stone*, 2 R. I. 129, 57 Am. Dec. 709. **Vt.**—*Danforth v. Smith*, 23 Vt. 247.

Question of Surprise.—In *McCray v. Lowry*, 25 Mo. App. 247, the court declares: "When the prayer for *general* relief is sufficient the *special* relief prayed at the bar must essentially depend upon the proper frame and structure of the bill; for the court will grant such relief only as the case stated will justify, and will not ordinarily be so indulgent as to permit a bill framed for one purpose to answer another, especially if the defendant may be surprised or prejudiced thereby." *Quoting* Story's Eq. Pl., §42.

48. **U. S.**—*Finley v. Lynn*, 6 Cranch 238, 3 L. ed. 211. **N. J.**—*Read v. Cramer*, 2 N. J. Eq. 277, 34 Am. Dec. 204. **N. C.**—*Whitfield v. Cates*, 59 N. C. 136, which allows the plaintiff to fall back on a secondary equity in the bill. **Tenn.**—*Anderson v. Binford*, 2 Baxt. 310.

In *Peterson v. Turney*, 2 Tenn. Ch. App. 519, the relief was granted although the "predominant idea" of the pleadings seemed to have been to obtain different relief. To the same effect, *Filler v. Tyler*, 91 Va. 458, 22 S. E. 235.

In *Peyton v. Rose*, 41 Mo. 257, the court rejected part of the petition as

Where an action is brought to obtain legal relief, but the evidence shows a right to equitable relief only, all relief has been denied,⁴⁹ although where one demanded equitable relief and the evidence showed him to be entitled to legal relief, such relief has been granted.⁵⁰ To obviate such difficulties the plaintiff may frame his bill with a double aspect and add a prayer in the alternative.⁵¹

As to whether or not the plaintiff may rely upon allegations in the answer or is confined to the allegations in the bill, there is a conflict of authority, the weight of authority holding that the plaintiff cannot do this.⁵²

3. As Affected by Evidence.—It is well settled that a decree is erroneous unless it be supported by the evidence and proofs in the case.⁵³ This does not mean that all the allegations of the bill must be proved precisely as alleged in the pleadings. Substantial compliance

surplusage, disregarded part of the prayer and rendered a decree as to the balance.

49. *Towle v. Jones*, 19 Abb. Pr. (N. Y.) 449.

"Where, upon the facts found, the court . . . erroneously granted relief when there appears to be adequate remedy at law," the appellate court will reverse the decree, not as a nullity but as erroneous. *Munson v. Munson*, 30 Conn. 425.

50. *Wheelock v. Lee*, 74 N. Y. 495; *Leonard v. Rogan*, 20 Wis. 540.

51. **U. S.**—*Hobson v. McArthur*, 16 Pet. 182, 10 L. ed. 930. **N. Y.**—*Colton v. Ross*, 2 Paige 396, 22 Am. Dec. 648. **N. C.**—*Foster v. Cook*, 8 N. C. 509. **W. Va.**—*Brown v. Wylie*, 2 W. Va. 502, 98 Am. Dec. 781.

See 4 STANDARD PROC. 122.

Amendments.—Sometimes an amendment can be made even after the hearing of the evidence has begun, to make the pleadings conform to the evidence. *Howell v. Sebring*, 14 N. J. Eq. 84.

In *Kline v. Triplett* (Va.), 25 S. E. 886, the appellate court affirmed a decree, not conformable to the allegations of the bill, where the sole objection to the same was that the bill was not formally amended to conform with the evidence.

In *White v. Fromme*, 120 App. Div. 782, 105 N. Y. Supp. 634, the court prescribes an amendment of the pleadings in preference to a dismissal of the bill where the facts are before the court.

52. The following cases deny this privilege to the plaintiff: **U. S.**—*Knox*

v. Smith, 4 How. 298, 11 L. ed. 983; *Battle v. Mutual Life Ins. Co.*, 10 Blatchf. 417, 2 Fed. Cas. No. 1,109. **Ala.**—*Land v. Cowan*, 19 Ala. 297. **Md.**—*Hilleary v. Hurdle*, 6 Gill 105; *Lingan v. Henderson*, 1 Bland 236. *Contra*, **Ia.**—*Simplot v. Simplot*, 14 Iowa 449. **Mo.**—*Bevin v. Powell*, 83 Mo. 365 (held proper, where answer sets up affirmative relief), *affirming* 11 Mo. App. 216. **Tenn.**—*Cox v. Waggoner*, 5 Sneed 542; *Rose v. Mynatt*, 7 Yerg. 30. See *Hilleary v. Hurdle*, *supra*.

See the title "**Bills and Answers.**"

Plaintiff cannot get relief on a contract set up in the answer and not the same as that alleged in the bill unless he abandons his own version and accepts that of the defendant. *Boardman v. Davidson*, 7 Abb. Pr. N. S. (N. Y.) 439.

53. **U. S.**—*McKinnon v. McKinnon*, 46 Fed. 713. **Cal.**—*Sanchez v. McMahon*, 35 Cal. 218. **Del.**—*Cloud v. Whiteman*, 2 Har. 401. **Ill.**—*Brauer v. Laughlin*, 235 Ill. 265, 85 N. E. 283, *reversing* judgment, *Laughlin v. Brauer*, 138 Ill. App. 524; *Campbell v. Campbell*, 63 Ill. 502. **Ia.**—*Rees v. Shepherdson*, 95 Iowa 431, 64 N. W. 286. **Ky.**—*Tribble v. Fryer*, 5 J. J. Marsh. 179; *Bush v. White*, 3 T. B. Mon. 100. **Md.**—*Grove v. Fresh*, 9 Gill & J. 280. **Mich.**—*Messenger v. Peter*, 129 Mich. 93, 88 N. W. 209, 8 Det. Leg. N. 867. **Minn.**—*Wilson v. McCormick*, 10 Minn. 216. **Ohio.**—*Dille v. Woods*, 14 Ohio 122. **Pa.**—*Zellar v. Farrand*, 38 Pa. Super. 398. **Va.**—*Beale v. Hall*, 97 Va. 383, 34 S. E. 53; *Shumate v. Dunbar*, 6 Munf. 430.

with the rule is sufficient.⁵⁴ Admissions contained in the pleadings are sufficient proofs for this purpose.⁵⁵ A decree not rendered in compliance with this rule, although erroneous, is not void for want of jurisdiction.⁵⁶

D. DECREES AS AFFECTED BY PRAYER FOR RELIEF.—1. General Statements.—It is well settled that the court may grant a portion only of the relief prayed.⁵⁷ However, there is a conflict of authority as to whether or not the court may grant relief inconsistent with the prayer for relief or relief not prayed for. Many courts manifest a disposition to disregard entirely the prayer and look only to the pleadings and proofs in determining what relief may be granted.⁵⁸ In some states, by statute, it is provided that the prayer limits the relief only when no answer is filed, and that in all other cases any relief consistent with the pleadings and proofs may be granted.⁵⁹ One court lays down the rule that any relief may be granted on the pleadings and proofs if the opposite party be not taken by surprise.⁶⁰ Other courts deny the right to relief not prayed for,⁶¹ or that they

54. *Allen v. Woodruff*, 96 Ill. 11.

In *Weeden v. Hawes*, 10 Conn. 50, the court refused to infer one question of fact from others found.

55. *Griffith v. Henderson*, 55 Fla. 618, 45 So. 1008; *Dwyer v. Bratkoysky*, 170 Mass. 502, 49 N. E. 915.

56. *Stewart v. Tennant*, 52 W. Va. 559, 44 S. E. 223.

57. Ill.—*Street v. Chicago Wharfing & Storage Co.*, 157 Ill. 605, 41 N. E. 1108. Ia.—*Walker v. Ayres*, 1 Iowa 449. Miss.—*Vicksburg & M. R. Co. v. Ragsdale*, 54 Miss. 200. Pa. Appeal of *Garner*, 1 Walk. 438, 1 Leg. Rec. 1.

58. Cal.—*Zellerbach v. Allenberg*, 99 Cal. 57, 33 Pac. 786. Ind.—*Hunter v. McCoy*, 14 Ind. 528. Mo.—*Sharkey v. McDermott*, 91 Mo. 647, 4 S. W. 107, 60 Am. Rep. 270; *Miltnerberger v. Morrison*, 39 Mo. 71. N. Y.—*Jones v. Butler*, 20 How. Pr. 189. Ohio.—*Miami Exporting Co. v. United States Bank*, Wright 249. Ore.—*Gilmore v. Burch*, 7 Ore. 374. Pa.—*Fitzpatrick v. Engard*, 4 Pa. Dist. 383. Tex.—*Hipp v. Hockett*, 4 Tex. 20. Wash.—*Jackson v. Totebo*, 3 Wash. 456, 28 Pac. 916.

See *supra*, last section.

In *In re Owings*, 1 Bland (Md.) 370, 17 Am. Dec. 311 at 404 *et seq.*, the court declares: It is not essentially necessary, in suits other than for accounting, "that the decree should directly respond to the special prayer of the bill, by merely denying relief upon

the case; or by granting it to the plaintiff, either conditionally or partially, or entirely as prayed. The matter in controversy being fully developed, a decree may, in several instances, be framed to meet the case disclosed, altogether apart from the relief which the plaintiff asks for himself. *Johnson v. Johnson*, 1 Mun. 554, note;" *The Charitable Corporation v. Sutton*, 9 Mod. 356, 2 Atk. 406.

59. *Stockton v. Lockwood*, 82 Ind. 158; *Humphrey v. Thorn*, 63 Ind. 296; *Colman v. Ryan*, 68 N. Y. Supp. 253, citing *N. Y. C. C. P.*, §1207.

60. *Landis v. Olds*, 9 Minn. 90.

61. U. S.—*Hendryx v. Perkins*, 114 Fed. 801, 52 C. C. A. 435. Ala.—*Driver v. Fortner*, 5 Port. 9. Cal.—*Chapman v. Bank of California*, 97 Cal. 155, 31 Pac. 896. Ill.—*Ward v. Enders*, 29 Ill. 519; *Hotchkiss v. Makeel*, 87 Ill. App. 623, *affirmed*, *Makeel v. Hotchkiss*, 190 Ill. 311, 60 N. E. 524, 83 Am. St. Rep. 131, holding that it is not error to deny relief not prayed for. Ia.—*McConnell v. Denham*, 72 Iowa 494, 34 N. W. 298; *Mobley v. Dubuque Gaslight & Coke Co.*, 11 Iowa 71. Ky.—*Jarman v. Davis*, 4 T. B. Mon. 115. Mass.—*Low v. Low*, 177 Mass. 306, 59 N. E. 57. Miss.—*Weeks v. Thrasher*, 52 Miss. 142. Mo.—*Gamble v. Daugherty*, 71 Mo. 599; *Hug v. Van Burkleeo*, 58 Mo. 202; *McFarlan v. Morris Canal & Bkg. Co.*, 34 N. J. Eq. 369. Pa.—*Rice v. Ruckle*, 225 Pa. 231, 74 Atl. 28.

have the right to grant relief contrary to that asked for in the prayer.⁶²

Where rigid rules exist as to the prayer for relief, it is proper to pray for relief in the disjunctive or alternative, using the connective "or" between two or more prayers, where the pleader is in doubt as to the exact nature of the relief obtainable. A prayer in the conjunctive, using the connective "and," may prove fatal to the plaintiff's case.⁶³ Perhaps all courts will agree that the prayer must receive a reasonable interpretation, and is to be construed in reference to the purposes and nature of the action.⁶⁴

2. Effect of Prayer for General Relief.—It is well settled that under a prayer for general relief, relief not otherwise asked for may be granted in addition to that sought in the special prayer,⁶⁵ or the relief prayed for in the special prayer may be denied and other relief may be granted under the general prayer.⁶⁶

62. *Claggett v. Hall*, 9 Gill & J. (Md.) 59; *Browning v. Pratt*, 17 N. C. 44.

63. *Colton v. Ross*, 2 Paige (N. Y.) 396, 22 Am. Dec. 648; *Tennessee Ice Co. v. Raine*, 107 Tenn. 151, 64 S. W. 29.

64. *Brooks v. Carpentier*, 53 Cal. 287.

65. **U. S.**—*Tayloe v. Merchants' Fire Ins. Co.*, 9 How. 390, 13 L. ed. 187; *Underground Elec. R. Co. v. Owsley*, 169 Fed. 671; *Omaha Horse R. Co. v. Cable Tramway Co.*, 32 Fed. 727; *Moore v. Mitchell*, 2 Woods 483, 17 Fed. Cas. No. 9,770, judgment *affirmed*, 95 U. S. 587, 24 L. ed. 492. **Ala.**—*Mobile Land Co. v. Gass*, 142 Ala. 520, 39 So. 229; *Shelby v. Tardy*, 84 Ala. 327, 4 So. 276; *Driver v. Fortner*, 5 Port. 9. **Ark.**—*Dews v. Cornish*, 20 Ark. 332. **Ill.**—*Beall v. Dingman*, 227 Ill. 294, 81 N. E. 366; *Penn v. Fogler*, 182 Ill. 76, 55 N. E. 192, *reversing* 77 Ill. App. 365; *Miller v. Whelan*, 158 Ill. 544, 42 N. E. 59; *Stanley v. Valentine*, 79 Ill. 544; *Hopkins v. Snedaker*, 71 Ill. 449; *Isaacs v. Steel*, 4 Ill. 97. **Ind.**—*Crumbaugh v. Smock*, 1 Blackf. 305. **Ky.**—*Louisville, etc. R. Co. v. Baskett*, 31 Ky. L. Rep. 1035, 104 S. W. 695; *Repplier v. Buck*, 5 B. Mon. 96; *Oldham v. Woods*, 3 T. B. Mon. 47. **La.**—*Newton v. Gray*, 10 La. Ann. 67. **Md.**—*Gerding v. Wells*, 103 Md. 624, 64 Atl. 298, 433; *Gibson v. McCormick*, 10 Gill & J. 65; *Bentley v. Cowman*, 6 Gill & J. 153. **Mass.**—*Franklin v. Greene*, 2 Allen 519. **Miss.**—*Dodge v. Evans*, 43 Miss. 570; *Dease v. Moody*, 31 Miss. 617. **N. J.**—*City of Newark v. Erie R. Co.*, 76 N. J. Eq. 317, 74 Atl. 505, *reversing* 75 N. J.

Eq. 20, 71 Atl. 620; *Graham v. Berryman*, 19 N. J. Eq. 29; *Belleville Mut. Life Ins. Co. v. Van Winkle*, 12 N. J. Eq. 333; *Hill v. Beach*, 12 N. J. Eq. 31. **Tenn.**—*Tennessee Ice Co. v. Raine*, 107 Tenn. 151, 64 S. W. 29; *Galloway v. Galloway*, 2 Baxt. 328; *Bartee v. Tompkins*, 4 Sneed 623; *Workingmen's Bldg. & Sav. Assn. v. Williams* (Tenn. Ch. App.), 37 S. W. 1019. **Tex.**—*Swope v. Missouri Trust Co.*, 26 Tex. Civ. App. 133, 62 S. W. 947; *Morris v. Holland*, 10 Tex. Civ. App. 474, 31 S. W. 690. **Va.**—*Raper v. Sanders*, 21 Gratt. 60. **W. Va.**—*Waldron v. Harvey*, 54 W. Va. 608, 46 S. E. 603, 102 Am. St. Rep. 959; *Stewart v. Tennant*, 52 W. Va. 559, 44 S. E. 223; *Nuzum v. Morris*, 25 W. Va. 559; *Hall v. Pierce*, 4 W. Va. 107; *Woods v. Fisher's Admr.*, 3 W. Va. 536.

A prayer for general relief is as broad as the powers of the court. *Converse v. Incorporated Town of Deep River*, 139 Iowa 732, 117 N. W. 1078.

Surprise.—Such relief must not be such as is calculated to surprise the adverse party. *Denison v. League*, 16 Tex. 399.

Under the general prayer for relief, it is the duty of the chancellor to look through the bill to see whether the facts charged do not authorize other and further relief than that which is specially asked. *Rutherford v. Jones*, 14 Ga. 521, 60 Am. Dec. 655.

Any relief except by injunction may be granted under the general prayer. *Chicago, St. L. & N. O. R. Co. v. Maccomb*, 2 Fed. 18.

66. **Ala.**—*Alabama Terminal & Imp.*

It is also well settled that the prayer for general relief in no wise relieves the party of the necessity of placing the proper allegations in the pleadings to support the relief. In other words, even under a prayer for general relief, the decree must conform to the allegations in the pleadings.⁶⁷ Moreover, a number of other authorities declare that although the complainant has made a mistake as to the general relief prayed he may obtain relief under the general prayer.⁶⁸

A number of authorities declare that under the prayer for general

- Co. v. Hall, 152 Ala. 262, 44 So. 592. Del.—Jones v. Bush, 4 Har. 1. Ill. Gibbs v. Davies, 168 Ill. 205, 48 N. E. 120; Vansant v. Allmon, 23 Ill. 30; Merchants' Nat. Bank v. Hogle, 25 Ill. App. 543. Ia.—Pond v. Waterloo Agr. Wks., 50 Iowa 596. Md.—Wootten v. Burch, 2 Md. Ch. 190. Mich.—Grand Trunk R. Co. v. Wolcott, 159 Mich. 588, 124 N. W. 530, 16 Det. Leg. N. 1041; Merrill v. Wilson, 66 Mich. 232, 33 N. W. 716. Miss.—Barnett v. Nichols, 56 Miss. 622. Mo.—Holland v. Anderson, 38 Mo. 55. N. H.—Treadwell v. Brown, 44 N. H. 551. N. J.—Annin v. Annin, 24 N. J. Eq. 184; Monmouth Co. Mut. Fire Ins. Co. v. Hutchinson, etc. R. Co., 21 N. J. Eq. 107. Pa.—Appeal of Darlington, 86 Pa. 512, 27 Am. Rep. 726; Appeal of Slemmer, 58 Pa. 155, 98 Am. Dec. 248. S. C.—Barr v. Haseldon, 10 Rich. Eq. 53. Tenn. Scott v. Fowlkes, 12 Heisk. 700.
67. U. S.—English v. Foxall, 2 Pet. 595, 7 L. ed. 531; Haggart v. Wilczynski, 143 Fed. 22, 74 C. C. A. 176; Lewis Pub. Co. v. Wyman, 168 Fed. 756; Connolly v. Belt, 5 Cranch C. C. 405, 6 Fed. Cas. No. 3,117. Ala.—South & N. A. R. Co. v. Gray, 160 Ala. 497, 49 So. 347; Rice v. Eiseman, 122 Ala. 343, 25 So. 214; Wiley v. Knight, 27 Ala. 336; Sandford v. Ochotalomi, 23 Ala. 669. Ark.—Mason v. Gates, 90 Ark. 241, 119 S. W. 70; Rogers v. Brooks, 30 Ark. 612; Cook v. Bronaugh, 13 Ark. 183. Cal.—Oliver v. Blair, 8 Pac. 612; Carpenter v. Brenham, 50 Cal. 549. Del.—Jones v. Bush, 4 Har. 1. Ga.—Hickson v. Bryan, 80 Ga. 314, 5 S. E. 495; Peek v. Wright, 65 Ga. 638. Ill.—Maxwell v. McWilliams, 145 Ill. App. 155; Thompson v. American Percheron Horse Breeders' & Imp. Assn., 114 Ill. App. 131; Amberg v. Nachtway, 92 Ill. App. 608. Ind. Spivey v. Frazee, 7 Ind. 661. Ind. Ter. Sayer v. Brown, 7 Ind. Ter. 675, 104 S. W. 877. Ia.—Paton v. Lancaster, 38 Iowa 494; Wilson v. Horr, 15 Iowa 489; Simplot v. Simplot, 14 Iowa 449; Casady v. Woodbury County, 13 Iowa 113. La.—Erwin v. Bank of Kentucky, 5 La. Ann. 1. Me.—Scudder v. Young, 25 Me. 153. Md.—Tomlinson v. McKaig, 5 Gill 256; Chalmers v. Chambers, 6 Har. & J. 29; Hitch v. Davis, 3 Md. Ch. 266; Crain v. Barnes, 1 Md. Ch. 151. Mo.—Newham v. Kenton, 79 Mo. 382; McNair v. Biddle, 8 Mo. 257. N. H. Pennoek v. Ela, 41 N. H. 189. N. J. Cogswell & Boulter Co. v. Cogswell, 40 Atl. 213; Walker v. Hill's Exr., 21 N. J. Eq. 191; Jordan v. Clark, 16 N. J. Eq. 243. N. Y.—Wilkin v. Wilkin, 1 Johns. Ch. 111; Wasey v. Holbrook, 141 App. Div. 336, 125 N. Y. Supp. 1087, modifying judgment 65 Misc. 84, 120 N. Y. Supp. 675. N. C. Kornegay v. Carroway, 17 N. C. 403. Pa.—Mercantile Library Co. v. University of Pennsylvania, 220 Pa. 328, 69 Atl. 861. Tenn.—Hall v. Fowlkes, 9 Heisk. 745; Dodd v. Benthall, 4 Heisk. 601; Lee v. Cone, 4 Coldw. 392. Tex. Crawford v. Stevens (Tex. Civ. App.), 31 S. W. 79. W. Va.—Pickens v. Knisely, 29 W. Va. 1, 11 S. E. 932, 6 Am. St. Rep. 622; Piercy v. Beckett, 15 W. Va. 444.
68. U. S.—Patrick v. Isenhardt, 20 Fed. 339. Ala.—Sharpe v. Miller, 157 Ala. 299, 47 So. 701. Colo.—Hamill v. Thompson, 3 Colo. 518. N. Y.—Bebee v. Bank of New York, 1 Johns. 529, 3 Am. Dec. 353. Tex.—Silberberg v. Pearson, 75 Tex. 287, 12 S. W. 850.

Relief of a character similar to that specially prayed, but founded on different equitable principles, may clearly be granted under the prayer for general relief. Junior Order Bldg. & L. Assn. v. Sharpe, 63 N. J. Eq. 500, 52 Atl. 832.

Although the prayer of a bill be artificially framed, under the general prayer for relief, the court may disregard the mistakes, and treat them as surplusage, and grant such relief as

relief, the complainant is entitled to any relief which the facts pleaded will warrant.⁶⁹ On the other hand, it has been repeatedly held in some jurisdictions that the complainant can get no relief under the general prayer for relief unless such relief be consistent with the relief specially prayed.⁷⁰ Where this rule prevails, it is readily complied with by praying for special relief and general relief in the alternative or disjunctive.⁷¹

One further limitation upon the power to grant relief under the general prayer has been recognized, to-wit: only when the complainant meets with an obstruction to the obtaining of the special relief prayed can he resort to the general prayer and obtain relief thereunder, inconsistent with the special prayer.⁷²

3. Effect of Prayer for Special Relief.—It is well settled that if the bill contains a prayer for special relief only, no other relief can be granted, regardless of the fact that allegations of the bill and the evidence would warrant other relief.⁷³

will conform to the bill. *Truebody v. Jacobson*, 2 Cal. 269.

69. *Ala.*—*May v. Lewis*, 22 Ala. 646; *Kelly v. Payne*, 18 Ala. 371. *Ark.* *Ross v. Davis*, 17 Ark. 113; *Kelly's Heirs v. McGuire*, 15 Ark. 555. *Ill.* *Walker v. Converse*, 148 Ill. 622, 36 N. E. 202; *Rankin v. Rankin*, 117 Ill. App. 636, judgment *affirmed*, 216 Ill. 132, 74 N. E. 763. *Ind.*—*Shotts v. Boyd*, 77 Ind. 223. *La.*—*Kinder v. Scharff*, 125 La. 594, 51 So. 654. *Miss.* *Burnet v. Boyd*, 60 Miss. 627. *N. Y.* *Bailey v. Burton*, 8 Wend. 339. *S. C.* *Brown v. McDonald*, 1 Hill Eq. 297.

70. *Fla.*—*Lee v. Patten*, 34 Fla. 149, 15 So. 775. *Ga.*—*Butler v. Durham*, 2 Ga. 413; *Marine & F. Ins. Bank v. Early*, R. M. Charl. 279. *Ill.*—*Ellis v. Hill*, 162 Ill. 557, 44 N. E. 858. *Ky.*—*Crow v. Owensboro & N. R. Co.*, 82 Ky. 134. *Md.*—*Dunnoek v. Dunnoek*, 3 Md. Ch. 140. *N. H.*—*Busby v. Littlefield*, 31 N. H. 193; *Stone v. Anderson*, 26 N. H. 506. *N. J.*—*Chambers v. Kunzman*, 59 N. J. Eq. 433, 45 Atl. 599; *Rennie v. Crombie*, 12 N. J. Eq. 457. *N. C.* *Barnes v. Strong*, 54 N. C. 100. *Pa.* *In re Passyunk Bldg. Assn.*, 83 Pa. 441; *Williamson v. Smith*, 4 Pa. Dist. 307; *Thomas v. Ellmaker*, 1 Pars. Eq. Cas. 98. *S. C.*—*Clifton v. Haig*, 4 Desaus. 330. *Tenn.*—*Peek v. Peek*, 9 Yerg. 301. *Va.*—*Hurt v. Jones*, 75 Va. 341; *James v. Bird*, 8 Leigh 510. *W. Va.*—*Vance Shoe Co. v. Haight*, 41 W. Va. 275, 23 S. E. 553.

In *Curry v. Lloyd*, 22 Fed. 258, the bill alleged a conveyance of land in

fraud of creditors, and that thereafter the grantor made improvements, and asked for a cancellation of the deed. Fraud not being shown it was held that compensation for the improvements was not decreable. See also *Smith v. Smith*, 36 N. C. 83.

71. *Gonzales v. Hukil*, 49 Ala. 260, 20 Am. Rep. 282; *Graham v. Cook*, 48 Ala. 103; *Simmons v. Williams*, 27 Ala. 507; *Thomason v. Smithson*, 7 Port. (Ala.) 144; *James v. Kennedy*, 10 Heisk. (Tenn.) 607.

Prayer may be objectionable that asks for general and special relief. *Ala.*—*Ex parte Branch*, 53 Ala. 140. *Miss.*—*Pleasants & Co. v. Glascock*, Smed. & M. Ch. 17. *N. Y.*—*Colton v. Ross*, 2 Paige 396, 22 Am. Dec. 648; *Dowdall v. Lenox*, 2 Edw. Ch. 267; *Wiltshire v. Marfleet*, 1 Edw. Ch. 654. *W. Va.*—*Brown v. Wylie*, 2 W. Va. 502, 98 Am. Dec. 781.

72. *Pensacola & G. R. Co. v. Spratt*, 12 Fla. 26; *Allen v. Coffman*, 1 Bibb (Ky.) 469.

Where a bill charges that an act of the legislature is contrary to the constitution of the United States, and in violation of the rights of the complainant and illegal and void, the court will not, under the general prayer for relief, declare such act unconstitutional and void, where such a declaration would not benefit the complainant. *Smith v. Trenton Delaware Falls Co.*, 4 N. J. Eq. 505.

73. *Ala.*—*Driver v. Fortner*, 5 Port. 9. *Ark.*—*Dews v. Cornish*, 20 Ark. 332.

E. DECREES AS AFFECTED BY RELATIONS OF PARTIES. — 1. In General. — The court of equity does not always enter a decree in favor of the complainant or respondent. In some cases there may be a decree against both parties.⁷⁴ The want of interest of one of numerous complainants will not necessarily vitiate the rights of others to receive relief.⁷⁵ However, where the complainants are united in interest jointly, both or neither must recover.⁷⁶

2. Relief Against Particular Defendants. — The court may render a decree against some but not all of the defendants,⁷⁷ unless their interests are inseparably joined or it is inconceivable that relief is proper as to one and not as to the other.⁷⁸

3. Relief Among Defendants. — In equity it is not essential, as at law, that the parties litigant be on opposite sides of the case.⁷⁹ When a case is made out between the defendants, one defendant has a right to insist that the court grant relief against the co-defendant,⁸⁰ and the court should⁸¹ and must⁸² grant such relief, to prevent a multiplicity of suits.⁸³ However, such decree must be based upon the plead-

D. C.—*Merillat v. Hensey*, 34 App. Cas. 398. **Me.**—*Loggie v. Chandler*, 95 Me. 220, 49 Atl. 1059. **Md.**—*Lingan v. Henderson*, 1 Bland 236. **N. J.**—*Halsted v. Meeker's Exrs.*, 18 N. J. Eq. 136. **Pa.**—*Delaware & H. Canal Co. v. Pennsylvania Coal Co.*, 21 Pa. 131; *Thomas v. Ellmaker*, 1 Clark 502, 3 Pa. Law J. 190. **Tex.**—*Nowlin v. Hughes*, 2 Wills. Civ. Cas. §314. **W. Va.**—*Price v. Price*, 68 W. Va. 389, 69 S. E. 892; *Coff v. Price*, 42 W. Va. 384, 26 S. E. 287. **Wis.**—*Laird v. Boyle*, 2 Wis. 431.

Under a special prayer, relief of the same general character but less extensive, may be granted, or the prayer may be amended, if necessary. *Camden Horse R. Co. v. Citizens' Coach Co.*, 31 N. J. Eq. 525.

74. *Jones v. Poston*, 55 N. C. 184.

In *In re Owing's Case*, 1 Bland (Md.) 370, 17 Am. Dec. 311, at 405, it is said: "There may be a decree against both parties, as where the contest is as to some private right of property, and it appears from the proofs that the title is in neither, but in the state, both parties may be perpetually enjoined from using the property to the prejudice of the public. *Penn. v. Ld. Baltimore*, 1 Ves. 454; *Barclay v. Russell*, 3 Ves. 436; *Rex v. Leigh*, 4 Burr. 2146."

75. *Henderson v. Peck*, 3 Humph. (Tenn.) 247.

76. *Richter v. Noli*, 128 Ala. 198,

30 So. 740; *Gamble v. Jordan*, 54 Ala. 432.

In *Smith's Exr. v. Proffitt's Admx.*, 82 Va. 832, 1 S. E. 67, the court refused to make the decree embrace independent matters between two of the parties.

77. *City of Baltimore v. Ketchum*, 57 Md. 23.

78. *Mubrey v. Carberry*, 204 Mass. 378, 90 N. E. 576 is to this effect.

In a suit against defendants upon a joint contract, one being a resident, the other a non-resident, a several judgment may be rendered against the resident served with process. *Moore v. Estes*, 79 Ky. 282.

79. *Platt v. Oliver*, 3 McLean 27, 19 Fed. Cas. No. 11,116, *affirmed*, *Oliver v. Piatt*, 3 How. (U. S.) 333, 11 L. ed. 622.

80. *Tyson v. Harrington*, 41 N. C. 329; *Tyson v. Tyson*, 37 N. C. 137.

81. *Shannon v. Marselis*, 1 N. J. Eq. 413; *Burlew v. Quarrier*, 16 W. Va. 108; *Vance v. Evans*, 11 W. Va. 342.

82. **Md.**—*Contee v. Dawson*, 2 Bland 264. **N. J.**—*Vanderveer v. Holcomb*, 17 N. J. Eq. 87. **W. Va.**—*Roots v. Mason City Salt & Min. Co.*, 27 W. Va. 483.

83. *Arnold v. Miller*, 26 Miss. 152; *Ingram v. Smith, Head* (Tenn.) 411.

This general proposition is recognized in the following cases: **U. S.**—*Foote v. Linck*, 5 McLean 616, 9 Fed. Cas. No. 4,913. **Md.**—*Horner v. Nitsch*,

ings and proofs among the parties.⁸⁴ Moreover, there can be no relief granted between the co-defendants unless there is a decree in favor of the complainant.⁸⁵

4 Relief Among Plaintiffs.—Not only may relief be granted among co-defendants, but also among co-plaintiffs.⁸⁶

5. Relief in Favor of Defendant Against Plaintiff.—The matter

103 Md. 498, 63 Atl. 1052. **Mich.** Thurston v. Prentiss, 1 Mich. 193. **Mo.** Browning v. Chrisman, 30 Mo. 353. **N. J.**—Vanderveer v. Holcomb, 17 N. J. Eq. 547. **N. C.**—Blackwood v. Jones, 57 N. C. 54. **Ohio.**—Dougherty v. Walters, 1 Ohio St. 201. **S. C.**—Motte v. Schult, 1 Hill Eq. 146, 26 Am. Dec. 194; Henderson v. McClure, 2 McCord Eq. 466; Hyatt v. McBurney, 15 S. C. 393. **Va.**—Mundy v. Vawter, 3 Gratt. 494, 518. **Wis.**—Ogden v. Glidden, 9 Wis. 46.

84. U. S.—Boon's Heirs v. Chiles, 8 Pet. 532, 8 L. ed. 1034. **Md.**—Hanson v. Worthington, 12 Md. 418. **N. Y.**—Jones v. Grant, 10 Paige 348; Elliott v. Pell, 1 Paige 263; Woodgate v. Fleet, 9 Abb. Pr. 222. **Va.**—Glenn v. Clark, 21 Gratt. 35; Steed v. Baker, 13 Gratt. 380; Allen v. Morgan, 8 Gratt. 60; Yerby v. Grigsby, 9 Leigh 387; Morris v. Terrell, 2 Rand. 6. **W. Va.**—Pickens v. Daniels, 58 W. Va. 327, 52 S. E. 215; Yates v. Stuart's Admr., 39 W. Va. 124, 19 S. E. 423; Radcliff v. Corrothers, 33 W. Va. 682, 11 S. E. 228; Watson v. Wigginton, 28 W. Va. 533; Hansford v. Chesapeake Coal Co., 22 W. Va. 70; Tavenner v. Barrett, 21 W. Va. 656; Hoffman v. Ryan, 21 W. Va. 415; Worthington v. Staunton, 16 W. Va. 208; Ruffner v. Hewitt, 14 W. Va. 737.

Defendant can have no relief on matters not stated in his answer and which his co-defendant had no opportunity to respond to by the pleading and evidence. Walker v. Byers, 14 Ark. 247.

As to cross-bill, see Trapnall v. Byrd's Admr., 22 Ark. 10.

In Reed v. Warner, 5 Paige (N. Y.) 650, the court refused to settle rights between defendants, where they all appeared by one counsel.

85. S. C.—Risher v. Adams, 9 Rich. Eq. 247. **Va.**—Ould v. Myers, 23 Gratt. 383; Hubbard v. Goodwin, 3 Leigh 492. **W. Va.**—Kennewig Co. v. Moore, 49 W. Va. 323, 38 S. E. 558; Radcliff v.

Corrothers, 33 W. Va. 682, 11 S. E. 228; Western Lunatic Asylum v. Miller, 29 W. Va. 326, 1 S. E. 740, 6 Am. St. Rep. 644; Watson v. Wigginton, 28 W. Va. 533; Hansford v. Chesapeake Coal Co., 22 W. Va. 70.

Under the code practice, co-defendants cannot set up demands and ask relief against each other, unless their disputes arise out of the subject of the action as set out in the complaint, and have such relation to the plaintiff's claim that their adjustment is necessary to a final determination of the cause. Hulbert v. Douglas, 94 N. C. 128.

The court declared its unwillingness to extend the practice of decreeing between co-defendants farther than it has already gone, in Law v. Sutherland, 5 Gratt. (Va.) 357.

In Epperson v. Epperson, 108 Va. 471, 62 S. E. 344, the court on the authority of Cottingham v. Earl of Shrewsbury, 3 Hare 627, 67 Eng. Reprint 530, declared: "If the plaintiff cannot get at his right without trying and deciding a case between co-defendants, the court will try and decide that case, and the co-defendants will be bound. But, if the relief given to the plaintiff does not involve or require a decision of any case between co-defendants, the co-defendants will not be bound by any proceedings which may be necessary only to the decree the plaintiff obtains."

No positive relief in adjusting equities between defendants can be decreed or granted to one defendant against another, except such as can be granted incidentally to the relief sought by the complainant. Mounts v. Potts, 23 N. J. Eq. 188.

An answer intended to affect rights of a co-defendant must make him a party and call for relief against him and he must be served with process. Turner v. Stewart, 51 W. Va. 493, 41 S. E. 924.

86. Haskell v. Raoul, 2 Tread. Const. (S. C.) 852.

of granting affirmative relief to a defendant as against a plaintiff is a matter regulated in many jurisdictions by statute. It is generally held that any affirmative relief sought by a defendant in an equity suit must be by cross-bill,⁸⁷ or by an answer in the nature of a cross-bill,⁸⁸ and cannot be granted upon the facts stated in the answer,⁸⁹ except in so far as a refusal of relief to the plaintiff amounts to a grant of such relief.⁹⁰ However, if the mere failure to file a cross-bill is urged as error, the appellate court may refuse a reversal on this ground.⁹¹

F. TIME WHEN RELIEF MAY BE OBTAINED.—The following rules may be deduced from the authorities in reference to the time when relief may be obtained:⁹²

A final decree should not be entered before the cause is at issue,⁹³ nor until the facts upon which the rights of the parties depend have been ascertained;⁹⁴ nor while a pending motion remains undisposed

87. *May v. Duke*, 61 Ala. 53; *Price v. Blackmore*, 65 Ill. 386. See the title "Cross-Bill."

88. *Dixon's Admr. v. Campbell*, 3 Dana (Ky.) 603; *Clark v. Clark*, 62 N. H. 267.

Relief was granted to the defendant on cross-bill in the following cases: Mich.—*Scripps v. Sweeney*, 160 Mich. 148, 125 N. W. 72, 17 Det. Leg. N. 1. Tex.—*Pearson v. Boyd*, 62 Tex. 541. Wash.—*Baxter v. City of Seattle*, 3 Wash. 352, 23 Pac. 537.

By rule of court, filing of a cross-bill may be made unnecessary. *Coach v. Kent Circuit Judge*, 97 Mich. 563, 56 N. W. 937.

89. *Hill v. Ryan Groc. Co.*, 78 Fed. 21, 23 C. C. A. 624.

90. *Edwards v. Helm*, 5 Ill. 142.

Equity may make the plaintiff's relief conditional on the doing of equity to defendant by paying a sum to defendant, although defendant has filed no cross-bill therefor. *Andrews v. Connolly*, 145 Fed. 43.

91. *Kellogg v. Aherin*, 48 Iowa 299; *Richards v. Shaw*, 77 N. J. Eq. 399, 77 Atl. 618.

The rule that defendant must file a cross-bill to get affirmative relief is held not to apply to suits for accounts, in *Downes v. Worch*, 28 R. I. 99, 65 Atl. 603. The opinion in this case contains a review of the authorities on this question.

When the statements of an answer in the nature of a cross-bill, if true, entitle the defendant to relief, and the complaint fails to answer them, it is error for the court, in making its decree, to disregard the statements of

the cross-bill. *Lash v. Hardin*, 6 J. J. Marsh. (Ky.) 451.

Relief may be granted on a cross-bill though the original bill is dismissed. *Callahan v. Mercantile Trust Co.*, 188 Mass. 393, 74 N. E. 666.

Giving the defendant relief unsought is unwarranted. *Village of Trenton v. Rucker*, 162 Mich. 19, 127 N. W. 39, 17 Det. Leg. N. 548.

Affirmative relief should be denied where none is demanded in the answer. *Wilson v. Wilson*, 126 App. Div. 941, 111 N. Y. Supp. 483.

Matters foreign to the bill cannot be introduced by an answer praying affirmative relief. *Price v. Price*, 63 W. Va. 389, 69 S. E. 892.

92. The question as to the taking of a decree *pro confesso* before a final decree on default is obtained is reserved for later treatment. See *infra*, III.

93. *Southern Home Bldg. & Loan Assn. v. Riddle*, 129 Ala. 562, 29 So. 667.

In many cases, no final decree can be pronounced until an issue has been tried, inquiries made, accounts taken, estates sold, and other matters adjusted. Danl. Ch. Pl. & Pr., p. 987.

94. *Ogilvie v. Knox Ins. Co.*, 2 Black 539, 17 L. ed. 349; *Anderson v. Reed*, 11 Iowa 177.

Where it appears from the answer of a defendant, that he has in his hands a specific sum which he admits to be due to the complainant, and other matters in the suit are contested, the court will order the admitted debt to be paid to the complainant without

of,⁹⁵ nor while exceptions are pending,⁹⁶ nor before the defendants have had a full opportunity to answer,⁹⁷ nor while an answer⁹⁸ or demurrer⁹⁹ is pending or undisposed of. However, a defendant may take a final decree immediately after his plea has been adjudged good.¹

Frequently the rights and liabilities of the parties change after the bill has been filed. It has been declared several times that the court in rendering its decree must look at the state of affairs at the time when the decree is pronounced and not at the situation at the time when the bill was filed.² For example, the court will render its decree for all notes involved in the litigation and due at the time of entering its decree, although they were not all due at the time when the bill was filed.³

As to transfers *pendente lite*, it is held proper to dismiss the bill

waiting for a final decree. *Clarkson v. DePeyster*, Hopk. Ch. (N. Y.) 274.

Where the supplemental bill upon which a decree was based did not appear in the record and was lost before decree taken, it was held that it was a fatal error to proceed to a decree before supplying the lost files. *Groch v. Stenger*, 65 Ill. 481. To the same effect is *Bank of Bramwell v. White*, 53 W. Va. 382, 44 S. E. 287.

Small v. Wicks, 82 Iowa 744, 47 N. W. 1031, held that the court need not delay in decreeing against one defendant in default until issues are heard as to the defendant appearing. *Small v. Wicks*, 82 Iowa 744, 47 N. W. 1031.

A decree entered within two weeks after the cause was put at issue, the record not showing that the cause was brought to a hearing by stipulation, or that the defendant was present at the hearing or had notice thereof, is held to have been prematurely entered. *McKinney v. McKinney*, 36 Mich. 37.

95. *Blythe v. Hinckley*, 84 Fed. 228; *Coffin v. Kemp*, 4 G. Gr. (Iowa) 119 is to this effect, where the motion is material.

96. In *Tyndale v. Stanwood*, 187 Mass. 531, 73 N. E. 540, the court declared: "The final decree, inadvertently entered while exceptions were pending, took effect only as an order for a decree, which could not become operative until the exceptions were disposed of." And see *Prescott v. Prescott*, 175 Mass. 64, 55 N. E. 805.

97. *Hoye v. Penn*, 1 Bland (Md.) 28.

98. *Coffin v. Kemp*, 4 G. Gr. (Iowa)

119; *Jenkin v. McCully*, 1 Morris (Iowa) 447.

99. *Jenkin v. McCully*, 1 Morris (Iowa) 447.

1. *W. A. Gaines & Co. v. Rock Springs Distilling Co.*, 179 Fed. 544.

2. *U. S.*—*Randel v. Brown*, 2 How. 406, 11 L. ed. 318. *Me.*—*Burleigh v. White*, 70 Me. 130. *Okla.*—*Superior Oil & Gas Co. v. Mehlin*, 25 Okla. 73, 108 Pac. 545. *W. Va.*—*Fulton v. Messenger*, 61 W. Va. 477, 56 S. E. 830.

If the defendant is of age when a judgment is entered but an infant when the action is brought, he is bound by the judgment unless he brings a direct proceeding to have the same set aside. *Thain v. Rudisill*, 126 Ind. 272, 26 N. E. 46.

If the allegations of a bill refer to the condition of things at the time the bill is filed, the relief afforded must be limited to that state of facts. *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420.

No decree can be made relative to matters happening subsequent to the bringing of a bill in chancery unless they are brought into the case by some proper supplemental proceeding. *Downer v. Wilson*, 33 Vt. 1.

3. *U. S.*—*Dancel v. Goodyear Shoe Mach. Co.*, 137 Fed. 157. *Mich.*—*Johnson v. Van Velsor*, 43 Mich. 208, 5 N. W. 265. *Ohio.*—*Drake v. Brackett*, 1 Ohio Dec. (Reprint) 56, 1 West Law J. 395.

It is not error to provide that one of a series of notes not yet due shall entitle the holder to judgment on its maturity. *Schoenpflug v. Ketcham* (Tenn. Ch. App.), 52 S. W. 666.

if the plaintiff transfers his interest *pendente lite*,⁴ and, perhaps, this must be done.⁵ However, it has been held that the court is not bound to notice a transfer *pendente lite*,⁶ and that the court may proceed to render a decree which will inure to the benefit of the assignee of the plaintiff.⁷

Frequently, by statute, provision is made as to the term when a decree may be entered.⁸

G. CONSENT DECREES.—In general, a court of equity will render a decree conformable to the agreement of the parties, when the parties consent to such decree.⁹

A conflict of authority exists as to whether or not a consent decree must conform to the pleadings and proofs.¹⁰

A consent decree is not a mere private agreement of the parties, but may be considered as fully *res adjudicata* as a decree rendered *in invitum*.¹¹

III. DECREES PRO CONFESSO.—A. THEORY OF.—The use

4. *Brewer v. Dodge*, 28 Mich. 359.

5. *Johnson v. Thompson*, 129 Mass. 398.

6. *Mechanics' Bank v. Seton*, 1 Pet. (U. S.) 299, 7 L. ed. 152; *Wills v. Whitmore*, 9 Baxt. (Tenn.) 198.

7. *Wills v. Whitmore*, 9 Baxt. (Tenn.) 198.

8. Various statutory provisions of this character are discussed in the following cases: *Tabb v. Wortham's Admr.*, 28 Ky. L. Rep. 260, 89 S. W. 191; *Passmore v. Moore*, 1 J. J. Marsh. (Ky.) 591; *Kanawha Coal Co. v. Ballard & Welch Coal Co.*, 43 W. Va. 721, 29 S. E. 514; *Moore v. Smith*, 26 W. Va. 379.

By virtue of Federal Equity Rules 18 and 19, it is error to render a final decree for want of appearance at the first term after the service of subpoena, unless another rule day has intervened. *O'Hara v. McConnell*, 93 U. S. 150, 23 L. ed. 840.

It is not error for a court of chancery to render a final decree of foreclosure of a mortgage at the appearance term. *Delahay v. McConnel*, 5 Ill. 156.

It is competent for the court to render a decree upon the same day that appearance in the case is so entered. *Shaw v. National State Bank*, 49 Iowa 179.

Where a defendant files his answer, it is the practice of the court of chancery not to proceed to the passage of a final decree (but by consent) until the commission returned has remained

on file one entire term. *Oliver's Exrs. v. Palmer*, 11 Gill & J. (Md.) 426.

9. *Ala.*—*Lewis v. Lewis*, Minor 35. *Ill.*—*Coultas v. Green*, 43 Ill. 277. *Md.* *Ware v. Richardson*, 3 Md. 505, 56 Am. Dec. 762.

"A draft of a consent decree, agreed to, and signed out of court by the parties to a pending cause, cannot be entered as a consent decree, if, at the time such draft is offered for entry, consent thereto is withdrawn, and its entry is objected to by one of the parties who signed it, and who will be materially affected thereby." *Herold v. Craig*, 59 W. Va. 353, 53 S. E. 466, *per Cox, J.*

Although a defendant admits all the allegations and charges in the bill, he does not thereby consent that a decree shall be entered against him, as prayed for in the bill. *Hendrickson v. Winne*, 3 How. Pr. (N. Y.) 127.

10. The following cases hold such conformity to be unnecessary: *Wilson v. Schaefer*, 107 Tenn. 300, 64 S. W. 208; *Tellico Mfg. Co. v. Williams* (Tenn. Ch. App.), 59 S. W. 1075; *Seiler v. Union Mfg. Co.*, 50 W. Va. 208, 40 S. E. 547. *Contra*, *Iglehart v. Armiger*, 1 Bland (Md.) 519.

11. *Harding v. Harding*, 198 U. S. 317, 25 Sup. Ct. 679, 49 L. ed. 1066, *reversing judgment* 140 Cal. 690, 74 Pac. 284.

A consent decree binds the consenting parties only. *Myllius v. Smith*, 53 W. Va. 173, 44 S. E. 542.

of decrees *pro confesso* is now well established in the United States. The object of such a decree is to provide a just and reasonably expeditious mode of obviating the delays and difficulties to which complainants are subjected by the neglect of defendants and their disobedience of the mandates of the court.¹² Moreover, it dispenses with the former practice of prosecuting a party to a contempt and sequestration.¹³

B. WHEN BILL MAY BE TAKEN PRO CONFESSO. — 1. In General. A bill may be taken *pro confesso* if a party having been duly served, or, having entered his appearance, fails to file a demurrer, plea or answer to the bill within the time prescribed.¹⁴

2. Excuses for Failure to Plead. — a. Want of Service. — It is well settled that if the defendant has not been properly served, a decree *pro confesso* entered against him is erroneous.¹⁵ It must appear that the party has been duly served and that a proper return has been made.¹⁶

The practice of taking decrees *pro confesso* against non-resident defendants served by publication is generally recognized. In such cases it must appear that all the details prescribed by statute to perfect such service have been complied with before the decree can be

12. Prout v. Dade County Security Co., 55 Fla. 816, 47 So. 12.

The mode of practice of taking bills *pro confesso* is of such serious consequence to the rights of the parties, that it is both proper and necessary that it should be strictly confined within the limits prescribed by statute and rules of court. *Lanum v. Steel*, 10 Humph. (Tenn.) 280.

Not only a bill proper but also a cross-bill or an answer in the nature of a cross-bill may be taken as confessed. *Coach v. Adsit*, 97 Mich. 563, 56 N. W. 937; *Goff v. Price*, 42 W. Va. 384, 26 S. E. 287.

A bill need not be taken as confessed against defendants from whom no relief is sought. *Liggett v. Wall*, 2 A. K. Marsh. (Ky.) 149.

13. Caines v. Fisher, 1 Johns. Ch. (N. Y.) 8.

14. U. S. — Halderman v. Halderman, 1 Hempst. 407, 11 Fed. Cas. No. 5,908; *Fellows v. Hall*, 3 McLean 487, 8 Fed. Cas. No. 4,723. **Ala.** — *Dunning v. Stanton*, 9 Port. 513. **Ark.** — *Bernie v. Vanderveer*, 16 Ark. 616; *Hatfield v. Brown*, 8 Ark. 283. **Fla.** — *International Kavlin Co. v. Vause*, 55 Fla. 641, 46 So. 3; *Ray v. Frank*, 44 Fla. 681, 32 So. 925. **Ill.** — *Grob v. Cushman*, 45 Ill. 119. **Ind.** — *Comley v. Hendricks*, 8 Blackf. 189; *Elston v. Drake*,

5 Blackf. 540. **Miss.** — *Sheffield v. Friedberg*, 84 Miss. 188, 36 So. 242; *Chewning v. Nichols*, 1 Smed. & M. Ch. 122. **N. J.** — *Young v. Young*, 17 N. J. Eq. 161; *Emery v. Downing*, 13 N. J. Eq. 59. **N. Y.** — *Hoxie v. Scott*, 1 Clarke Ch. 457. **W. Va.** — *Katzenstein v. Prager*, 67 W. Va. 343, 67 S. E. 792.

A decree *pro confesso* cannot be entered for the want of appearance of the defendant, at least in Florida. *Lente v. Clarke*, 22 Fla. 515, 1 So. 149.

15. Fla. — *Lybass v. Town of Ft. Myers*, 56 Fla. 817, 47 So. 346; *Sarasota Ice, Fish & Power Co. v. Lyle & Co.*, 53 Fla. 1069, 43 So. 602. **Ind.** — *Reed v. Glover*, 6 Blackf. 345. **Ky.** — *Johnston v. Macconnell*, 3 Bibb 1; *Bradley v. Lamb*, Hard. 527; *Ayers v. Scott*, Sneed 162. **La.** — *Morris v. Bailey*, 15 La. Ann. 2. **Md.** — *Hurt v. Crane*, 36 Md. 29. **W. Va.** — *Goff v. Price*, 42 W. Va. 384, 26 S. E. 287.

16. Pegg v. Copp, 2 Blackf. (Ind.) 257; *Taylor v. Jackson*, 2 Bibb (Ky.) 572.

An order taking a bill for confessed should not be made before the process is served on all the defendants concerned in interest with those against whom the confession is taken. *Alexander v. Quigley's Exrs.*, 2 Duv. (Ky.) 399.

entered.¹⁷ Obviously, when the defendant makes an entry of appearance, service is made unnecessary.¹⁸ A decree *pro confesso* without service of process or appearance is absolutely void.¹⁹

b. *Death of Party Bound To Plead.*—Where the party under obligation to answer dies before the expiration of the time allowed for answer, it is improper to take the bill for confessed as against him although he died before answering.²⁰

c. *Failure To Plead After Amendment of Bill.*—After the amendment of a bill, the bill as amended may be taken as confessed.²¹ However, the defendant must be given the full opportunity prescribed in such cases to answer the bill as amended.²²

d. *Insufficient Answer.*—If the answer filed be insufficient, the plaintiff may except thereto for insufficiency, and if the answer be adjudged insufficient, it is the duty of the defendant to file a further answer. If he fails to do this, the bill may then be taken as confessed

17. Ala.—Keiffer v. Barney, 31 Ala. 192. Ark.—Saffold v. Saffold, 14 Ark. 408. Ky.—Brown v. Humphreys, 1 J. J. Marsh. 392; Robertson v. Crawford, 1 A. K. Marsh. 449; Copeland v. Curry, Sneed 180; Lewis v. Hancock, Sneed 151. Me.—Adams v. Stevens, 49 Me. 362. Md.—Central Bank v. Copeland, 18 Md. 305. N. J.—McCahill v. Equitable Life Assur. Soc., 26 N. J. Eq. 531. N. Y.—Sawyer v. Sawyer, 3 Paige 263; Southwick v. Van Bussum, 1 Paige 648. Tenn.—Grewar v. Henderson, 1 Tenn. Ch. 76; Douglass v. Evans, 1 Overt. 82. W. Va.—Billmyer Lumb. Co. v. Merchants' Coal Co., 66 W. Va. 696, 66 S. E. 1073.

The statutory provisions in Arkansas are discussed in Henry v. Blackburn, 32 Ark. 445.

An order *pro confesso* entered before the proof of service of the subpoena has been made or filed, is premature and irregular. Good practice requires an affirmative showing of the non-appearance of the defendant, as a preliminary to an order *pro confesso*. Eaton v. Eaton, 33 Mich. 305.

18. This proposition is impliedly recognized in Woods v. Dickinson, 7 Mackey (D. C.) 301; Chewning v. Nichols, Smed. & M. Ch. (Miss.) 122.

19. Blanton v. Hall, 2 Heisk. (Tenn.) 423.

When one of several trustees, who have been made defendants to a bill, dies, and another person, by consent in court, is substituted in his stead, the irregularity, if there be any, is

waived; and if said substituted party appears by attorney, and fails to answer, a decree *pro confesso* may be taken against him, notwithstanding he may not have been served with process. Mobile & C. P. R. Co. v. Talman, 15 Ala. 472.

It is not error to render a decree *pro confesso* against unknown heirs, where it does not appear from the record that they were minors. Newlin v. Snyder, 78 Ill. 528.

20. Gordan v. Fairecloth, 27 Ga. 372.

21. Black v. Lusk, 69 Ill. 70; Trust & Fire Ins. Co. v. Jenkins, 8 Paige (N. Y.) 589.

22. Nelson v. Eaton, 66 Fed. 376, 13 C. C. A. 523, 27 U. S. App. 677; Harris v. Deitrich, 29 Mich. 366.

Where a complainant amends his bill during the running of an order for an absent defendant to appear, it is not necessary to obtain a new order for the absentee to appear and answer the bill as amended, and to advertise a second time. Bond v. Howell, 11 Paige (N. Y.) 233.

Upon the filing of a supplemental bill in chancery it is not necessary under the Illinois practice, that a summons should issue, nor an appearance be entered before a *pro confesso* order can be entered. It is not error to require a defendant already in court by service, to answer a supplemental bill, and on his failure to do so, to render a decree *pro confesso* to such supplement. Mix v. Beach, 46 Ill. 311.

for want of further answer.²³ However, the plaintiff cannot treat a defective answer as a nullity and have the bill taken as confessed for want of answer without excepting to the same and having it adjudged insufficient.²⁴

C. PROCEEDINGS TO TAKE BILL PRO CONFESSO. — 1. **General Rule.** A decree *pro confesso* cannot be entered while a demurrer,²⁵ plea,²⁶ answer,²⁷ motion,²⁸ or any issue raised by the pleadings,²⁹ remains undisposed of.³⁰ In many jurisdictions, by statute or by rule of court, the time within which a decree *pro confesso* may be entered is prescribed by statute.³¹

Several authorities treat the entry of a decree *pro confesso* as a merely ministerial act and not as being of a judicial character.³²

23. **Ill.**—Yates v. Continental Ins. Co., 207 Ill. 512, 69 N. E. 779; Bauerle v. Long, 165 Ill. 340, 46 N. E. 227; Work v. Hall, 79 Ill. 196. **Ind.**—Pegg v. Davis, 2 Blackf. 281. **Ky.**—Philips v. Coons, 4 Bibb 247. **Md.**—Parron v. Brannock, 2 Bland, 450 note. **Tenn.** Lanum v. Steel, 10 Humph. 280; Lea v. Vanbibber, 6 Humph. 18.

24. Ewing v. Blight, 3 Wall. Jr. 134, 8 Fed. Cas. No. 4,589; Clinch River Mineral Co. v. Harrison, 91 Va. 122, 21 S. E. 660.

After overruling a demurrer a decree *pro confesso* may be entered. Gates & Bro. v. Cragg, 11 W. Va. 300.

The question whether the defendant should be ruled to answer, is one of discretion, and will not be reviewed. Roach v. Chapin, 27 Ill. 194.

25. Joest v. Adel, 209 Ill. 432, 70 N. E. 638.

26. Jordan v. Jordan, 16 Ga. 446; Smith v. Cozart, 45 Miss. 698.

27. **D. C.**—Wagenhurst v. Wineland, 22 App. Cas. 356. **Fla.**—King v. Bell, 54 Fla. 568, 45 So. 488. **Ill.**—Griswold v. Brock, 29 Ill. App. 423.

Where an answer was actually filed before an order taking a bill in equity *pro confesso* was obtained, but after the time limited for answering had expired, it was irregular to take an order for judgment for want of an answer without first having such answer removed from the record. Maxwell v. Jarvis, 14 Wis. 506.

28. Blythe v. Hinckley, 84 Fed. 228.

29. Sampson v. Hendricks, 8 Blackf. (Ind.) 288.

30. It has been held that under Equity Rule 18 a demurrer lacking the affidavit of defendant and certificate of counsel required by Rule 31, is fatal-

ly defective, and that a decree *pro confesso* may be entered. Sheffield Furnace Co. v. Witherow, 149 U. S. 574, 13 Sup. Ct. 936, 37 L. ed. 853.

31. Such provisions in various states are discussed by the following authorities: **Ala.**—Pitfield v. Gazzam, 2 Ala. 325. **Fla.**—Ropes v. McCabe, 40 Fla. 388, 25 So. 273; Johnson v. Johnson, 23 Fla. 413, 2 So. 834; Lente v. Clarke, 22 Fla. 515, 1 So. 149. **Ga.**—Carter v. Jordan, 15 Ga. 76; Guerry v. Durham, 11 Ga. 9. **Ind.**—Platt v. Judson, 3 Blackf. 235. **Ky.**—Bedford v. Duly, 1 A. K. Marsh. 220; Kenton v. Carswell, Sneed 119. **Tenn.**—Tipton v. Tipton, 118 Tenn. 691, 104 S. W. 237; Wessells v. Wessells, 1 Tenn. Ch. 60.

Anticipatory Decree.—An order to take a bill *pro confesso*, unless the defendant answers it by a certain day given, cannot be anticipated, and a decree *pro confesso* passed in anticipation of such day. Fitzhugh v. McPherson, 9 Gill & J. (Md.) 51.

32. The want of a formal order on the record, that the bill be taken *pro confesso*, cannot be assigned for error. Savage v. Berry, 3 Ill. 545.

In Lanum v. Steel, 10 Humph. (Tenn.) 280, it is declared that according to the Tennessee practice, orders for taking bills *pro confesso* properly appertain to the duties of the clerk and master, and not of the chancellor, and should be made at the rules and not in court. Seay v. Seay, 1 Tenn. Ch. 2, to the same effect.

Under statute, in Georgia, no order need be taken for the purpose of taking a bill *pro confesso*, but a decree can be entered by complainant, or his solicitor in his absence. Miller v. Wilkins, 79 Ga. 675, 4 S. E. 261.

A rule requiring an affidavit of regularity of the steps to take the bill as confessed is for the convenience of the judge only, and its absence does not invalidate proceedings which are in fact correct.³³

It is improper, in an affidavit of regularity, to detail the proceedings at length. The affidavit should simply state that the bill had been taken as confessed upon a personal service of the subpoena, or on a voluntary appearance of the defendant, or upon a proceeding against him as an absentee, as the case may be, and that all the proceedings to take the bill as confessed are regular, unless in a special case where the solicitor wishes to submit the question of regularity to the decision of the court.³⁴

Under the rules of the United States supreme court, such decree is not what the complainant chooses to make it, but must be proper upon the statements of the bill assumed to be true.³⁵

2. Notice.—Whether or not a defendant in chancery, served with process to appear, is bound to take notice of any subsequent proceedings in the suit and is entitled to further notice when the plaintiff proposes to take the bill as confessed, is a question concerning which there is a conflict of opinion. Frequently the decision rests upon local statutes, rules or customs.³⁶

It is held in *Lewis v. Hancock*, Sneed (Ky.) 151, that an order *pro confesso* against defendants served by publication must be made in open court and cannot be done at the rules. But in *Allen v. Coffman*, 1 Bibb (Ky.) 469, in which case the defendant was duly subpoenaed, it is held that taking a bill *pro confesso* in the office at the rules in the first instance is correct.

A decree *pro confesso* may be rendered without evidence in support of the bill. *Humphreys v. Darlington*, 3 G. Gr. (Iowa) 588.

A bill may be taken for confessed without first filing the exhibits. *Gwin v. Stone*, 1 Smed. & M. Ch. (Miss.) 124.

It is a matter of discretion with the court to extend the time for answering. To this effect, see *Dougherty v. Jones*, 11 Ga. 431; *Collins v. Crotty*, 65 Ill. 545.

33. *Ireland v. Woolman*, 15 Mich. 253.

34. *Nott v. Hill*, 6 Paige (N. Y.) 9.

Security To Abide Future Order. By statute, in proceedings against absent debtors, the court upon taking the bill for confessed and making a decree must require the plaintiff to give security for abiding such future order as may be made for restoring the estate or effects of the absent defend-

ant, upon his appearance, and answering the bill; and a decree without such security is erroneous. *Klinefelter v. Blaine*, 3 Dana (Ky.) 467. And see *Grant v. Stewart*, 1 Desaus. (S. C.) 136.

35. *Thomson v. Wooster*, 114 U. S. 104, 5 Sup. Ct. 788, 29 L. ed. 105; *Wong Him v. Callahan*, 119 Fed. 381.

36. The following authorities hold such notice to be unnecessary: *Ala.* *Vary v. Thompson*, 168 Ala. 367, 52 So. 951. *Me.*—*Glover v. Jones*, 95 Me. 303, 49 Atl. 1104. *Md.*—*Harrison v. Morton*, 87 Md. 671, 40 Atl. 897. *N. J.* *Oakley v. O'Neill*, 2 N. J. Eq. 287.

Such notice is necessary according to *Sterling v. Ashton*, 12 Phila. (Pa.) 227, 34 Leg. Int. 362.

Necessary if the defendant has appeared but has not answered. *Wampler v. Wolfinger*, 13 Md. 337.

If plaintiff amends his complaint, defendant must be notified. *Howton v. Jordan*, 154 Ala. 428, 46 So. 234.

Under the twentieth rule for the regulation of the practice of federal circuit courts in equity, the interlocutory order for taking a bill for confessed is not required to be served before entering a final decree, and consequently the want of such service is not ground for a bill of review. *Bank*

3. Rule to Answer.—In some jurisdictions a rule to answer *instantly* is required before a decree *pro confesso* can be taken.³⁷

D. SETTING ASIDE DECREE.—1. In Discretion.—The court may, upon application, for cause shown, set aside and vacate a decree *pro confesso* and allow an answer to be filed.³⁸ Such applications are addressed to the discretion of the court in most jurisdictions.³⁹ Generally, the application will be granted, if the applicant has not conducted himself unreasonably and if no serious injury will result.⁴⁰

Good cause must be shown for the conduct of the defendant in failing to answer.⁴¹ Moreover, the defendant is required to show that he

of United States v. White, 8 Pet. (U. S.) 262, 8 L. ed. 938.

37. The use of the rule to answer in this connection is discussed in the following cases: Nesbit v. St. Patrick's Church, 9 N. J. Eq. 76. Under the seventeenth rule of equity adopted in 1822. Pendleton v. Evans, 4 Wash. C. C. 336, 19 Fed. Cas. No. 10,920; Halderman v. Halderman, 1 Hempst. 407, 11 Fed. Cas. No. 5,908.

There is no such rule in Illinois. Grob v. Cushman, 45 Ill. 119.

38. Fla.—Horner v. White, 46 Fla. 479, 35 So. 662. Ky.—Moore v. Moore, 5 Dana 464. Mich.—Low v. Mills, 61 Mich. 35, 27 N. W. 877. N. J.—Mutual Life Ins. Co. v. Sturges, 32 N. J. Eq. 678; Williamson v. Sykes, 13 N. J. Eq. 182. Pa.—Smith v. Carter, 219 Pa. 315, 68 Atl. 736. E. I.—Masterson v. Whipple, 27 R. I. 192, 61 Atl. 446. Tenn.—Cook v. Dews, 2 Tenn. Ch. 496. W. Va.—Ferrell v. Camden, 57 W. Va. 401, 50 S. E. 733; Morrison & Co. v. Leach, 55 W. Va. 126, 47 S. E. 237.

After an order that a bill be taken *pro confesso*, merely gratuitously putting in an answer is not sufficient to set aside the order. Carter v. Torrance, 11 Ga. 654.

If the defendant be absent from the state when a decree *pro confesso* is rendered against him, his remedy is to come in and defend; he cannot institute a new suit while the former decree remains in force. Davoue v. Fanning, 4 Johns. Ch. (N. Y.) 199.

39. U. S.—Dean v. Mason, 20 How. 198, 15 L. ed. 876; Provident Life & Trust Co. v. Camden & T. R. Co., 177 Fed. 854, 101 C. C. A. 68. Ala.—Hurter v. Robbins, 21 Ala. 585. Ill.—Powell v. Clement, 78 Ill. 20; Collins v. Crotty, 65 Ill. 545. Tenn.—Edwards v. Turner (Tenn. Ch. App.), 47 S. W. 144; Buchanan v. McManus, 3 Humph.

449. Contra, Pond v. Lockwood, 11 Ala. 567 (by statute); Bailey v. Jones, 107 Md. 405, 68 Atl. 881.

40. Ga.—Carter v. Torrance, 11 Ga. 654. Mich.—Smith v. Saginaw City Bank, Har. 426; Graham v. Elmore, Har. 265; Hart v. Lindsay, Walk. Ch. 72; Russell v. Waite, Walk. Ch. 31. Miss.—Gwin v. Harris, 1 Smed. & M. Ch. 528. N. J.—Emery v. Downing, 13 N. J. Eq. 59.

41. Fla.—Stribling v. Hart, 20 Fla. 235. Mich.—Thayer v. Swift, Walk. Ch. 384. Tenn.—Bashaw v. Temple, 115 Tenn. 596, 91 S. W. 202; Cain v. Jennings, 3 Tenn. Ch. 131 (under statute).

The showing of cause in the following cases were held insufficient: Fla. King v. Bell, 54 Fla. 568, 45 So. 488. Miss.—Kitchens v. Harrall, 54 Miss. 474. N. J.—Mulford v. Reilly, 32 N. J. Eq. 419. Tenn.—Campbell v. Atwood (Tenn. Ch. App.), 47 S. W. 163.

Press of business of counsel held insufficient cause in Cook v. Dews, 2 Tenn. Ch. 496.

The mere fact that the allegations of the bill taken for confessed are false is no ground for setting the decree aside. Bell v. Rucker, 4 B. Mon. (Ky.) 452.

The following were held to be sufficient causes for setting the decree *pro confesso* aside: Inadvertence of defendant (Yost v. Alderson, 58 Miss. 40); misrepresentation in obtaining decree *pro confesso* (Williams v. Duncan, 44 Miss. 375); collusion (Ash v. Bowen, 10 Phila. 68, 30 Leg. Int. 226); neglect of defendant's solicitor (Graham v. Elmore, Har. (Mich.) 265); neglect of agent in defending the suit (Wayne v. Washington Mut. Ins. Co., 1 Ohio Dec. 181, 3 West Law J. 305); defective service (Hawkins v. Brown [R. I.], 68 Atl. 474); want of jurisdiction over

has a meritorious defense,⁴² with the exception of cases wherein the bill is substantially defective.⁴³

2. Application.—The customary method of application to have a decree *pro confesso* set aside is by motion⁴⁴ or petition,⁴⁵ accompanied by an answer⁴⁶ or a statement of reasons for not so accompanying the same;⁴⁷ and in addition, or in place thereof, an affidavit showing the merits of the application.⁴⁸ The affidavit must be made by the defendant himself in the absence of extraordinary circumstances.⁴⁹

3. Setting Aside on Terms.—In many cases the court will set aside a decree and attach terms or conditions in the setting aside;⁵⁰ for example, the decree may be set aside to enable defendant to answer but not to plead,⁵¹ or upon condition that the defendant pay the costs.⁵²

E. FUNCTION AND EFFECT OF DECREE PRO CONFESSO.—A decree *pro confesso* has the effect of an answer admitting the allegations of

party (*Non-Magnetic Watch Co. v. Assn. Horlogere Suisse*, 45 Fed. 210); mental debility of defendant (*Haywood v. Coman*, 4 N. C. 204, 2 Car. Law Rep. 106); premature entry of decree *pro confesso* (*Roberts v. Brooks*, 71 Fed. 914); oversight of counsel (*Benjamin Schwartz & Sons v. Kennedy*, 156 Fed. 316); surprise (*Miller v. Wright*, 25 N. J. Eq. 340); decree *pro confesso* irregularly entered (*Fellows v. Hall*, 3 McLean 281, 8 Fed. Cas. No. 4,722); want of notice (*McGowan v. James*, 12 Smed. & M. (Miss.) 445).

A defect, apparent on the face of the bill, of jurisdiction of the person of the defendant, may be taken advantage of by a motion to vacate a decree *pro confesso*. (*Eldred v. American Palace Car Co.*, 103 Fed. 209).

The defendant should object to the decree at the earliest possible moment. (*Glos v. Shedd*, 218 Ill. 209, 75 N. E. 887; *Evarts v. Becker*, 8 Paige (N. Y.) 506).

42. Fla.—*Prout v. Dade County Security Co.*, 55 Fla. 816, 47 So. 12; *Keil v. West*, 21 Fla. 508. **Ill.**—*Terry v. Eureka College*, 70 Ill. 236; *Grubb v. Crane*, 5 Ill. 153. **Mich.**—*Mills v. McLeod*, 86 Mich. 290, 49 N. W. 134; *Stockton v. Williams*, Har. 241; *Bilox City R. Co. v. Maloney*, 19 So. 832. **N. Y.**—*Wells v. Cruger*, 5 Paige 164. **Tenn.**—*Lewis v. Simonton*, 8 Humph. 185; *Kelly v. Roane Iron Co.* (Tenn. Ch. App.), 53 S. W. 1102; *Cain v. Jennings*, 3 Tenn. Ch. 131; *Totten v. Nance*, 3 Tenn. Ch. 264. **Wis.**—*Babcock v. Perry*, 4 Wis. 31.

43. *Cooke v. Haungs*, 113 Ill. App. 501.

44. *Beekman v. Peck*, 3 Johns. Ch. (N. Y.) 415.

45. *Hart v. Lindsay*, Walk. Ch. (Mich.) 72.

46. Ill.—*Colehour v. Bass*, 143 Ill. App. 530. **Mich.**—*Stockton v. Williams*, Har. 241. **N. Y.**—*Hunt v. Wallis*, 6 Paige 371. **Tenn.**—*Stark v. Murphy* (Tenn. Ch. App.), 52 S. W. 736.

47. *Pittman v. McClellan*, 55 Miss. 299.

48. U. S.—*Schofield v. Horse Springs Cattle Co.*, 65 Fed. 433. **Ill.**—*Dunn v. Keegin*, 4 Ill. 292. **Mich.**—*Bank of Michigan v. Williams*, Har. 219. **Tenn.**—*Cook v. Dews*, 2 Tenn. Ch. 496. **Wis.**—*Mowry v. Hill*, 11 Wis. 146.

49. *Totten v. Nance*, 3 Tenn. Ch. 264; *Cook v. Dews*, 2 Tenn. Ch. 496.

50. *Quincy v. Foot*, 1 Barb. Ch. (N. Y.) 496; *Wilson v. Waterman*, 6 Rich. Eq. (S. C.) 255.

51. *Allen v. Baugus*, 1 Swan (Tenn.) 404.

52. *McFarland v. State Sav. Bank*, 129 Fed. 244; *Gerard v. Gerard*, 2 Barb. Ch. (N. Y.) 73.

If the decree *pro confesso* be set aside, in the absence of an agreement to the contrary, the defendant may set up the statute of limitations as a defense. *Belt v. Bowie*, 65 Md. 350, 4 Atl. 295; *Douglas v. Douglas*, 3 Edw. Ch. (N. Y.) 390.

If a statute provides for the setting aside of a decree *pro confesso* upon the filing of an answer, a plea will not suffice to take the place of an answer. *Bank of St. Mary's v. St. John*, 25 Ala. 566.

the bill to be true,⁵³ as against those defendants who have permitted a decree *pro confesso* to be entered against them,⁵⁴ even though the plaintiff has not sworn to the bill.⁵⁵ However, it is an admission of the facts alleged in the bill and not of the conclusions of law therein contained.⁵⁶ Moreover, it is an admission only of definite and certain allegations of the bill,⁵⁷ and of facts which are well pleaded.⁵⁸

53. **Ala.**—Butler v. Butler, 11 Ala. 668. **Ill.**—Crawford v. Cook, 55 Ill. App. 351; Parke v. Brown, 12 Ill. App. 291. **Ky.**—Atterberry v. Knox, 8 Dana 282. **Tenn.**—Bashaw v. Temple, 115 Tenn. 596, 91 S. W. 202; Claybrook v. Wade, 7 Coldw. 555; Stone v. Duncan, 1 Head 103; Koen v. White's Heirs, Meigs 358; Jackson v. Honeycut, 1 Overt. 30.

"A *pro confesso* decree is as binding upon the parties thereto upon all questions involved in the suit as is a contested decree on the same questions." Harrington v. Dickinson, 155 Mich. 161, 118 N. W. 931.

A decree *pro confesso* is binding until set aside, although the defendant by reason of non-residence may have an opportunity, by statute, to have the same set aside. Watlington v. Howley, 1 Desaus. (S. C.) 167.

The only effect of a decree *pro confesso* is to enable the case to be proceeded with *ex parte* against the defendant as to whom it is taken. Unless followed by a final decree, it settles no rights. Lockhart v. Horn, 3 Woods 542, 15 Fed. Cas. No. 8,446.

An order taking a bill for confessed does not prevent the filing of a meritorious answer at any time before the submission of the case for trial. Alexander v. Quigley's Exrs., 2 Duv. (Ky.) 399.

54. **Fulton v. Woodman**, 54 Miss. 158; **Holloway v. Moore**, 4 Smed. & M. (Miss.) 594.

Where a joint suit is brought against a fraudulent grantor and grantee and the grantor answers denying fraud, and the grantee allows a decree *pro confesso* to be entered against himself, the answer of the grantor is evidence in favor of the grantee. This is to be distinguished from a case wherein the defenses are entirely separate. Here they are indissolubly connected. There can be no fraudulent grantee without a fraudulent grantor. **Duncomb v. Wallace**, 105 Tenn. 385, 59 S. W. 1013.

55. **Schoenflug v. Ketcham** (Tenn. Ch. App.), 52 S. W. 666.

56. **Ala.**—**Johnson v. Hathaway**, 155 Ala. 516, 46 So. 760. **D. C.**—**Perkins v. Tyrer**, 24 App. Cas. 447. **Tenn.**—**Doak v. Stahlman** (Tenn. Ch. App.), 58 S. W. 741; **Barnes v. Brown**, 1 Tenn. Ch. App. 726.

57. **Fla.**—**Hale v. Yeager**, 57 Fla. 442, 49 So. 544. **Ill.**—**Wing v. Cropper**, 35 Ill. 256. **Ky.**—**Craig v. Horine**, 1 Bibb 8. **Mich.**—**Backus v. Cowley**, 162 Mich. 585, 127 N. W. 775. **Va.**—**Welsh v. Solenberger**, 85 Va. 441, 8 S. E. 91.

58. **Ala.**—**Johnson v. Kelly**, 80 Ala. 135; **McDonald v. Mobile Life Ins. Co.**, 56 Ala. 463. **Colo.**—**Buck v. Fischer**, 2 Colo. 182. **Ill.**—**Henry v. Seager**, 80 Ill. App. 172. **N. Y.**—**Williams v. Corwin**, Hopk. Ch. 471.

The allegations of a bill taken *pro confesso* are to be construed strictly. **Breckinridge v. Waters**, 4 Dana. (Ky.) 620.

Upon a bill filed by C, which avers that A was authorized to assign the interest of B and the mortgage security to the complainant, and A and B are summoned by publication, and make default, this allegation will sustain a decree taken *pro confesso*, declaring that the whole interest in the note was assigned by A to B. **Herring v. Woodhull**, 29 Ill. 92, 81 Am. Dec. 296.

A decree *pro confesso* taken against an absent defendant served only by publication is not evidence of the truth of the statements of the bill in any collateral contest. **Cobb v. Thompson**, 1 A. K. Marsh. (Ky.) 507.

Where the default is upon constructive notice, a greater degree of certainty is required than where the decree is rendered upon actual service of the subpoena. **Clarke v. Strong**, 13 Ark. 491.

A bill taken as confessed against an absentee, after publication, who does not appear in the suit, is not evidence of any fact against him, even

As to whether or not it is necessary to enter a decree *pro confesso* before a final decree against a defendant duly served but failing to appear can be rendered, there is a conflict of authority. According to the weight of authority the decree *pro confesso* should first be entered,⁵⁹ unless defendant waives it.⁶⁰ A few courts regard the failure to enter the decree *pro confesso* as being, at most, an error of form and not of substance.⁶¹ However, although the final decree entered without the previous taking of a decree *pro confesso* against the party in default may be erroneous, it is not void on this account.⁶²

A defendant against whom a decree *pro confesso* has been passed and which he cannot have set aside is not wholly remediless. He may move to dismiss the bill for want of equity,⁶³ or may question the legality of the proceedings.⁶⁴ Moreover, if the bill is referred to a master, the defendant may cross-examine the witness,⁶⁵ or he may have his testimony considered before final decree.⁶⁶ Moreover, he has a right to be heard upon the form of the decree and to appeal from it.⁶⁷

F. FINAL DECREE ON DECREE PRO CONFESSO. — 1. General Statement. — It does not follow that because the plaintiff has procured a decree *pro confesso* against a defendant, that he will as of course procure a final decree. The bill may be dismissed for various reasons.⁶⁸

2. Necessity of Proof. — The general rule is that in procuring a final decree upon a decree *pro confesso*, no proof of the allegations of the bill is necessary,⁶⁹ unless the allegations of the bill are of an un-

as to his personal rights. *Danforth v. Woods*, 11 Paige (N. Y.) 9.

59. **Ark.**—*Anthony v. Shannon*, 8 Ark. 52. **Ga.**—*Groce v. Field*, 13 Ga. 24. **Ill.**—*Western Union Tel. Co. v. Pacific & A. Tel. Co.*, 49 Ill. 90. **Ky.** *Shields v. Bryant*, 3 Bibb 525; *Copeland v. Curry*, Sneed 180. **Miss.** *Mezeix v. McGraw*, 44 Miss. 100; *Beville v. McIntosh*, 41 Miss. 516; *Carman v. Watson*, 1 How. 333. **Mo.** *Evans v. State*, 1 Mo. 492. **Va.**—*Le-grand v. Francisco*, 3 Munf. 33.

60. *Williams v. Clyatt*, 53 Fla. 987, 43 So. 441; *Wilson v. Spring*, 64 Ill. 14; *Harris v. Schilling*, 108 Ill. App. 116.

61. *Linder v. Lewis*, 1 Fed. 378; *Newell v. City of Camden*, 40 N. J. Eq. 499, 728, 4 Atl. 644, 645.

After a final hearing, the party in default cannot take advantage of the failure to enter a decree *pro confesso*. *Allen v. City of New York*, 7 Fed. 483.

If a defendant be served with a subpoena, the bill need not be taken for confessed. *Heath v. Mitcherson*, 1 J. J. Marsh. (Ky.) 547.

If the plaintiff fails to procure a decree *pro confesso* against a defendant

personally served, he must prove his case before obtaining a final decree. *Albright v. Texas*, S. F. & N. R. Co., 8 N. M. 422, 46 Pac. 448.

62. *Rushing v. Thompson's Exr.*, 20 Fla. 583.

63. *Madden v. Floyd*, 69 Ala. 221; *Thornton's Admr. v. Neal*, 49 Ala. 590.

64. *Lybass v. Town of Ft. Myers*, 56 Fla. 817, 47 So. 346.

65. *Bauerle v. Long*, 165 Ill. 340, 46 N. E. 227.

66. *Benson v. Ketchum*, 14 Md. 331.

67. *Blanchard v. Cooke*, 144 Mass. 207, 11 N. E. 83.

68. **Ala.**—*Moore v. Wright*, 4 Stew. & P. 84. **Ill.**—*Lynch v. Naylor*, 63 Ill. App. 107. **N. C.**—*Attorney-General v. Carver*, 34 N. C. 231. **Pa.**—*Ash v. Bowen*, 10 Phila. 68, 30 Leg. Int. 226.

69. **U. S.**—*Andrews v. Cole*, 20 Fed. 410, as to English practice. **Ala.**—*Baker v. Young*, 90 Ala. 426, 8 So. 59; *Carradine v. O'Connor*, 21 Ala. 573; *Hartley v. Bloodgood*, 16 Ala. 233; *Wellborn v. Tiller*, 10 Ala. 305; *Levert v. Redwood*, 9 Port. 79. **Colo.**—*Clear Creek, Colorado G. & S. Min. Co. v. Root*, 1 Colo. 374. **Ill.**—*Glos v. Shedd*, 218 Ill. 209, 75 N. E. 887; *Boston v.*

certain and indefinite character, in which case proof should be required.⁷⁰ It is generally regarded as a matter of discretion with the court to require proof or not.⁷¹ If, however, proof be introduced, it may disprove the allegations of the bill, and if it does this it necessitates the dismissal of the bill.⁷²

A frequent statutory requirement necessitates the proof of the plaintiff's case, if the defendant be a non-resident not personally served.⁷³

3. Conformity to Allegations of Bill.—Although the proceedings after a decree *pro confesso* are *ex parte*, it is well settled that the plaintiff can obtain no relief beyond the scope of the allegations of the bill.⁷⁴ If the allegations of the bill do not entitle the plaintiff to any relief, the bill must be dismissed.⁷⁵ Moreover, the bill is construed

Nichols, 47 Ill. 353; Harmon v. Campbell, 30 Ill. 25; Johnson v. Donnell, 15 Ill. 97; Farnsworth v. Strasler, 12 Ill. 482; Armstrong v. Douglas Park Bldg. Assn., 60 Ill. App. 318. **Ky.** Baltzell v. Hall, 1 Litt. 97; Steel v. McDowell, 2 Bibb 123. **Mich.**—Michigan Ins. Co. v. Whittemore, 12 Mich. 427; Ward v. Jewett, Walk. Ch. 45. **N. C.**—Attorney-General v. Carver, 34 N. C. 231. **Tenn.**—Phillips v. Hollister, 2 Coldw. 269; Douglass v. Evans, 1 Overt. 82. **Va.**—Pullen v. Mullen, 12 Leigh 434.

Apparently *contra*: **Ala.**—Singleton v. Gayle, 8 Port. 270. **Ill.**—Heacock v. Hosmer, 109 Ill. 245. **Va.**—Anonymous, 4 Hen. & M. 476.

70. Ala.—O'Neal v. Robinson, 45 Ala. 526, where bill was defective. **Ind.**—Laney v. Laney, 4 Ind. 149; Cole-
rick v. Hooper, 3 Ind. 316, 56 Am. Dec. 505; Platt v. Judson, 3 Blackf. 235; Pegg v. Davis, 2 Blackf. 281. **Ia.** Bolander v. Atwell, 14 Iowa 35; Harrison v. Kramer, 3 Iowa 543. **Mich.** Messenger v. Peter, 129 Mich. 93, 88 N. W. 209.

71. Cronan v. Frizell, 42 Ill. 319; Moore v. Titman, 33 Ill. 357; Stephens v. Bichnell, 27 Ill. 444; Manchester v. McKee, 9 Ill. 511; Ferguson v. Sutphen, 8 Ill. 547; Fellows v. Shelmire, 5 Blackf. 48; Bowman v. Hall, 2 Ind. 206.

Where a decree could not be made against part of the heirs, and the bill is taken *pro confesso* as to some of the heirs and others deny its allegations and require proof, to authorize a decree against any of the heirs, the production of proof is indispensable. Ross v. Daviess, 4 J. J. Marsh. (Ky.) 383.

72. Cook v. Woodbury County, 13 Iowa 21; Atkins v. Faulkner, 11 Iowa 326; Purviance v. Barton, 2 Gill & J. (Md.) 311.

73. Ind.—Trimble v. White, 2 Ind. 205. **N. Y.**—Wolcott v. Weaver, 3 How. Pr. 159 (containing a discussion of this question); Aymer v. Gault, 2 Paige 284. **Tenn.**—Scovel v. Absten, 1 Tenn. Ch. 73.

As the result of a number of statutes in Alabama, it was held that it is not necessary in suits against absent defendants to prove the allegations of the bill when it is taken *pro confesso*. The enactment which requires proof, only applies to suits against resident defendants. Arnold v. Sheppard, 6 Ala. 299.

Necessity of affidavit before final decree by complainant or his solicitor in his absence. See Coston v. Dudley, 65 Ga. 252.

74. U. S.—Masterson v. Howard, 18 Wall. 99, 21 L. ed. 764. **D. C.**—Knott v. Giles, 27 App. Cas. 581. **Fla.**—Lyle v. Winn, 45 Fla. 419, 34 So. 158; Price v. Boden, 39 Fla. 218, 22 So. 657; Marks v. Baker, 20 Fla. 920. **Ill.** Carter v. Lewis, 29 Ill. 500; Gault v. Hoagland, 25 Ill. 241; Curlett v. Curlett, 106 Ill. App. 81. **Ky.**—Gould v. Bond No. 2, 1 Bush 189. **Mich.**—Hardwick v. Bassett, 25 Mich. 149. **Miss.** Austin v. Barber, 38 Miss. 553, 41 So. 265; West Feliciana R. Co. v. Stockett, 27 Miss. 739. **N. J.**—Mutual Life Ins. Co. v. Sturges, 32 N. J. Eq. 678. **Tenn.** Ross v. Ramsey, 3 Head 15; Chadwell v. McCall, 1 Tenn. Ch. 640.

75. City of Orlando v. Equitable Bldg. & Loan Assn., 45 Fla. 507, 33

strictly against the plaintiff for this purpose.⁷⁶ If the allegations of the bill are not clear, the court is forced either to render no decree,⁷⁷ or to allow evidence to be introduced to remove the uncertainty.⁷⁸

4. Effect of Answer by One Defendant.—If there be a number of joint defendants and part allow a decree *pro confesso* to be entered against them and one or more of the others appear, plead and disprove the plaintiff's case against all of them, the defense of part enures to the benefit of all of them, and the bill must be dismissed as to all.⁷⁹ However, this rule has no application if the defendants are not liable jointly or if the defense of the defendant who appears be purely personal to him and in no way disproves the case made against the defendant in default.⁸⁰

5. Time to Obtain Final Decree.—In many jurisdictions, rules or statutes prescribe the length of time which must elapse before a final decree can be obtained upon a decree *pro confesso*.⁸¹

So. 986; Hurlbut v. Britain, 2 Dougl. (Mich.) 192.

76. Brodie v. Skelton, 11 Ark. 120; White v. Lewis, 2 A. K. Marsh. (Ky.) 123.

77. Marshall v. Tenant, 2 J. J. Marsh. (Ky.) 155, 19 Am. Dec. 126.

78. D. C.—Davis v. Speiden, 3 Mac Arthur 283. Ind.—Close v. Hunt, 8 Blackf. 254. Mich.—Ramsdell v. Eaton, 12 Mich. 117.

79. U. S.—Frow v. De La Vega, 15 Wall. 552, 21 L. ed. 60. Ark.—Real Estate Bank v. Bozeman, 15 Ark. 316; Aikin v. Harrington, 12 Ark. 391. Ky. Harrison v. Deremiah, 2 Bibb 349. Md. Walsh v. Smyth, 3 Bland 9; Ligan v. Henderson, 1 Bland 236. Miss.—Kennedy v. East Union Lumb. & Mfg. Co., 92 Miss. 405, 46 So. 625; Kelly v. Brooks, 57 Miss. 225; Hargrove v. Martin, 6 Smed. & M. 61; Minor v. Stewart, 2 How. 912. N. Y.—Clason v. Morris, 10 Johns. 524; Grider v. Corbin, 116 App. Div. 818, 102 N. Y. Supp. 181. N. C.—Andres v. Lee, 21 N. C. 318. Tenn.—Butler v. Kinzie, 90 Tenn. 31, 15 S. W. 1068; McDaniel v. Goodall, 2 Coldw. 391; Hennessee v. Ford, 8 Humph. 499; Driver v. White (Tenn. Ch. App.), 51 S. W. 994. Vt.—Kopper v. Dyer, 59 Vt. 477, 9 Atl. 4, 59 Am. Rep. 742; Sparhawk v. Buell, 9 Vt. 41. Va.—Aiken v. Connelley, 24 S. E. 909; Terry v. Fontaine's Admr., 83 Va. 451, 2 S. E. 743; Cartigne v. Raymond, 4 Leigh 579.

80. Ala.—Ft. Payne Bank v. Alabama Sanitarium, 103 Ala. 358, 15 So. 618. S. C.—State v. City of Columbia, 12 S. C. 370. Tenn.—Simpson v.

Moore, 5 Lea 372; Phillips v. Hollister, 2 Coldw. 269. Va.—Ashby v. Bell's Admr., 80 Va. 811.

Where a bill in equity against two defendants makes distinct charges against and seeks a distinct relief from each, and one of the defendants answers, and the bill is taken *pro confesso* against the other, the defendant who answers has no right to be heard upon the form of a decree against his co-defendants, though the court will take care that such decree shall be framed reserving his rights unprejudiced. Millard v. Tripp, 2 R. I. 543.

81. To the effect that the final decree may be entered at once, see Stribling v. Hart, 20 Fla. 235; Claybrook v. Wade, 7 Coldw. (Tenn.) 555.

Both may be entered together. Stark v. Murphy (Tenn. Ch. App.), 52 S. W. 736. At the same term. Sanders v. Powell, 7 Smed. & M. (Miss.) 206.

Final decree may be rendered at the return term of the summons. Grubb v. Crane, 5 Ill. 153.

Federal Practice.—Before the amendment of Equity Rule 19 (see 97 U. S. viii) no final decree could be taken until the first day of the next term, but now it may be done at any time after thirty days after the bill is taken *pro confesso*, but not at once. Consolidated Fruit Jar Co. v. Strong, 6 Fed. Cas. No. 3,130.

A decree *pro confesso* on a cross-bill is interlocutory and not within Rule 19, but within Rule 1 of the federal practice in equity. Blythe Co. v. Bankers' Inv. Co., 147 Cal. 32, 81 Pac. 281. See also Blythe Co. v. Blythe,

6. Necessity of Notice.—It is generally held that no notice of proceedings incident to the taking of a final decree after the entry of a decree *pro confesso* need be given to the defendant in default.⁸²

Several authorities make a distinction between decrees *pro confesso* for want of appearance and for want of answer. In the former case, they declare that there is no one on whom notice can be served, and therefore it becomes impossible to serve the same.⁸³

IV. FORMS OF RELIEF.—A. ADAPTED TO CASE.—A court of equity in rendering a decree may adapt its relief to the exigencies of the case.⁸⁴ The bill may be dismissed generally, or as to one party only.⁸⁵

Relief in Alternative.—The court may grant relief in the alternative, giving the party against whom the decree is rendered an election between two courses.⁸⁶

B. COMPLETENESS OF RELIEF.—It is well settled that the court of equity should and must give complete relief in its final decree, the maxim being applicable that equity having once taken jurisdiction will give full and adequate relief.⁸⁷ For this reason both legal and equitable relief must be ascertained when drawn in question.⁸⁸

Much difficulty arises in enforcing the general rule that in order to give complete relief all necessary parties must be in court before a final decree can be rendered.⁸⁹ While such is the general rule, where

172 U. S. 644, 19 Sup. Ct. 873, 43 L. ed. 1183.

82. **U. S.**—Provident Life & Trust Co. v. Camden & T. R. Co., 177 Fed. 854, 101 C. C. A. 68; Austin v. Riley, 55 Fed. 833. **Ala.**—Mussina v. Bartlett, 8 Port. 277. **Fla.**—Lyle v. Winn, 45 Fla. 419, 34 So. 158; Price v. Boden, 39 Fla. 218, 22 So. 657; Stribling v. Hart, 20 Fla. 235. **N. Y.**—Rose v. Woodruff, 4 Johns. Ch. 547.

83. **Buck v. Fischer**, 2 Colo. 182; **Armstrong v. Douglas Park Bldg. Assn.**, 60 Ill. App. 318.

After a decree *pro confesso*, a defendant who has appeared by solicitor is entitled to notice of an application for a decree to the end that the decree be not allowed to go beyond the case made by the bill and such proofs as complainants may make. **Southern Pac. R. Co. v. Temple**, 59 Fed. 17.

If after a decree *pro confesso* the plaintiff desires to amend the same he must give due notice to defendant personally or his attorney of record. **Lincaln v. Africa**, 228 Pa. 546, 77 Atl. 918.

84. *In re Owings*, 1 Bland (Md.) 370, 17 Am. Dec. 311; **Murtha v. Curley**, 90 N. Y. 372, 12 Abb. N. C. (N. Y.) 12.

85. **Fitzhugh v. Barmard**, 12 Mich. 104.

86. **Smith v. Onion**, 19 Vt. 427; **Smith's Exx. v. Profit's Admx.**, 82 Va. 832, 1 S. E. 67.

87. **Ala.**—**Mobile & C. P. R. Co. v. Talman**, 15 Ala. 472. **Ark.**—**Chicot Lumb. Co. v. Dardell**, 84 Ark. 140, 104 S. W. 1100. **Cal.**—**Kraft v. De Forest**, 53 Cal. 656. **Ill.**—**Schmohl v. Fiddick**, 34 Ill. App. 190. **Me.**—**Bailey v. Myrick**, 36 Me. 50. **Mich.**—**Smith v. Rumsey**, 33 Mich. 183; **Graham v. Elmore**, Har. 265.

88. **Hull v. Clark**, 14 Smed. & M. (Miss.) 187; **Smith v. Doak**, 3 Tex. 215.

Such legal relief must be only incidental to the equitable relief. **City of Paterson v. East Jersey Water Co.**, 74 N. J. Eq. 49, 70 Atl. 472.

89. **Stirman v. Cravens**, 33 Ark. 376; **Kennedy v. Davenport**, 13 B. Mon. (Ky.) 167.

The rights of all persons whose interests are immediately connected with the decision, and affected by it, should be provided for in the decree. **McPherson v. Parker**, 30 Cal. 455, 89 Am. Dec. 129.

a decree can be made settling the rights of the parties before the court without in any way prejudicing the rights of absent parties, the court may proceed to render its decree, without waiting for the absent parties to be brought before it.⁹⁰ However, a decree objectionable on the ground of incompleteness is not void as to the parties before the court when the same was rendered, although it may be erroneous.⁹¹

C. ENFORCING ULTIMATE LIABILITY. — As a rule, the court of equity will in its decree subject to liability in the first instance the defendant who ought ultimately to pay the debt.⁹² However, this can be done only where the parties are before the court at the time of the decree, and their several liabilities are clearly ascertained.⁹³

D. RELIEF UPON CONDITION. — A court of equity may modify the demands of parties as justice may require, and it may refuse its decree unless the party will take a decree upon the condition that he do certain things or relinquish certain rights.⁹⁴ This is in accordance with the maxim that he who seeks equity must do equity.⁹⁵ Such a decree is of no force until such condition is complied with.⁹⁶ There need be no prayer in the answer,⁹⁷ nor cross-bill⁹⁸ for such relief as the

90. U. S.—*Cole Silver Min. Co. v. Virginia & G. H. Water Co.*, 1 Sawy. 685, 6 Fed. Cas. No. 2,990. Ark.—*Apperson & Co. v. Burgett*, 33 Ark. 328. Ill.—*Munger v. Jacobson*, 99 Ill. 349. Ky.—*Brand v. Webb*, 2 A. K. Marsh. 574.

A court of equity ought not to decree the land to one of the contending parties, and the title to the same land to the other. This would be creating a controversy instead of settling one. *Whitesides v. Lackey*, 1 Litt. (Ky.) 80.

A final decree on the merits cannot be made separately against one of several defendants upon a joint charge against all, when the case is still pending as to others. *Frow v. De La Vega*, 15 Wall. (U. S.) 552, 21 L. ed. 60.

Where a cross-bill and answers are filed in a case and the decree undertakes to dispose of the whole case, it should dispose of the issues raised in them. *Moore v. Huntington*, 17 Wall. (U. S.) 417, 21 L. ed. 642.

A chancellor may by decree settle the equities and liabilities of the principal parties to the suit, and reserve for subsequent examination questions of liens in favor of other persons. *White v. Hampton*, 10 Iowa 238.

"Although the general rule of the court is to make a complete decree upon all the points connected with the case, it frequently happens that the parties are so circumstanced that a

decision upon all the points connected with their interests cannot be pronounced till a future period. All that the court usually does, under such circumstances, is to order the interest of the fund to be paid to the person entitled to the dividends during his life, and to declare that, upon his death, the parties interested in the fund are to be at liberty to apply to the court as they may be advised." *Daniell*, Ch. Pl. & Pr. (6th ed.) 996.

91. *Murphy v. Orr*, 32 Ill. 489.

92. Ala.—*Thomson v. Bradford*, 7 Biss. 351, 23 Fed. Cas. No. 13,981. Va. *McNeil v. Baird*, 6 Munf. 316. W. Va. *Bansimer v. Fell*, 39 W. Va. 448, 19 S. E. 545.

93. *Garnett v. Macon*, 2 Brock. 185, 10 Fed. Cas. No. 5,245; *Garnett v. Macon*, 6 Call (Va.) 308.

94. Ky.—*Lewis v. Outton*, 3 B. Mon. 453. N. C.—*Daughtry v. Reddick*, 40 N. C. 261. W. Va.—*West Virginia O. & O. Land Co. v. Vinal*, 14 W. Va. 637.

95. *Farmers' Loan & Tr. Co. v. Denver, etc.*, R. Co., 126 Fed. 46, 60 C. C. A. 588.

96. *Sparhawk v. Buell*, 9 Vt. 41.

97. *Walden v. Bodley*, 14 Pet. (U. S.) 156, 10 L. ed. 398. See the title "Bills and Answer."

98. *Andrews v. Connolly*, 145 Fed. 43. See the title "Cross-Bill."

plaintiff may thus be indirectly obliged to give the defendant. Such a condition is looked upon as being a modification of the plaintiff's relief rather than a grant of affirmative relief to the defendant.⁹⁹

V. FORM OF DECREE. — A. GREAT DIVERSITY. — Owing to the infinite varieties of decrees in equity, a wide range must be allowed the court as to the form which the decree is to take.¹

According to English custom, decrees consist of four parts:² First, the date and title;³ second, the recitals; third, the declaratory part, if any, making a declaration of the rights of the parties; fourth, the ordering or mandatory part, containing the specific direction of the court upon the matters before it.

Mere informality, although not to be encouraged, will not vitiate a decree.⁴

Implications. — Although it is not erroneous to express matters necessarily implied, such matters need not be inserted in the decree.⁵

B. COMPLETENESS AND CERTAINTY. — 1. **General Rule.** — The de-

99. *Rowan v. Sharp's Rifle Mfg. Co.*, 33 Conn. 1.

A condition in a decree that one party pay, on the other surrendering possession of the land, without ordering a surrender, or reserving it to the court to determine on the performance, is disapproved in *Jarman v. Davis*, 4 T. B. Mon. (Ky.) 115.

To grant a decree of foreclosure, conditional upon the exercise of the right of redemption by the mortgagor, is a practice which does not seem to be sanctioned by any rule of equity, or any known authority. *Potter v. Marvin*, 4 Minn. 525.

1. *Glenn v. Bechtel*, 152 Cal. xvi, 93 Pac. 78; *Bechtel v. Weir*, 152 Cal. 443, 93 Pac. 75; *Robinson v. Clark*, 76 Me. 493.

2. *Danl. Ch. Pl. & Pr.*, p. 1001.

3. By rule of court, in England, every decree should have written or stamped upon its first page the year, letter and number of the cause. *Cons. Ord. I*, 48, 49, 50.

The decree commences with a recital of the day, month and year when it was pronounced, and of the names of the several parties to the cause, who should have the same titles in the decree as they have in the bill. *Danl. Ch. Pl. & Pr.*, p. 1002.

The caption of a decree or order, unless otherwise directed by the court, should correspond with the time of the actual entry of such decree or order.

And where a decree is entered *nunc pro tunc* as of a previous date, or otherwise, it should appear by some entry in the minutes of decrees, or in the minutes of the proceedings in the cause, or in both, at what time the decree or order was actually entered. *Barclay v. Brown*, 7 Paige (N. Y.) 245.

4. *McLemore v. Nuckolls*, 37 Ala. 662; *Harland v. Eastland*, Hard. (Ky.) 596.

The terms "decreed," "resolved," "ordered," "judgment rendered," and the like, are equivalent to original technical terms, to-wit, "have and recover" as at law, or "ordered that the party pay" as in equity, provided the entry shows an actual giving of judgment and exhibits what is required to be specified with clearness and precision. *Johnson v. Miller*, 55 Ill. App. 168.

The use of the expressions "therefore, it is considered by the court," and "that the defendant recover" instead of "It is thereupon decreed and ordered," and "that the complainant do pay," respectively, although these are awkward improprieties, does not affect the substance of the decree. *Lindley v. Payne*, 3 Litt. (Ky.) 299.

5. **U. S.**—*Root v. Woolworth*, 150 U. S. 401, 14 Sup. Ct. 136, 37 L. ed. 1123. **Ky.**—*Meriwether v. Hite*, 2 A. K. Marsh. 181. **Wis.**—*Sevmour v. Laycock*, 47 Wis. 272, 2 N. W. 297.

creed must be complete, certain,⁶ consistent.⁷ It should be complete in itself and not dependent upon anything extrinsic and merely referred to in the decree.⁸ However, in rare cases, the decree may refer to the bill for a description of the property in litigation.⁹

2. Decrees for Payment of Money.—If the decree contains an order for the payment of a sum of money, it must order the payment of a definite sum of money, and not leave the ascertainment of the amount to the future or in the hands of any designated person.¹⁰

Interest.—If the sum in question involves principal and interest, the decree must order the payment of the aggregate sum.¹¹ Whether or not a decree is to carry interest is a question of substantive law.¹²

3. Persons Involved.—The decree must specify the person in whose favor it is rendered,¹³ and the person against whom it is rendered,¹⁴ and if a special master be appointed to execute the decree, he must be designated.¹⁵ It seems advisable to designate such persons by name and not merely by description.

4. Decrees Involving Property and Estates.—If an estate is to be divided and distributed, the decree must specify accurately the property involved,¹⁶ and the amount of the share of each person,¹⁷ and not leave these questions for future determination and litigation.

5. Time for Performance.—If the decree requires the performance of an act, it must designate a time for performance.¹⁸ Frequently a decree directs the transfer of property upon the payment of money.

6. *Elliott v. Waring*, 5 T. B. Mon. (Ky.) 338, 17 Am. Dec. 69; *Mudd v. Carrico*, 4 Litt. (Ky.) 16.

7. *Sims v. Redding*, 20 Tex. 386.

8. *Honore v. Colmesnil*, 1 J. J. Marsh. (Ky.) 506; *Jessop v. Borough of Kittanning*, 225 Pa. 583, 74 Atl. 553.

If a decree orders a railroad to construct and maintain a bridge proper and safe for the purpose intended to be answered, greater particularity is not required. *Carpenter v. Easton & A. R. Co.*, 28 N. J. Eq. 390.

The decree was held sufficient in this respect in *Broxson v. McDougal*, 63 Tex. 193.

A decree directing a tender to be made in notes on the Bank of the Commonwealth, and in case they should be refused, other measures to be taken by the person tendering them, is erroneous, in making the party a judge of the facts of tender and refusal, and the legality of those acts. *Farner v. Samuel*, 4 Litt. (Ky.) 187.

9. *Jones v. Belt*, 2 Gill (Md.) 106.

10. Ill.—*Tompkins v. Wiltberger*, 56 Ill. 385; *Smith v. Trimble*, 27 Ill. 152; *Frye v. Bank of Illinois*, 10 Ill.

332. Ky.—*Arnold v. Arnold*, 11 B. Mon. 81; *Noland v. Richards*, 1 J. J. Marsh. 582; *White v. Guthrie*, 1 J. J. Marsh. 503. Miss.—*Freeman v. Ledbetter*, 43 Miss. 165. Tenn.—*Codwise v. Taylor*, 4 Sneed 346.

11. *Barstow v. McLachlan*, 5 Ill. App. 96; *Cranmer v. McSwords*, 26 W. Va. 412.

12. *Hughes v. Standeford*, 3 Dana (Ky.) 285.

13. *Turner v. Dupree*, 19 Ala. 198; *DeWolf v. Long*, 7 Ill. 679.

14. *Church v. Chambers*, 3 Dana (Ky.) 274.

15. *Alexander v. Wolley*, 4 Ill. App. 225.

16. *Jones v. Minogue*, 29 Ark. 637.

17. *White's Heirs v. White's Admrs.*, 3 Dana (Ky.) 374.

18. *Terril v. Arnold*, 4 Litt. (Ky.) 300.

By rule of court in England, every decree, or order, requiring a person to do an act, is to state the time, or the time after service of the decree or order, within which the act is to be done. Cons. Ord. xxiii, 10; Ord. 7 Jan. 1870, r. 1 (L. R. 5 Ch. xxxii).

In such cases it must designate the time when the money is to be paid.¹⁹

C. REASONS FOR DECREE. — A few American authorities require the statement of the reasons for the decree to be contained therein,²⁰ and such statements are frequently inserted in England.²¹ Such recitals have been held to be unnecessary in this country.²²

D. RECITAL OF PLEADINGS. — Contrary to the former English practice, the present English and American practice does not require the reciting of the pleadings and proceedings in the decree.²³

E. RECITAL OF FINDINGS OF FACTS AND EVIDENCE. — Although the earlier authorities regard a finding of the facts on which the decree is based as necessary,²⁴ the later authorities consider such findings not essential to the validity of the decree,²⁵ or construe the decree as including a finding of facts that will support it.²⁶

Ultimate Facts. — Wherever a finding of facts is necessary in a decree, ultimate facts only,²⁷ and not lengthy recitals of evidentiary facts are required.²⁸

19. *Craig v. McMullin*, 9 Dana (Ky.) 311; *Hebron v. Kelly*, 77 Miss. 48, 25 So. 877, affirming on rehearing 77 Miss. 48, 23 So. 641.

If the decree omits to fix a time for performance, it is not thereby rendered ineffectual, but the court will, upon motion for that purpose, of which notice must be given, make a supplemental order, fixing a time for the performance of the act. *Danl. Ch. Pl. & Pr.*, p. 1043.

20. *Pillow v. Wade*, 31 Ark. 678; *Hartfield v. Brown*, 8 Ark. 283.

21. The declaration of the grounds on which the decree is based is very useful. *Bax v. Whitbread*, 16 Ves. 15, 24, 33 Eng. Reprint 889; *Gordon v. Gordon*, 3 Swanst. 400, 478. See the following English cases: *Ex parte Earl of Ilchester*, 7 Ves. 348, 32 Eng. Reprint 142; *Gibson v. Kinven*, 1 Vern. 66n., 23 Eng. Reprint 315; *Attorney General v. Clapham*, 4 De G., M. & G. 591, 42 Eng. Reprint 638, 1 Jur. N. S. 505, 10 Hare 617, 1 Seton 20, 68 Eng. Reprint 1042; *Onions v. Tyrer*, 1 P. Wms. 343, n. 1, 24 Eng. Reprint 418; *Maynard v. Moseley*, 3 Swanst. 653, 36 Eng. Reprint 1010; *Oliver v. Oliver*, L. R. 11 Eq. 506; *Austin v. Austin*, 11 Jur. N. S. 536, 13 W. R. 761, L. C., 4 De G., J. & S. 716, 722, 46 Eng. Reprint 1098; *Munn v. Hancock*, L. R. 6 Ch. 850.

22. *Farnsworth v. Strasler*, 12 Ill. 482; *Jackson v. Valley Tie & Lumb. Co.*, 108 Va. 714, 62 S. E. 964.

Erroneous Reason Stated. — If an er-

roneous reason be given, and the decree is right for another reason, the decree will not be reversed on this ground. *Vance Shoe Co. v. Haught*, 41 W. Va. 275, 23 S. E. 553.

23. *Danl. Ch. Pl. & Pr.*, p. 1002; *Tomlinson v. McKaig*, 5 Gill (Md.) 256.

United States Equity Rule 86 provides that "in drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: 'This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.:'" (Here insert the decree or order.)

24. *Peters v. Rosseter*, 1 Root (Conn.) 273; *Bacon v. Childs*, 1 Root (Conn.) 466; *Sampson v. Hunt*, 1 Root (Conn.) 207, 521; *Burbank v. Wiley*, 66 N. C. 58 (by statute).

25. **Me.** — *Pierce v. Woodbury*, 100 Me. 1, 60 Atl. 424. **Mo.** — *Judge v. Booge*, 47 Mo. 544, under code. **Wash.** *Kilroy v. Mitchell*, 2 Wash. 407, 26 Pac. 865.

26. *Kidd v. New York Sec. & Tr. Co.*, 75 N. H. 154, 71 Atl. 878.

27. *Walker v. Carey*, 53 Ill. 470.

28. *Koch v. Arnold*, 242 Ill. 208, 89 N. E. 1028; *Moore v. School Trus-*

Reference to Verdict.—If the findings of fact are based on a verdict of a jury, the court may refer to the same and adopt and approve it.²⁹ However, the court should show its approval of the verdict and not base the decree on the verdict alone.³⁰

The following rules are supported by the authorities as to the necessity of a recital of the evidence on which the decree is based, in the decree itself³¹:—

The evidence must in some manner be preserved in the record.³² It is sufficient if the evidence be preserved by recitals in the decree.³³ This rule is particularly important under the modern practice which allows oral testimony in equity cases.³⁴ If the evidence is preserved elsewhere in the record, it need not be recited in the decree.³⁵

F. RECITALS OF SERVICE.—The decree must contain a recital of the facts showing service upon a non-resident defendant who has not appeared,³⁶ where the record fails to show this.³⁷

tees, 19 Ill. 83; *Brown v. Peterson*, 117 Ill. App. 401; *Dey v. Dunham*, 2 Johns. Ch. (N. Y.) 182.

Where fraud is an inference of law it is sufficient if the court finds the facts without, in terms, finding fraud. But where the fraud depends upon motives and intentions, the fraud is actual and must be found specifically. *Lavette v. Sage*, 29 Conn. 577.

29. *Goldman v. Rogers*, 85 Cal. 574, 24 Pac. 782; *Hayden v. Anderson*, 57 Ga. 378.

30. *Rynerson v. Allison*, 28 S. C. 81, 5 S. E. 218; *Charlotte, C. & A. R. Co. v. Earle*, 12 S. C. 53.

31. By rule of court, a decree in chancery need not set forth the evidence, or recite the facts, on which it is based. *Mason v. Daly*, 117 Mass. 403.

32. *Bogda v. Glos*, 244 Ill. 575, 91 N. E. 657; *Day v. Davis*, 213 Ill. 53, 72 N. E. 682; *Baird v. Powers*, 131 Ill. 66, 22 N. E. 796; *Driscoll v. Tannock*, 76 Ill. 154; *Hughs v. Washington*, 65 Ill. 245; *Grob v. Cushman*, 45 Ill. 119; *Eaton v. Warren*, 43 Ill. 437; *Eaton v. Sanders*, 43 Ill. 435; *Waugh v. Robins*, 33 Ill. 182; *Trenchard v. Warner*, 18 Ill. 142; *Fricke v. Fricke*, 124 Ill. App. 39; *Chapman v. Kane*, 97 Ill. App. 657; *Adamski v. Wiecezorek*, 93 Ill. App. 357; *Ricketts v. Chicago Permanent Bldg. & L. Assn.*, 67 Ill. App. 71; *Urdike v. Parker*, 11 Ill. App. 356.

This requirement rests upon the party seeking affirmative relief. *Alexander v. Alexander*, 45 Ill. App. 211.

This rule does not apply to statutory proceedings of a chancery character, such as a suit in reference to mechanics' liens. *Drennan v. Huskey*, 31 Ill. App. 208.

33. *Axtell v. Pulsifer*, 155 Ill. 141, 39 N. E. 615; *Nichols v. Thornton*, 16 Ill. 113; *Hovorka v. Hemmer*, 107 Ill. App. 312.

34. *Gorman v. Mullins*, 172 Ill. 349, 50 N. E. 222.

35. *Seymour v. Edwards*, 31 Ill. App. 50; *Bonnell v. Lewis*, 3 Ill. App. 283; *Dousman v. Hooe*, 3 Wis. 466.

36. Ala.—*Butler v. Butler*, 11 Ala. 668. Ill.—*Randall v. Songer*, 16 Ill. 27. Ky.—*Green v. Breckenridge*, 4 T. B. Mon. 541.

37. *Hanson v. Patterson*, 17 Ala. 738; *Hartley v. Bloodgood*, 16 Ala. 233.

It is not necessary that the decree should find in specific terms that the clerk mailed the notice to a non-resident defendant. It is sufficient to state that all steps necessary to notify the defendants have been taken. This includes mailing the notice. *Burke v. Donovan*, 60 Ill. App. 241.

White v. White, 66 W. Va. 79, 66 S. E. 2, contains a review of the authorities concerning recitals as to service.

If a bill in equity be taken as confessed on account of the non-appearance of the defendant, and a final decree be rendered against him, the record should show that the court had jurisdiction of the person of the defendant. *Shipley v. Mitchell*, 7 Blackf. (Ind.) 472.

VI. PREPARATION, SIGNING, ENTRY, ENROLMENT AND RECORDING OF DECREES.—A. TENDENCY TO CONFORM TO LAW.

Much intricacy attaches to the formal preparation and the placing of decrees upon the records. The tendency is in the direction of making the practice at law in reference to judgments and the equity practice in reference to decrees conform.³⁸

B. PREPARATION.—In England, when a decree is pronounced by the court, a note of it is taken down by the registrar in attendance and from these notes the decree is afterwards prepared, and copies issued to the solicitors of the parties.³⁹

In the United States the preparation of the decree is frequently left to the attorneys in the case, generally the winning counsel,⁴⁰ although it may be prepared by the adverse side, if such an arrangement is consented to.⁴¹

C. SIGNING.—A contrariety of opinion exists as to the necessity and effect of signing decrees. In some jurisdictions the signing of the decree by the chancellor is required,⁴² or is considered an essential prerequisite to the full force and validity of the decree;⁴³ in others it is regarded as unnecessary⁴⁴ or merely as evidence of the chancellor's assent to the same.⁴⁵

38. "In a proper sense there is no filing of a judgment, and the draft made for the guidance of the clerk is not a decree of the court." *Horn v. Horn*, 234 Ill. 268, 84 N. E. 904.

In *Hubbell v. Lankenau*, 63 Fed. 881, after the lapse of twelve years an informal order was treated as a formal decree.

The minutes or memoranda found on the chancellor's docket are not conclusive evidence that a decree has been rendered. *Cone v. Bloomer*, 85 Ark. 334, 108 S. W. 221.

39. *Danl. Ch. Pl. & Pr.*, p. 1008.

40. *Horn v. Horn*, 234 Ill. 268, 84 N. E. 904; *Sagory v. Bayless*, 13 Smed. & M. (Miss.) 153.

The federal judges scan such a decree with great nicety. *Stepp v. National Life & Maturity Assn.*, 37 S. C. 417, 16 S. E. 134.

Good practice requires that a defendant who has appeared in the cause should have such notice of the entry of the decree as to give him an opportunity to attend and be heard upon the settlement thereof. *Detroit Fire & M. Ins. Co. v. Renz*, 33 Mich. 298.

41. *Coleman v. Coleman*, 2 Pears. (Pa.) 516.

Semble.—An interlocutory decree need not necessarily be submitted to

opposing counsel. *Rankin v. Bancroft*, 114 Ill. 441, 3 N. E. 97.

42. *Raymond v. Smith*, 1 Metc. (Ky.) 65, 71 Am. Dec. 458.

43. *Davoue v. Fanning*, 4 Johns. Ch. (N. Y.) 199.

The decree not having been signed by the chancellor, the illegality of the execution based thereon, on that ground, was properly sustained. Where a decree is signed by counsel instead of the chancellor, such defect can be cured at a subsequent term by a *nunc pro tunc* judgment. The rights of third persons could not be thereby affected. *Sloan v. Cooper*, 54 Ga. 486.

44. Ill.—*Horn v. Horn*, 234 Ill. 268, 84 N. E. 904. Neb.—*Fouts v. Mann*, 15 Neb. 172, 18 N. W. 64. Tex.—*Canon v. Hemphill*, 7 Tex. 184.

45. In *Ommen v. Talcott*, 180 Fed. 925, it is declared to be the practice in the federal courts to sign decrees. But when the judge in open court gives verbal directions to enter the same, that is sufficient; the signature being regarded merely as evidence of the assent of the judge.

A decree is inoperative as a decree until it has received the file mark of the clerk. So, where a decree was prepared by the judge before the expiration of his term of office, but was not

D. ENTRY.—1. In General.—Several authorities regard the entry of a decree as an essential prerequisite to its completeness.⁴⁶ A decree is considered entered from the time it is left with the clerk to be copied into the minutes of the court, after it has been allowed by the court.⁴⁷ In entering the decree the clerk is performing a merely ministerial act,⁴⁸ and has no authority to vary in any way the decree as approved by the judge.⁴⁹ A decree can never be entered unless and until it is approved by the court.⁵⁰

2. Nunc Pro Tunc.—In many cases it is permissible to enter a decree *nunc pro tunc*.⁵¹ For example, where one of the parties dies after the submission of the cause,⁵² or after the argument in the cause,⁵³ the decree may be entered as of a date prior to the death in question. When a decree has not been entered earlier through accident or mistake, it may be entered *nunc pro tunc*.⁵⁴ However, a decree cannot be entered *nunc pro tunc* so as to affect the rights of third parties acquired before the actual pronouncement of the decree.⁵⁵

filed until after his successor had been elected and qualified, it is a nullity. A judicial act can only be performed by one who was a judge at the time the act was done. *Russell v. Sargent*, 7 Ill. App. 98.

46. *Ala.*—*Hall v. Hudson*, 20 Ala. 284. *Mich.*—*Ryerson v. Eldred*, 18 Mich. 490. *Va.*—*Lee v. Willis*, 99 Va. 16, 37 S. E. 826.

By federal statute (§828 Rev. St.) a clerk in a federal court may refuse to enter a decree until his fees are paid. *Ommen v. Talcott*, 180 Fed. 925.

An entry by the clerk on Sunday is void, according to *Lee v. Willis*, 99 Va. 16, 37 S. E. 826.

47. *Gay v. Gay*, 10 Paige (N. Y.) 369.

48. *Edwards v. Turner* (Tenn. Ch. App.), 47 S. W. 144.

49. *Smith v. Cumins*, 52 Iowa 143, 2 N. W. 1401.

50. *Beach v. Shaw*, 4 Barb. (N. Y.) 288.

Approval of the decree by the chancellor is authority for the clerk to sign it. *Horn v. Horn*, 234 Ill. 268, 84 N. E. 904.

Entry of a decree before the time authorized where defendant is served by publication may be irregular, but is not of itself fatal, provided the court remains in session sufficiently long to afford the statutory time for appearance. *Goodell v. Auditor General*, 143 Mich. 240, 106 N. W. 890, 114 Am. St. Rep. 646.

If the decree be not actually entered

until after the judge who drew it up and announced it dies, an entry of it may be made at the next term. *Doggett v. Emerson*, 1 Woodb. & M. 1, 7 Fed. Cas. No. 3,961.

51. Such an entry was held proper in *Klopping v. Stellmacher*, 36 N. J. L. 176.

Such entries, on the facts in question, were held improper in the following cases: *Ark.*—*Poole v. Oliver*, 89 Ark. 578, 117 S. W. 747. *Ill.*—*Stevens v. Coffeen*, 39 Ill. 148. *Mich.*—*Eslow v. Albion Tp.*, 32 Mich. 193. *Wash.* *Puget Sound Agr. Co. v. Pierce County*, 1 Wash. Ter. 75.

52. *Flock v. Wyatt*, 49 Iowa 466; *Gunderman v. Gunnison*, 39 Mich. 313.

53. *Mass.*—*Emery v. Parrott*, 107 Mass. 95. *N. J.*—*Burnham v. Dalling*, 16 N. J. Eq. 310. *N. Y.*—*Wood v. Keyes*, 6 Paige 478; *Campbell v. Meslier*, 4 Johns. Ch. 334, 8 Am. Dec. 570. *Eng.*—*Danl. Ch. Pl. & Pr.*, p. 1017; *Willimott v. Ogilby*, cited in 2 Seton 1547. *Contra*, *Bertie v. Lord Falkland*, 1 Dick. 25, 21 Eng. Reprint 176. As to the latter case, see *Mann v. Ricketts*, 2 Coop. temp. Cott. 35, 47 Eng. Reprint 1022.

54. *Newland v. Gaines*, 1 Heisk. (Tenn.) 720.

55. *Dawson v. Scriven*, 1 Hill Eq. (S. C.) 177.

A decree in chancery may be amended by a *nunc pro tunc* entry so as to make it speak the truth; and the making of such amendment, at a subsequent term, so as to show that the

E. ENROLMENT.—1. An Ancient Practice.—In England, the practice existed of enrolling decrees. This custom has never existed in the United States,⁵⁶ with the possible exception of one or two of the states where the old forms of equity practice are retained to a great extent.⁵⁷ Therefore, when we find an American court speaking of the enrolment of decrees,⁵⁸ we may depend upon it that it has reference to an American equivalent of enrolment and not to the old English custom.

2. Time of Enrolment.—In the United States, a decree is deemed enrolled as of the term when it is rendered,⁵⁹ and the term, for this purpose, does not expire until the commencement of the ensuing term;⁶⁰ or, after it has been signed and filed and the term has

cause was heard upon oral as well as written evidence, does not revive the appellant's right to file a bill of exceptions setting out the evidence. That right expires with the lapse of the term. *Hershey v. Baer*, 45 Ark. 240.

A decree *nunc pro tunc* is always admissible where a decree was ordered or intended to be entered, and was omitted to be entered only by the inadvertence of the court; but a decree which was not actually meant to be made in a final form cannot be entered in that shape *nunc pro tunc* in order to give validity to an act done by a judicial officer under a supposition that the decree was final instead of interlocutory. *Gray v. Brignardello*, 1 Wall. (U. S.) 627, 17 L. ed. 692.

Orders to enter decrees, *nunc pro tunc*, will be made after a very long interval has elapsed from the time of pronouncing the decree; and even where the original decree has been lost, the court has permitted it to be entered *nunc pro tunc*, from the office copy, after the lapse of twenty-three years. *Danl. Ch. Pl. & Pr.*, p. 1017; *Lawrence v. Richmond*, 1 J. & W. 241, 37 Eng. Reprint 367; *Donne v. Lewis*, 11 Ves. 601, 32 Eng. Reprint 1221.

56. *Ommen v. Talcott*, 180 Fed. 925; *Robinson v. Rudkins*, 28 Fed. 8.

In *Cocke v. Gilpin*, 1 Rob. (Va.) 22, the court declared: "The practice of enrollment is unknown in Virginia, as are many other matters of practice in the multifarious and expensive system of the English chancery, requiring numerous officers, and calculated to promote accuracy and precision, and relieve the court from laborious details, by condensing and simplifying

the questions submitted to its consideration."

The federal equity rules make no provision for enrolment. Sec. 750 of the revised statutes makes such provision and is to be regarded as supplementary to the equity rules. *Consolidated Store Service Co. v. Dettenthaler*, 93 Fed. 307.

A part only of a decree or order cannot be enrolled; but an order directing additional accounts and inquiries may be enrolled by itself. *Danl. Ch. Pl. & Pr.*, p. 1021.

A decree may be enrolled by a defendant as well as by a plaintiff. *Danl. Ch. Pl. & Pr.*, p. 1023.

"It has been said, that mere interlocutory orders, made upon motion or petition, which do not decide any of the merits of the cause, and only relate to the proceedings in it, cannot be the subject of enrollment; but this notion seems to be unfounded; and such orders have often been enrolled." *Danl. Ch. Pl. & Pr.*, p. 1021; *William v. Page*, 1 De G. & J. 561, 564, 44 Eng. Reprint 840; *M'Gregor v. Topham*, 4 Hare 162, 67 Eng. Reprint 603.

57. *Giant Powder Co. v. California Vigorit Powder Co.*, 5 Fed. 197.

58. For example, see the following cases: *Davoue v. Fanning*, 4 Johns. Ch. (N. Y.) 199; *Minthorne v. Tompkins*, 2 Paige (N. Y.) 102.

59. *Ommen v. Talcott*, 180 Fed. 925.

Ala.—*Ansley v. Robinson*, 16 Ala. 793. **D. C.**—*Fries v. Fries*, 1 Mac Arthur 291. **Md.**—*In re Young's Estate*, 3 Md. Ch. 461.

60. *Nowland v. Glenn*, 2 Md. Ch. 368.

elapsed;⁶¹ or, as soon as signed;⁶² or, as soon as signed and placed upon the records⁶³ or filed.⁶⁴

3. Purpose and Effect.—The purpose of the practice of enrolment is to provide a permanent memorial of the decree.⁶⁵ By enrolment, the decree is given the highest character as evidence and may then be pleaded in bar to any new proceeding.⁶⁶ Moreover, although the decree may be modified before enrolment,⁶⁷ after enrolment it can be reopened only by a bill of review,⁶⁸ and can be amended only as to clerical errors.⁶⁹ Moreover, enrolment is sometimes a condition precedent to the levying of execution to enforce the decree.⁷⁰

F. RECORDING.—Frequently by statute provision is made for the recording of decrees. Recording is analogous to enrolment under the former equity practice.⁷¹

61. *Burch v. Scott*, 1 Gill & J. (Md.) 393.

62. *Allen v. Burke*, 1 Bland (Md.) 544; *Smith v. Valentine*, 19 Minn. 452 (by statute).

63. *Parsons v. Stevens* (Me.), 78 Atl. 347; *Sagory v. Bayless*, 13 Smed. & M. (Miss.) 153.

64. *Hollingsworth v. McDonald*, 2 Har. & J. 230, 3 Am. Dec. 545; *Burch v. Scott*, 1 Bland. 112; *Low v. Mills*, 61 Mich. 35, 27 N. W. 877.

65. *Consolidated Store-Service Co. v. Dettenthaler*, 93 Fed. 307.

The case of *Cocke v. Gilpin*, 1 Rob. (Va.) 22, contains a good discussion concerning the purpose and effect of enrolment.

66. *Minn.*—*Smith v. Valentine*, 19 Minn. 452. *N. Y.*—*Davoue v. Fanning*, 4 Johns. Ch. (N. Y.) 199. *S. C.*—*Morgan v. Morgan*, 45 S. C. 323, 23 S. E. 64. *Eng.*—*Daniell Ch. Pl. & Pr.*, p. 1018, *et seq.*; *Pearse v. Dobinson*, L. R. 1 Eq. 241.

67. *Fraker v. Brazelton*, 12 Lea (Tenn.) 278; *Dousman v. Hove*, 3 Wis. 466.

68. *Maynard v. Pereault*, 30 Mich. 160. See the title "Bills of Review."

It is doubtful whether the enrolment of an interlocutory order prevents a rehearing. *Daniell, Ch. Pl. & Pr.*, p. 1021; *Att.-Gen. v. Mayor of Wigan*, 5 De G. M. & G. 52, 18 Jur. 299, 42 Eng. Reprint 789; *Ollerenshaw v. Harrop*, L. R. 9 Ch. 480.

69. *Guise v. Middleton*, 1 Smed. & M. Ch. (Miss.) 89.

The enrolment relates back to the time of the decree for the purpose of protecting acts done under it in the

interim. *Goelet v. Lansing*, 6 Johns. Ch. (N. Y.) 75.

See authorities, *infra*, in this article, under the section dealing with the amendment and setting aside of decrees.

70. *Minthorne v. Tompkins*, 2 Paige (N. Y.) 102; *Norton v. Tallmadge*, 3 Edw. Ch. (N. Y.) 310.

At one time in New York, by statute, enrolled decrees were given a preference in payment out of the personal estate of the deceased debtor according to the time of enrollment. *Ainslie v. Radcliff*, 7 Paige (N. Y.) 439.

In England, no appeal to the House of Lords can take place, unless the decree appealed against has been enrolled. *Daniell, Ch. Pl. & Pr.*, p. 1019; *Andrewes v. Walton*, 8 Cl. & F. 457, 8 Eng. Reprint 180, 6 Jur. 519. *Broadhurst v. Tunnicliff*, 9 Cl. & F. 71, 8 Eng. Reprint 342.

71. *Hughes v. Washington*, 65 Ill. 245; *Raymond v. Smith*, 1 Mete. 65, 71 Am. Dec. 458.

There is a discussion of section 750 of the Revised Statutes of the United States, making provision for a final record of decree, in *Consolidated Store Service Co. v. Dettenthaler*, 93 Fed. 307.

If the proceedings in equity have not been recorded at full length, the original papers, documents and docket-entries may be adduced and used in court as constituting the record of the case. *Bank of the United States v. Benning*, 4 Cranch C. C. 81, 2 Fed. Cas. No. 908.

A loose leaf typewritten record was held a sufficient entry of record in

VII. CONSTRUCTION.—**A. INTENT.**—In construing a decree its meaning is to be ascertained from the manifest intent of the court which makes it,⁷² the purpose of the court,⁷³ and in the light of the proceedings incident to its rendition.⁷⁴ Technical details⁷⁵ or mere surplusage⁷⁶ in no manner affect the same.⁷⁷

Presumptions.—It is well settled, that the presumptions are all in favor of the validity of the decree, which will be sustained if possible.⁷⁸

B. USE OF EXTRINSIC EVIDENCE.—As a rule, if the decree is free from ambiguity, its meaning is to be determined from its actual terms.⁷⁹ However, an ambiguity in the decree opens the door for an examination of the proceedings in the case to ascertain the meaning of the decree,⁸⁰ but not for an examination of documents not made a part

Lynch v. Burt, 132 Fed. 417, 67 C. C. A. 305.

A decree is not duly recorded as soon as left with the clerk of the court to be docketed, but becomes such when docketed several months later. *Johnson v. Nat. Exch. Bank*, 33 Gratt. (Va.) 473.

72. *Doscher v. Blackiston*, 7 Ore. 403.

73. *Buck v. Webb*, 7 Colo. 212, 3 Pac. 211.

74. **U. S.**—*Milwaukee & M. R. Co. v. Chamberlain*, 3 Wall. 704, 18 L. ed. 247. **Fla.**—*Theisen v. Whiddon*, 60 Fla. 372, 53 So. 642. **Ia.**—*McCullough v. Connelly*, 137 Iowa 682, 114 N. W. 301.

75. *West v. Belches*, 5 Munf. (Va.) 187.

76. *Thom v. Tyler*, 3 Blackf. (Ind.) 504.

77. The terms of a decree directing a conveyance to be made and made to operate as a conveyance by statute must be construed precisely as the conveyance itself would be. *Price v. Sisson*, 13 N. J. Eq. 168.

78. This rule is exemplified by the following authorities: **Ala.**—*New England Mtg. Sec. Co. v. Davis*, 122 Ala. 555, 25 So. 42; *Hunt v. Ellison*, 32 Ala. 173. **Fla.**—*Pearson v. Helvenston*, 50 Fla. 590, 39 So. 695. **Ill.** *Horn v. Horn*, 234 Ill. 268, 84 N. E. 904; *Day v. Davis*, 213 Ill. 53, 72 N. E. 682; *Dalton v. Roach*, 89 Ill. 85; *Murphy v. Orr*, 32 Ill. 489; *Grubb v. Crane*, 5 Ill. 153; *Carter v. Lewis*, 29 Ill. 500; *Johnson v. Miller*, 55 Ill. App. 168; *Drennan v. Huskey*, 31 Ill. App. 208. **Ia.**—*Citizens' Sav. Bank v. Stewart*, 90 Iowa 467, 57 N. W. 957; *Harrison v. Kramer*, 3 Iowa 543; *Humphreys v. Darlington*, 3 G. Gr. 588. **N. M.**—*Bent*

v. Miranda, 8 N. M. 78, 42 Pac. 91. **N. Y.**—*Chemung Canal Bank v. Judson*, 8 N. Y. 254. **Tenn.**—*Hopper v. Fisher*, 2 Head. 253. **Vt.**—*Sparhawk v. Buell*, 9 Vt. 41. **Va.**—*Day v. Hale*, 22 Gratt. 146. **W. Va.**—*Riggs v. Lockwood*, 12 W. Va. 133.

In *Blythe v. Hinckley*, 84 Fed. 228, it was held that the rule that all presumptions are in favor of the decree is only applicable as to collateral attack and not to an attack in the same suit.

A decree is not void for uncertainty but amendable by other parts of the record, where the name omitted is stated; and it will be considered amended accordingly. *Thomas v. Sterns*, 33 Ala. 137.

79. **U. S.**—*St. Louis, K. C. & C. R. Co. v. Wabash R. Co.*, 152 Fed. 349, 81 C. C. A. 643. **N. J.**—*Weehawken Ferry Co. v. Sisson*, 17 N. J. Eq. 475. **S. C.**—*Barrett v. James*, 30 S. C. 329, 9 S. E. 263. *Contra*, as to stipulations between the parties filed with the papers in the cause. *Thayer v. McGee*, 20 Mich. 195.

Opinion of Court.—In *New Orleans, M. & C. R. Co. v. City of New Orleans*, 14 Fed. 373, it is decided that if the decree speaks for itself, it cannot be qualified by the opinion by which it may be preceded. But it is declared in *Third Reformed Dutch Church v. Fox*, 12 Phila. 296, 35 Phila. (Pa.) 23, that in equity, the opinion of the court may explain the extent and operation of the decree.

80. **Fla.**—*State v. White*, 40 Fla. 297, 24 So. 160. **Ia.**—*Redhead v. Baker*, 86 Iowa 251, 53 N. W. 114. **Va.** *Walker v. Page*, 21 Gratt. 636.

of the proceedings.⁸¹ Moreover, it has been held, frequently, that recitals in the record, inconsistent with the decree, will control the latter.⁸²

VIII. OPERATION AND EFFECT.—A. RES ADJUDICATA.—A final decree of a court of competent jurisdiction is *res adjudicata* and binding upon all parties to the litigation and parties in privity with them⁸³ as to all matters litigated,⁸⁴ and as to all matters which might have been litigated therein.⁸⁵ Except as to cross-suits which need not be instituted in connection with the principal case,⁸⁶ and excepting cases wherein the dismissal is on the ground that the party has an adequate remedy at law,⁸⁷ the decree is conclusive proof of questions of fact therein decided, even as to proceedings essential to the validity of the same.⁸⁸

After the going into effect of a final decree, the court has no further jurisdiction either of the subject-matter or of the parties and all subsequent orders and decrees attempted to be entered in the case, are erroneous and void.⁸⁹ Moreover, a decree may be used as evi-

81. *Robinson v. Robinson*, 50 Ill. App. 414; *Morrison v. Laughter*, 47 N. C. 354.

82. Ill.—*Mantemach v. Studt*, 230 Ill. 356, 82 N. E. 829; *Davis Paint Mfg. Co. v. Metzger Linseed Oil Co.*, 90 Ill. App. 117 (judgment reversed, 188 Ill. 295, 58 N. E. 940). Tenn. *Davis v. Reaves*, 7 Lea 585. W. Va. *Alderson's Heirs v. Henderson*, 15 W. Va. 182.

Where a default has been taken and a decree entered, *pro confesso*, which recites that the defendants have been regularly notified of the pendency of the suit, by summons or advertisement, a *bona fide* purchaser under the decree will be protected, although the record may not furnish any evidence of a summons or advertisement. *Reddick v. State Bank*, 27 Ill. 145.

83. *Davenport v. Bartlett*, 9 Ala. 179. See the title "Former Adjudication."

84. *Cochran v. Miller*, 74 Ala. 50; *Barbour, Stedman & Herod v. Tompkins*, 58 W. Va. 572, 52 S. E. 707.

85. U. S.—*St. Louis, K. C. & C. R. Co. v. Wabash R. Co.*, 152 Fed. 849, 81 C. C. A. 643. Ia.—*Campbell v. Ayres*, 6 Iowa 339. Ky.—*Talbott v. Todd*, 5 Dana 190. W. Va.—*Ohio River R. Co. v. Johnson*, 50 W. Va. 499, 40 S. E. 407; *Bodkin v. Rollyson*, 48 W. Va. 453, 37 S. E. 617.

86. *Vandyke v. Walters*, 38 Ill. 444, is to this effect.

87. *Swift v. Allen*, 55 Ill. 303.

Decrees As Liens.—Decrees rendered in the courts of the United States are liens upon the defendant's real estate in all cases where similar decrees of the state courts are made liens by the law of the state. *Ward v. Chamberlain*, 2 Black (U. S.) 430, 17 L. ed. 319.

88. So held in *Smith v. Valentine*, 19 Minn. 452, wherein the decree confirmed a sale and recited that proper notice of the sale had been given.

Findings in a decree as to service are conclusive evidence against collateral attack. *Teel v. Dunnihoo*, 221 Ill. 471, 77 N. E. 906, 112 Am. St. Rep. 192.

A decree *pro confesso* reciting that defendants have been served is conclusive in the absence of anything in the record to the contrary. *Moore v. Green*, 90 Va. 181, 17 S. E. 872.

Where a decree is entitled as of a certain term of court, and is so certified in the record, this will be conclusive evidence that the decree was made in term time and not in vacation, and the record cannot be impeached. *Mason v. Patterson*, 74 Ill. 191.

89.—U. S.—*Greenleaf v. Queen*, 1 Pet. 138, 7 L. ed. 85. Ga.—*Clements v. Empire Lumb Co.*, 96 Ga. 319, 22 S. E. 987; *Whately v. Slaton*, 36 Ga. 653. Ky.—*Bobb v. Bobb*, 2 A. K. Marsh. 240. Md.—*Meluy v. Cooper*, 2 Bland 199, note. Va.—*Johnson v.*

dence,⁹⁰ although not recorded,⁹¹ nor formally enrolled.⁹² Moreover, a decree, although erroneous,⁹³ cannot be collaterally attacked,⁹⁴ except for want of jurisdiction,⁹⁵ or for fraud.⁹⁶

B. TIME OF TAKING EFFECT.—The time when a decree takes effect is a matter controlled by local statutes and rules. The old English rule regarded a term of court as a single day and all judgments rendered during the term as rendered on the first day.⁹⁷

C. EFFECT OF UNCERTAINTY.—It has been held that uncertainty of itself may make a decree void.⁹⁸

Anderson, 76 Va. 766; Battaile v. Maryland Hospital for Insane, 76 Va. 63; Nelson v. Jennings, 2 Pat. & H. 369. **W. Va.**—Waldron v. Harvey, 54 W. Va. 608, 46 S. E. 603, 102 Am. St. Rep. 959.

This rule does not apply if the decree be interlocutory. Summers v. Darne, 31 Gratt. (Va.) 791.

90. Hale v. Warner, 36 Ark. 217.

91. Lunn v. Scarborough (Tex. Civ. App.), 35 S. W. 508.

92. Bates v. Delavan, 5 Paige (N. Y.) 299.

By statute, it is made effective as evidence as soon as signed. Smith v. Valentine, 19 Minn. 452. It is also held, therein, that the decree itself and not a copy thereof entered by the clerk is the highest evidence.

A decree against the executor is not conclusive, but *prima facie* evidence only, against the heir or devisee. Garnett v. Macon, 2 Brock 185, 10 Fed. Cas. No. 5,245.

93. **Colo.**—Monti v. Bishop, 3 Colo. 605. **Ia.**—Traer v. Waitman, 56 Iowa 443, 9 N. W. 339. **Mich.**—Dunlap v. Byers, 110 Mich. 109, 67 N. W. 1067. **N. Y.**—Hunt v. Wallis, 6 Paige 371.

94. Burbridge v. Higgins, 6 Gratt. (Va.) 119.

95. See Torrains v. Hicks, 32 Mich. 307.

96. Jones v. Brittan, 1 Woods 667, 13 Fed. Cas. No. 7,455; Rollins v. Henry, 78 N. C. 342. See *supra* II, C.

97. The rule of the English courts, which regards a term of court as a single day, and all judgments rendered during the term as rendered on the first day, is never allowed to prevail over the substantial equities of third persons; and it has never been adopted in our practice, which assigns to judgments and decrees the exact date on

which they are rendered. Powe v. McLeod, 76 Ala. 418.

A decree *nisi*, upon default of appearance and answer to a bill in chancery, does not become absolute until the end of "the term next succeeding that to which the decree shall be returned 'executed'". Stewart v. Smith, 2 Cranch C. C. 615, 23 Fed. Cas. No. 13,436.

Under a territorial statute in Arkansas, a decree in chancery related to the first day of the term, and was a lien upon the lands of the defendant on that day; and a regular sale under a decree conveyed a title superior to that of a purchaser after the first day of the term, but prior to the day the decree was actually made. Keatts v. Fowler's Devises, 22 Ark. 483.

A final decree takes effect from the time it is made and declared. Butler v. Lee, 33 How. Pr. (N. Y.) 251.

A decree becomes final and conclusive at the adjournment of court, even if it did not become so by enrolment. Sagory v. Bayless, 13 Smed. & M. (Miss.) 153.

Decrees rendered during vacation take effect from the time they are entered of record. Pace v. Ficklin, 76 Va. 292.

"Where a cause in chancery is taken under advisement, and decided in vacation, and the decree then entered, the decree is not such a final decree as to authorize the complainant to proceed under it until after an intervening term of court, so as to afford any one affected by it an opportunity to question its correctness; so that an appeal taken then is premature." Hook v. Richeson, 106 Ill. 392.

98. **Ala.**—Turner v. Dupree, 19 Ala. 198. **Ill.**—Welch v. Louis, 31 Ill. 446. **Va.**—In Birchett v. Bolling, 5 Mumf. 442, an attachment was refused on a decree which was uncertain.

D. DECREES RELATING TO TITLE.—It is frequently provided by statute that a decree for the conveyance of real⁹⁹ estate shall have the same operation and effect as if the conveyance had been made, if the party against whom it is rendered does not comply therewith.¹ The constitutionality of such statutes has been sustained by the supreme court of the United States.² However, in the absence of such statutes, a court of equity does not possess the authority to divest a title of one party, by mere decree and vest it in another.³

IX. ENFORCEMENT.—**A. IN GENERAL.**—Formerly, a decree in equity, unless it was for land, operated only *in personam*. The only method of enforcement was by process of contempt under which the disobedient party might be imprisoned and kept in prison until he obeyed. If the party in question had been imprisoned, or if he could not be arrested, the court might also resort to a writ of sequestration.⁴ It is generally held that if the court has power to render the decree, it has power to carry the same into execution.⁵ The jurisdiction of the court continues after the final decree, for the purpose of the enforcement thereof.⁶

B. BILL TO ENFORCE DECREE.⁷—A bill in equity to carry a former and final⁸ decree into effect is proper, in many cases, where the subsequent course of events necessitates the filing of the same.⁹

99. These statutes are generally applicable to real estate only and not to personality. See *Jelke v. Goldsmith*, 52 Ohio St. 499, 40 N. E. 167.

1. **Cal.**—*Hager v. Shindler*, 99 Cal. 47. **Conn.**—*King v. Bill*, 28 Conn. 593. **Ga.**—*Epping v. Tunstall*, 57 Ga. 267. **Mo.**—*Macklin v. Schmidt*, 104 Mo. 361, 16 S. W. 241; *Macklin v. Allenberg*, 100 Mo. 337, 13 S. W. 350. **Ohio.** *Taylor v. Boyd*, 3 Ohio 337, 17 Am. Dec. 603.

2. *Langdon v. Sherwood*, 124 U. S. 74, 8 Sup. Ct. 429, 31 L. ed. 344.

3. **Ala.**—*Prewitt v. Ashford*, 90 Ala. 294, 7 So. 831. **Ky.**—*Mummy v. Johnston*, 3 A. K. Marsh. 220. **Miss.**—*Wallis's Heirs v. Wilson's Heirs*, 34 Miss. 357. **Ohio.**—*Shepherd's Lessee v. Ross County Comrs.*, 7 Ohio 271, pt. 1. **Va.** *Aldridge v. Giles*, 3 Hen. & M. 136.

A conveyance executed under a decree operates by virtue of the conveyance, and not by virtue of the decree. *Tardy v. Morgan*, 3 McLean 358, 23 Fed. Cas. No. 13,752.

4. *Daniell Ch. Pl. & Pr.*, 1031 *et seq.*

5. **Ark.**—*McGaughy v. Brown*, 46 Ark. 25. **Ky.**—*Wickliffe v. Lee*, 6 B. Mon. 543; *Waller v. Logan*, 5 B. Mon. 515. **Md.**—*Oliver v. Caton*, 2 Md. Ch. 297. **N. J.**—*South Jersey Realty Co. v. Staley*, 75 Atl. 934. **N. Y.**—*Ludlow*

v. Lansing, Hopk. Ch. 231. **Va.**—*Newman v. Chapman*, 2 Rand. 93, 14 Am. Dec. 766.

Debt lies on the decree of a surrogate for the payment of money. *Dubois v. Dubois*, 6 Cow. (N. Y.) 494.

Supplemental Proceedings can be resorted to in the federal court to enforce a money decree in an equity case, when the state courts of the same district allow it. *Sage v. St. Paul, S. & T. F. Ry. Co.*, 47 Fed. 3.

Ancillary proceedings against any party who interferes with the enforcement of the decree and who is a party to the litigation may be resorted to. *Alton Water Co. v. Brown*, 166 Fed. 840, 92 C. C. A. 598.

6. *Goff v. Robins*, 33 Miss. 153; *Trimble v. Patton*, 5 W. Va. 432.

7. See the title "**Bills To Enforce Decrees.**"

8. *McFadden v. McFadden*, 44 Cal. 306.

9. **Ala.**—*Griffin v. Spence*, 69 Ala. 393; *Hogan v. Davis*, 3 Ala. 70. **Idaho.** *Ray v. Ray*, 1 Idaho 566. **Ky.**—*Mummy v. Johnston*, 3 A. K. Marsh. 220. **N. Y.**—*White v. Geraerd*, 1 Edw. Ch. 336. **N. C.**—*Wright v. Bowden*, 54 N. C. 15, 59 Am. Dec. 600.

Such a bill must be filed as an

Moreover, a supplemental bill in aid of a final decree, to compel the carrying out of the latter, is maintainable.¹⁰ If such a bill be filed, it is generally held that the defendant cannot procure a re-examination of the merits of the original decree.¹¹

C. BY ATTACHMENT. — In many cases, attachment against the person of the defendant is resorted to in the enforcement of decrees.¹²

D. BY EXECUTION. — The practice of enforcing decrees by a levy of execution is now generally provided for by statute,¹³ particularly, in the case of decrees for the payment of money.¹⁴ In fact, this may be the only method of enforcement in some cases, and the old method of enforcement by contempt is unavailable.¹⁵

amended and supplemental bill. *Herd v. Bewley*, 1 Heisk. (Tenn.) 524.

10. Appeal of Winton, 97 Pa. 385.

11. **Ky.**—*Dunlap v. Melloy*, 3 Litt. 269. **Md.**—*Tomlinson v. McKaig*, 3 Gill 356. **Ohio.**—*Hampson v. Sumner*, 18 Ohio 444. **S. C.**—*Carr v. Green*, 1 Rich. Eq. Cas. 405.

In *Carneal v. Wilson*, 3 Litt. (Ky.) 80, it was held that defendant may avail himself of fraud in obtaining the original decree. *Contra*, *Caldwell v. Giles*, 2 Hill Eq. (S. C.) 548.

The impeachment of the original decree must be made by the exhibits and evidence in the cause wherein the decree was pronounced, not by matter extrinsic. *Greenup v. Rennix*, 3 Hard. (Ky.) 594. See the title "**Bills To Impeach Judgments and Decrees.**"

12. **Ga.**—*Saunders v. Smith*, 3 Ga. 121. **Ill.**—*Warfield-Pratt-Howell Co. v. Williamson*, 233 Ill. 487, 84 N. E. 706; *Whalen v. Billings*, 104 Ill. App. 281. **N. J.**—*Haggerty v. Badkin*, 72 N. J. Eq. 473, 66 Atl. 420; *Aspinwall v. Aspinwall*, 53 N. J. Eq. 684, 33 Atl. 470. **N. Y.**—*White v. Geraerd*, 1 Edw. Ch. 336. **Pa.**—*Scholl v. Schoener*, 1 Woodw. Dec. 134. **W. Va.**—*Trimble v. Patton*, 5 W. Va. 432.

The object of such attachment is not to inflict punishment, but to compel performance of the decree. *Scott v. Jailer*, 1 Grant's Cas. (Pa.) 237.

Effect of Statute.—*Semble*, according to *Scott v. Jailer*, 1 Grant's Cas. (Pa.) 237, attachment may be used to enforce decrees, unless the right is denied by statute. Owing to statute, the right was denied in *Watkins v. Dorsett*, 1 Bland (Md.) 530.

13. **Ala.**—*Stapler v. Hurt*, 16 Ala. 799. **Ill.**—*Warfield-Pratt-Howell Co. v. Williamson*, 233 Ill. 487, 84 N. E.

706; *Durham v. Mulkey*, 59 Ill. 91. **Ky.**—*Duff v. Combs*, 8 B. Mon. 386. **Mich.**—*Taylor v. Gladwin*, 40 Mich. 232. **N. J.**—*Aspinwall v. Aspinwall*, 53 N. J. Eq. 684, 33 Atl. 470. **Pa.**—*Scholl v. Schoener*, 1 Woodw. Dec. 134. **Vt.**—*Hall v. Dana*, 2 Aikens 381. **Va.**—*Windrum v. Parker*, 2 Leigh 361. **W. Va.**—*Hall v. McGregor*, 65 W. Va. 74, 64 S. E. 736. See the title "**Execution.**"

14. **Ga.**—*Coulter v. Sumpkin*, 94 Ga. 225, 21 S. E. 461. **Ill.**—*Whalen v. Billings*, 104 Ill. App. 281; *Durbin v. Durbin*, 71 Ill. App. 51. **Mont.**—*Raymond v. Blancgrass*, 36 Mont. 449, 93 Pac. 648. **Ore.**—*DeVall v. DeVall*, 57 Ore. 128, 109 Pac. 755, 110 Pac. 705. **Eng.**—*Taylor v. Jardine*, 1 Hare 316, 66 Eng. Reprint 1053; *Streeten v. Whitmore*, 5 Beav. 228, 49 Eng. Reprint 564, 6 Jur. 92.

15. *Clements v. Tillman*, 79 Ga. 451, 5 S. E. 194, 11 Am. St. Rep. 441. See the title "**Contempt.**"

Execution on Interlocutory Decrees. Though circumstances may exist which will warrant the court, or a judge in vacation, to allow process of execution on certain interlocutory decrees, these circumstances must be shown. *Shackelford v. Apperson*, 6 Gratt. (Va.) 451.

Decree Need Not Contain Award of Execution.—The successful party is entitled to an execution as a matter of right, unless the decree itself prohibits the issuing of an execution thereon. *Otis v. Forman*, 1 Barb. Ch. (N. Y.) 30.

Fi. Fa.—A court of equity does not usually proceed by *fi. fa.* to execute its decrees. *Karnes v. Harper*, 48 Ill. 527.

A *fi. fa.* cannot be issued on an order

E. BY WRIT OF ASSISTANCE. — A writ of assistance may be used to enforce a decree,¹⁶ particularly for the purpose of giving possession of land.¹⁷

F. BY WRIT OF POSSESSION. — In certain suits involving title to land, the court of equity will enforce its decree by a writ of possession.¹⁸

G. BY SEQUESTRATION. — Sequestration is a recognized method of enforcing decrees in equity.¹⁹ Originally, this process was used merely as a means of keeping the defendant out of possession of his property; in later times the practice of applying the money received by sequestration for the fulfillment of the decree became established.²⁰

H. ABATEMENT AND REVIVAL. — A decree rendered against a dead person is erroneous.²¹ A conflict of authority exists as to whether or not a revival of the suit is necessary, if after the decree is rendered, the party defendant dies.²²

If a revival of a decree is necessary, two methods of revival are recognized, to-wit: by bill of revivor,²³ and by a subpoena *scire facias*

in equity directing the defendant to pay money into court to be paid to the plaintiff, but if the order directs that the money be paid directly to complainant, a *fi. fa.* may be issued. The court declares this distinction to be derived from the English practice as shown in United Lines Tel. Co. v. Stevens, 67 Md. 156, 8 Atl. 908; *In re Leeds Banking Co.*, L. R. 1 Ch. 150.

16. Devaucene v. Devaucene, 1 Edw. Ch. (N. Y.) 272.

17. Keil v. West, 21 Fla. 508; Valentine v. Teller, Hopk. Ch. (N. Y.) 422. See the title "Assistance, Writ Of."

18. U. S.—O'Neale v. Caldwell, 3 Cranch C. C. 312, 18 Fed. Cas. No. 10,515. Ill.—Oberein v. Wells, 163 Ill. 101, 45 N. E. 294. Tenn.—Stark v. Murphy (Tenn. Ch. App.), 52 S. W. 736.

A court of chancery will not ordinarily issue a writ of possession in order to enforce its decrees; and never where a party in possession may make a successful defense of his possession, either at law or in equity. Flowers v. Brown, 21 Ill. 270.

19. Del.—Hayes v. Hayes, 4 Del. Ch. 20. Ill.—Warfield-Pratt-Howell Co. v. Williamson, 233 Ill. 487, 84 N. E. 706. Mass.—Grew v. Breed, 12 Mete. 363, 46 Am. Dec. 687. N. J.—National Docks & N. J. J. C. Ry. Co. v. Pennsylvania R. Co., 54 N. J. Eq. 167, 33 Atl. 936; Aspinwall v. Aspinwall, 53 N. J. Eq. 684, 33 Atl. 470. N. Y.

White v. Geraerdt, 1 Edw. Ch. 336; Hosack v. Rogers, 11 Paige 603.

See the title "Sequestration."

The writ of sequestration to enforce the performance of a decree is analogous to execution at law. Keighler v. Ward, 8 Md. 254.

20. Daniell, Ch. Pl. & Pr., p. 1031 *et seq.*

21. Hooe v. Barber, 4 Hen. & M. (Va.) 439.

If the death of the party "must be shown *aliunde*" the judgment "is voidable and not void and cannot be impeached collaterally." Jennings v. Simpson, 12 Neb. 558, 11 N. W. 880.

Marking a case "Ended" on the docket does not prevent a revival of the decree pronounced therein. Morgan v. Morgan, 45 S. C. 323, 23 S. E. 64.

22. That revival is necessary, see: Md.—*In re Owings*, 1 Bland. 370, 17 Am. Dec. 311. N. Y.—*Livingston v. Woolsey*, 4 Johns. Ch. 365; *Washington Ins. Co. v. Slee*, 2 Paige 365. Ohio. *Cist v. Beresford*, 1 Ohio C. C. 32.

That revival is unnecessary, see: N. Y.—*Wing v. De La Roinda*, 125 N. Y. 678, 25 N. E. 1064, *affirming* (City Ct. Brook., 1889), 5 N. Y. Supp. 550; *Harrison v. Simons*, 3 Edw. Ch. 394. S. C.—*Trenholm v. Wilson*, 13 S. C. 174. W. Va.—*Trimble v. Patton*, 5 W. Va. 432. See the title "Revival of Judgments and Decrees."

23. Ala.—*Deer v. State*, 155 Ala. 521, 46 So. 848; *State v. City of Mo-*

against the heirs or personal representatives of the deceased.²⁴

X. AMENDING, VACATING AND SETTING ASIDE DECREES.

A. IN GENERAL.—A court having power to render a decree has power to amend, vacate or set aside the decree,²⁵ subject to the limitations hereafter noted. The setting aside of decrees is a matter involving the discretion of the court.²⁶ However, in many cases it becomes the duty of the court to set aside the decree.²⁷ But a decree of court should not be set aside except for good cause shown,²⁸ nor even then, if the party aggrieved has been guilty of lack of diligence,²⁹ or is

bile, 24 Ala. 701. **Md.**—Gleen *v.* Clapp, 11 Gill & J. 1; Franklin *v.* Franklin, 1 Md. Ch. 342. **N. J.**—Peer *v.* Cookerow, 13 N. J. Eq. 136. **Ohio.**—Curtis *v.* Hawn, 14 Ohio 185. See the title “Reviver, Bill Of.”

24. **Ky.**—Duff *v.* Combs, 8 B. Mon. 386. **Md.**—Allen *v.* Burke, 1 Bland. 544, which contains an extended discussion of the question. **N. Y.**—Tallman *v.* Varick, 5 Barb. 277. **Tenn.**—Tipton *v.* Tipton, 118 Tenn. 691, 104 S. W. 237. See the title “Scire Facias.”

25. Howard *v.* Palmer, Walk. Ch. (Mich.) 391; Woodruff *v.* Cook, 2 Edw. Ch. (N. Y.) 259; Dinsmore *v.* Adams, 48 How. Pr. (N. Y.) 274; Osgood *v.* Joslin, 3 Paige (N. Y.) 195. See 4 STANDARD PROC. 478, and the title “Courts.”

A decree of court transferring the control of a railroad to a receiver and board was held to be an administration and not a judicial order and subject to change without the consent of the parties. Dunn *v.* Savannah & C. R. Co., 8 Rich. (S. C.) 207.

26. Terry *v.* Commercial Bank, 92 U. S. 454, 23 L. ed. 620; Robertson *v.* Miller, 3 N. J. Eq. 451.

27. Rust *v.* Lynch, 54 Md. 636; Postell *v.* Postell, 1 Desaus. (S. C.) 173.

28. **U. S.**—A. B. Dick Co. *v.* Wickelman, 77 Fed. 853; Ozark Land Co. *v.* Leonard, 24 Fed. 660; Lockwood *v.* Cleveland, 20 Fed. 164. **Fla.**—Macfarlane *v.* Dorsey, 49 Fla. 341, 38 So. 512; Friedman *v.* Rehm, 43 Fla. 330, 31 So. 234. **Ky.**—McLean *v.* Nixon, 18 B. Mon. 768. **Md.**—Ware *v.* Richardson, 3 Md. 505, 56 Am. Dec. 762. **Mich.**—Michigan Ins. Co. *v.* Whittemore, 12 Mich. 427; Russell *v.* Waite, Walk. Ch. 31. **N. J.**—Terhune *v.* Colton, 12 N. J. Eq. 312. **N. Y.**—Parker

v. Grant, 1 Johns. Ch. 630; DePeyster *v.* Hildreth, 2 Barb. Ch. 109; Ferussac *v.* Thorn, 1 Barb. 42. **Wis.**—Aetna Life Ins. Co. *v.* McCormick, 20 Wis. 265.

29. **U. S.**—Root *v.* Woolworth, 150 U. S. 401, 14 Sup. Ct. 136, 37 L. ed. 1123; Home St. R. Co. *v.* City of Lincoln, 162 Fed. 133, 89 C. C. A. 133; Hendryx *v.* Perkins, 114 Fed. 801, 52 C. C. A. 435; Dewey *v.* Stratton, 114 Fed. 179, 52 C. C. A. 135; Comly *v.* Buchanan, 81 Fed. 58; Ring Refrig. & Ice-Mach. Co. *v.* St. Louis Ice Mfg. & Cold Stor. Co., 67 Fed. 535; City of Omaha *v.* Redick, 63 Fed. 1, 11 C. C. 1, 27 U. S. App. 204; Black’s Admx. *v.* Gunn, 60 Fed. 151, 8 C. C. A. 534, 19 U. S. App. 477; Willimantic Linen Co. *v.* Clark Thread Co., 24 Fed. 799; Doubleday *v.* Sherman, 6 Blatchf. 513, 7 Fed. Cas. No. 4,019. **Conn.**—Gould *v.* Stanton, 17 Conn. 377. **Fla.**—Frisbee *v.* Timanus, 12 Fla. 300. **Ky.**—Harrison *v.* Meredith, 3 J. J. Marsh. 219. **Md.**—Maryland Home Fire Ins. Co. *v.* Kimmell, 89 Md. 437, 43 Atl. 764; Hitch *v.* Fenby, 4 Md. Ch. 190. **Mich.**—Lyon *v.* Brunson, 48 Mich. 194, 12 N. W. 32; Hart *v.* Lindsay, Walk. Ch. 72. **Miss.**—Woods *v.* Cheesborough, 95 Miss. 63, 48 So. 613. **N. H.**—Cummings *v.* Parker, 63 N. H. 198; George *v.* Johnson, 45 N. H. 456. **N. J.**—Embury *v.* Klemm, 30 N. J. Eq. 517; Miller *v.* Hild, 11 N. J. Eq. 25. **N. Y.**—Munn *v.* Worrall, 16 Barb. 221; Freeman *v.* Warren, 3 Barb. Ch. 635; Rogers *v.* Rogers, 1 Paige 188. **Ore.**—Chapman *v.* Wilbur, 5 Ore. 299. **Tenn.**—Myers *v.* James, 4 Lea 370. **Va.**—Smith’s Exr. *v.* Powell, 98 Va. 431, 36 S. E. 522. **W. Va.**—Wilson *v.* Kennedy, 63 W. Va. 1, 59 S. E. 736; Seymour *v.* Alkire, 47 W. Va. 302, 34 S. E. 953. **Wis.**—Rogan *v.* Walker, 1 Wis. 631.

estopped to assert his rights,³⁰ or has waived his right to object to the decree.³¹ In the foot-note below the authorities on the question as to what is sufficient cause are collected.³²

In many states, the time within which a decree may be set aside and the incidents connected therewith are controlled by statute.³³

B. INTERVENING RIGHTS OF THIRD PARTIES.—In many cases, wherein the rights of innocent third parties have intervened, the court will refuse to alter the decree.³⁴

30. U. S.—*Hill v. Phelps*, 101 Fed. 650, 41 C. C. A. 569; *In re Morris*, Crabbe 70, 17 Fed. Cas. No. 9,825. Ill. *Grosvenor v. Doyle*, 50 Ill. App. 47. N. J.—*Boynton v. Sandford*, 28 N. J. Eq. 184, and at 592 *sub nom* Sandford v. Boynton.

31. Md.—*Owens v. Barroll*, 88 Md. 204, 40 Atl. 880. Miss.—*Pipkin v. Haun*, Freem. Ch. 254. N. J.—*Hall v. Urquhart*, 11 N. J. Eq. 318; *Ruckman v. Decker*, 28 N. J. Eq. 5.

32. The following were held sufficient causes for setting aside the decree: Collusion between plaintiff and defendant (*Barker v. Todd*, 15 Fed. 265); accident (*Boyer v. Boyer*, 77 N. J. Eq. 144, 76 Atl. 309); error in original decree (*Edwards v. Thom*, 25 Fla. 222, 5 So. 707); fraud (*Mitchell v. Rice*, 132 Ala. 120, 31 So. 498; *Matthews v. Joyce*, 85 N. C. 258), which must be in the procurement of the decree and not, for example, in procuring the note on which the suit is founded; (*Adamski v. Wiczorek*, 93 Ill. App. 357; *Bodkin v. Rollyson*, 48 W. Va. 453, 37 S. E. 617); introduction of false testimony (*McMurray v. McMurray*, 67 Tex. 665, 4 S. W. 357); misapprehension due to old age (*Watson v. Smith*, 7 Ore. 448); mistake (*Boyer v. Boyer*, 77 N. J. Eq. 144, 76 Atl. 309; *Beaver v. Slanker*, 94 Ill. 175; *Miller v. Rushforth*, 4 N. J. Eq. 174; *Barclay v. Brown*, 7 Paige [N. Y.] 245); neglect of counsel (*Boyer v. Boyer*, 77 N. J. Eq. 144, 76 Atl. 309); newly discovered evidence (*Talbott v. Todd*, 5 Dana 190; *Nash v. Wetmore*, 33 Barb. [N. Y.] 155; *Tomlinson v. Tomlinson*, 11 Rich. Eq. [S. C.] 52); subsequent change of events (*Allen v. Allen*, 48 S. C. 566, 26 S. E. 786); surprise (*Van Deventer v. Stiger*, 25 N. J. Eq. 224); want of notice (*Kizer Lumb. Co. v. Moseley*, 56 Ark. 544, 20 S. W. 409).

A court of chancery will not hesi-

tate to set aside a decree improperly obtained, and to which a party has no right, merely because the party against whose property such decree runs is indebted to the person in whose favor the decree is rendered. *Vanderpool v. Knight*, 102 Ill. App. 596.

The following were held insufficient causes: Agreement not to prosecute, not properly shown (*Marsh v. Lasher*, 13 N. J. Eq. 253); agreement not properly executed (*Wager v. Stickle*, 3 Paige [N. Y.] 407); defense already adjudicated (*Evans v. International Trust Co.* [Tenn. Ch. App.], 59 S. W. 373); defense probably of no avail (*Hoffmire v. Hoffmire*, 7 Paige [N. Y.] 60); erroneous supposition (*Read v. Walker*, 18 Ala. 323); evidence merely cumulative (*Moody v. Farr*, 27 Miss. 788); finding of lost mortgage (*Lilly v. Quick*, 2 N. J. Eq. 97); ignorance of English and service only on counsel (*Appeal of Ulshafer*, 1 Walk. [Pa.] 457); mistake of law (*In re Ermand*, 24 Hun [N. Y.] 1); to enable party to enforce a forfeiture at law (*Baxter v. Lansing*, 7 Paige [N. Y.] 350); to enable party to raise technical objections (*Gay v. Gay*, 10 Paige [N. Y.] 369); to let in cross-bill (*Edrington v. Harper*, 5 J. J. Marsh. [Ky.] 293).

33. See the following authorities discussing such statutory provisions: Cal.—*In re Pedronera*, 80 Cal. 144, 22 Pac. 71. Fla.—*Macfarlane v. Dorsey*, 49 Fla. 341, 38 So. 512; *Friedman v. Rehm*, 43 Fla. 330, 31 So. 234. Md.—*Hitch v. Fenby*, 6 Md. 218.

34. *Teel v. Dunnihoo*, 230 Ill. 476, 82 N. E. 844; *Curtiss v. Brown*, 29 Ill. 201; *Kereheval v. Berry*, 6 J. J. Marsh. (Ky.) 508.

A deed made by the master in chancery which recites a decree rendered against a party not personally served, is notice to all persons claiming under it that such decree is not final, but is liable to be vacated and set aside

C. PARTIES WHO MAY PROCURE SUCH RELIEF. — 1. **A Party.** — As a rule, in order to entitle a party to the right to procure the alteration or setting aside of a decree, he must have been a party to the suit,³⁵ or in privity with a party to the suit,³⁶ and he must have been affected in some manner by the decree.³⁷

2. **Parties Under Disability.** — In certain states, provision is made by statute in reference to the setting aside of decrees upon the application of parties under disability.³⁸

D. **CLERICAL ERRORS.** — For good reason, the courts show great liberality in the correction of merely clerical errors,³⁹ or mere matters of form.⁴⁰ Several authorities are inclined to ignore such errors and deem an alteration unnecessary.⁴¹ It is well settled that, although,

within three years from the time it was rendered, and if such decree is so vacated and set aside within the time limited, all rights under it and all acts performed in executing it, are also annulled. *Martin v. Gilmore*, 72 Ill. 193.

A party is not deprived of his right to have a decree by default set aside within a reasonable time by the fact that third parties have purchased in reliance upon the decree. Such persons purchase at the risk that the decree may be set aside. *Benedict v. Auditor General*, 104 Mich. 269, 62 N. W. 364.

35. **U. S.**—*Sage v. Central R. Co. of Iowa*, 93 U. S. 412, 23 L. ed. 933. **N. C.** *Hinton v. Hinton*, 70 N. C. 730. **Tenn.** *Pettit v. Cooper*, 9 Lea 21.

36. *Gilliland v. Cullum*, 6 Lea (Tenn.) 521.

37. **Kan.**—*Schermerhorn v. Mahaffie*, 34 Kan. 108, 8 Pac. 199. **Tenn.**—*Wilson v. Schaefer*, 107 Tenn. 300, 64 S. W. 208; *Schoenpflug v. Ketcham* (Tenn. Ch. App.), 52 S. W. 666. **Va.**—*Handly v. Snodgrass*, 9 Leigh 484.

A final decree of the chancery court, which has been fully executed, cannot be opened on the petition of one who, by his own showing, had no interest whatever in the subject-matter of the controversy until long after it was terminated. *Boykin v. Kernochan*, 24 Ala. 697.

A decree rendered in a suit will not be set aside on the motion of a person who was not made a party to the proceeding. But, when the decree has been set aside on motion of a party entitled to it, such person may then file his cross-bill and have his rights

in the case determined. *Hall v. Davis*, 44 Ill. 494.

Where a decree is rendered affecting the interest of one not made a party, and he files a bill, whether of review on account of want of necessary parties, or as a bill for general relief, the original decree may be opened, and such party let in to defend as though he had been made a party defendant, but this is all the relief he is entitled to. *Gaytes v. Franklin Sav. Bank*, 85 Ill. 256.

38. See the following cases: *Crane v. Safford*, 217 Ill. 21, 75 N. E. 424; *Seymour v. Alkire*, 47 W. Va. 302, 34 S. E. 953.

Infants may and have a right to open a decree against them as infant defendants, after they attain full age, but have, in general, no right to open a decree in their favor, obtained upon their own prayer as infant complainants, nor to question it collaterally. *Hanna v. Spotts*, 5 B. Mon. (Ky.) 362, 43 Am. Dec. 132.

39. **U. S.**—*Witters v. Sowles*, 32 Fed. 130; *Robinson v. Rudkins*, 28 Fed. 8; *Massie v. Graham*, 3 McLean 41, 16 Fed. Cas. No. 9,263. **Mass.**—*Pingree v. Coffin*, 12 Gray 288. **Mich.** *Bates v. Garrison*, Harr. 221. **N. J.** *Day v. Argris Ptg. Co.*, 47 N. J. Eq. 594, 22 Atl. 1056. **S. C.**—*Knox v. Moore*, 41 S. C. 355, 19 S. E. 683. **Va.** *Dillard's Admr. v. Dillard*, 77 Va. 820.

40. *De Caters v. LeRay De Chaumont*, 3 Paige (N. Y.) 178; *Peaslee v. Barney*, 1 D. Chip. (Vt.) 331, 6 Am. Dec. 743.

41. *Worcester City Missionary Soc. v. Memorial Church*, 186 Mass. 531, 72 N. E. 71; *Laverty v. Moore*, 33 N. Y. 658.

generally speaking, final decrees cannot be amended after the term, even after the expiration of the term the court may alter the decree for the purpose of correcting merely clerical errors.⁴²

E. FINAL DECREES.—It is well settled that a final decree may be modified by the court rendering the same during the term at which the decree is entered.⁴³ This may be done on motion or at the suggestion of the court without motion.⁴⁴ It is also well settled that after the term at which the decree is entered,⁴⁵ the court has no power to alter the same or set it aside⁴⁶ in respect to judicial errors or errors

42. **Ala.**—*Ex parte* Robinson, 72 Ala. 389. **Ill.**—Davenport v. Kirkland, 156 Ill. 169, 40 N. E. 304; Hurd v. Goodrich, 59 Ill. 450; Lilly v. Shaw, 59 Ill. 72; Koehler v. Ernst Tosetti Brew. Co., 101 Ill. App. 339, *affirmed*, Ernst Tosetti Brew. Co. v. Koehler, 200 Ill. 369, 65 N. E. 636. **Ky.**—Hendrix v. Clay, 2 A. K. Marsh. 462. **N. J.**—Jones v. Davenport, 45 N. J. Eq. 77, 17 Atl. 570; Jarmon v. Wiswall, 24 N. J. Eq. 68; Dorsheimer v. Rorbaek, 24 N. J. Eq. 33. **N. M.**—United States v. Rio Grande Dam & Irrigation Co., 13 N. M. 386, 85 Pac. 393. **N. Y.**—Campbell v. Thatcher, 54 Barb. 382; Sprague v. Jones, 9 Paige 395. **S. C.**—Gowan v. Gentry, 32 S. C. 369, 11 S. E. 82. **Tenn.**—State v. Bank of Commerce, 96 Tenn. 591, 36 S. W. 719; Elliot v. Cochran, 1 Coldw. 389. **W. Va.**—Morris' Admr. v. Peyton's Admr., 29 W. Va. 201, 11 S. E. 954; Shipman v. Bailey, 20 W. Va. 140.

In making such correction, it is unnecessary to pass a new order or decree, but the court will direct the clerk to bring before them the original decree and the enrolment thereof, and in their presence to correct the same. Lovejoy v. Nelan, 19 Md. 56.

"When the error complained of is the insertion of a particular amount in a consent-decree as the result of a calculation of one of the parties upon a basis which other parties regard as not in accord with the understanding of the parties, such error is not a clerical error, but a mistake of parties." Morris' Admr. v. Peyton's Admr., 29 W. Va. 201, 11 S. E. 954.

43. **U. S.**—Henderson v. Carbondale Coal & Coke Co., 140 U. S. 25, 11 Sup. Ct. 691, 35 L. ed. 332; Doos v. Tyack, 14 How. 297, 14 L. ed. 428; Tilton v. Barrell, 17 Fed. 59; Reeves v. Keystone Bridge Co., 2 Bann. & A. 256, 20 Fed. Cas. No. 11,661. **Ill.** Frink v. King, 4 Ill. 144. **Ky.**—Worth-

ington v. Campbell, 8 Ky. L. Rep., 416, 1 S. W. 714. **Md.**—Nowland v. Glenn, 2 Md. Ch. 368. **Mass.**—Park v. Johnson, 7 Allen 378. **Miss.**—Pattison v. Josselyn, 43 Miss. 373. **N. Y.**—Lawrence v. Cornell, 4 Johns. Ch. 545. **S. C.** Tindal v. Tindal, 1 Rich. 111. **Tenn.** Timmons v. Garrison, 4 Humph. 148; Smith v. Sneed, Cooke 190. **W. Va.** Matthews v. Tyree, 53 W. Va. 298, 44 S. E. 526.

44. *Kelty v. High*, 29 W. Va. 381, 1 S. E. 561.

45. A decree pronounced but not entered is within the control of the court. **Ill.**—Paltzer v. Johnston, 114 Ill. App. 493, judgment affirmed, 213 Ill. 338, 72 N. E. 702. **Mass.**—White v. Gove, 183 Mass. 333, 67 N. E. 359. **Tenn.** Abbott v. Fagg, 1 Heisk. 742.

46. **U. S.**—Petersburg Sav. & Ins. Co. v. Dellatone, 70 Fed. 643, 17 C. C. A. 310, 30 U. S. App. 504; Stuart v. City of St. Paul, 63 Fed. 644; Allen v. Wilson, 21 Fed. 881; Kinney v. Consol. Va. Min. Co., 4 Sawy. 382, 14 Fed. Cas. No. 7,827. **Ala.**—McQueen v. Whitstone, 127 Ala. 417, 30 So. 548; Owen v. Bankhead, 82 Ala. 399, 3 So. 97; *Ex parte* Cresswell, 60 Ala. 378. **Ark.**—Gaither v. Campbell, 94 Ark. 329, 126 S. W. 1061; State v. Shall, 23 Ark. 601. **D. C.**—Schwartz v. Costello, 11 App. Cas. 553. **Ill.**—Koehler v. Ernst Tosetti Brew. Co., 101 Ill. App. 339, *affirmed*, Ernst Tosetti Brew. Co. v. Koehler, 200 Ill. 369, 65 N. E. 636; Kihlholz v. Wolff, 8 Ill. App. 371. **Ky.** Baker v. Madison, 4 J. J. Marsh. 390; Larue v. Larue, 2 Litt. 258. **La.**—State v. Atehafalaya R. R. & Bkg. Co., 7 Rob. 447. **Md.**—Burch v. Scott, 1 Gill & J. 393. **Mass.**—Marshall Engine Co. v. New Marshall Engine Co., 203 Mass. 410, 89 N. E. 548. **Mich.**—Cadotte v. Cadotte, 120 Mich. 667, 79 N. W. 932. **Miss.**—*Ex parte* Stanfield, 53 So. 538; Commercial Bank v. Lewis, 13 Smed. & M. 226. **Pa.**—Weigley v. Coffman,

of substance as distinguished from clerical errors,⁴⁷ upon a mere motion.⁴⁸ The alteration can be made only by bill of review,⁴⁹ or original bill,⁵⁰ or by appeal.⁵¹ To this latter rule, the following exceptions have been recognized. It is held that the decree may be altered after the term without the necessity of an appeal or bill of review if the decree has been entered by fraud,⁵² surprise,⁵³ or mistake;⁵⁴ or, if the decree has been rendered on default,⁵⁵ or, if the party against whom the decree has been rendered did not have an opportunity to be heard,⁵⁶ or if the correction is made with the consent of the parties,⁵⁷ or if the court in some manner reserves the right to modify the same.⁵⁸

23 W. N. C. 27. **S. C.**—Garlington v. Copeland, 32 S. C. 57, 10 S. E. 616. **Tenn.**—Burns v. Edgefield, 3 Tenn. Ch. 137; Bonvar v. Hagler, 7 Lea 85. **Va.** Bank of Virginia v. Craig, 6 Leigh 399. **W. Va.**—Fulton v. Messenger, 61 W. Va. 477, 56 S. E. 830; Barbour, Stedman & Herod v. Tompkins, 58 W. Va. 572, 52 S. E. 707; Ruhl v. Ruhl, 24 W. Va. 279.

47. Home St. R. Co. v. City of Lincoln, 162 Fed. 133, 89 C. C. A. 133; Hicklin v. Marco, 64 Fed. 609; Hop Bitters Mfg. Co. v. Warner, 28 Fed. 577.

48. Cameron v. McRoberts, 3 Wheat. (U. S.) 591, 4 L. ed. 467; McGregor v. Vermont Loan & Tr. Co., 104 Fed. 709, 44 C. C. A. 146; Austin v. Riley, 55 Fed. 833; Scott v. Hore, 1 Hughes 163, 21 Fed. Cas. No. 12,535.

49. **Ark.**—Turner v. Vaughan, 33 Ark. 454. **D. C.**—Fries v. Fries, 1 Mac Arthur 291. **Ill.**—Hughs v. Washington, 65 Ill. 245. **Md.**—In re Young's Estate, 3 Md. Ch. 461. **Mass.**—Lakin v. Lawrence, 195 Mass. 27, 80 N. E. 578. **N. J.**—Carpenter v. Muchmore, 15 N. J. Eq. 123. **N. Y.**—Bennett v. Winter, 2 Johns. Ch. 205. **Tenn.**—Allen v. Barksdale, 1 Head 238. **Va.** Nelson's Admr. v. Kounsler's Exr., 79 Va. 468. **W. Va.**—Snyder v. Middle States Loan, B. & C. Co., 52 W. Va. 655, 44 S. E. 250.

See the title "Bills of Review."

50. Burch v. Scott, 1 Bland (Md.) 112; Nelson's Admr. v. Kounsler's Exr., 79 Va. 468. See the title "Bills and Answers."

51. **U. S.**—Scott v. Blaine, Baldw. 287, 21 Fed. Cas. No. 12,525. **Me.** Parsons v. Stevens, 78 Atl. 347. **Md.** Trayhern v. National Mechanics' Bank, 57 Md. 590. **Va.**—Nelson's Admr. v. Kounsler's Exr., 79 Va. 468.

See the title "Appeals."

52. Fisher v. Simon, 67 Fed. 387, 14 C. C. A. 443, 32 U. S. App. 132; United States v. Williams, 67 Fed. 384, 14 C. C. A. 440, 32 U. S. App. 126; Jenkins v. Eldredge, 1 Woodb. & M. 61, 13 Fed. Cas. No. 7,269; Herbert v. Rowles, 30 Md. 271. *Contra*, Law v. Law, 55 W. Va. 4, 46 S. E. 697. Apparently *contra*, Burch v. Scott, 1 Bland (Md.) 112.

53. Trayhern v. National Mechanics' Bank, 57 Md. 590; Downes v. Friel, 57 Md. 531; Herbert v. Rowles, 30 Md. 271; Barry v. Barry, 1 Md. Ch. 20.

54. United States v. Castro, 5 Sawy. 625, 25 Fed. Cas. No. 14,754; United States v. Bennett, Hoff. Land Cas. 281, 24 Fed. Cas. No. 14,573; Trayhern v. National Mechanics' Bank, 57 Md. 590; Downes v. Friel, 57 Md. 531; Herbert v. Rowles, 30 Md. 271.

55. **Md.**—First Nat. Bank v. Eccleston, 48 Md. 145. **Mich.**—Benedict v. Auditor General, 104 Mich. 269, 62 N. W. 364. **N. Y.**—Tripp v. Vincent, 8 Paige 176; Millspaugh v. McBride, 7 Paige 509, 34 Am. Dec. 360.

See the title "Default."

56. Cawley v. Leonard, 28 N. J. Eq. 467; Brinkerhoff v. Franklin, 21 N. J. Eq. 334.

57. Pfeaff v. Jones, 50 Md. 263; Williams v. Banks, 19 Md. 524; Morris' Admr. v. Peyton's Admr., 29 W. Va. 201, 11 S. E. 954. *Contra*, Brady v. Hamlett, 33 Ark. 105.

58. **U. S.**—Linder v. Lewis, 1 Fed. 378. **La.**—Balio v. Wilson, 12 Mart. O. S. 358, 13 Am. Dec. 376. **Va.**—Shepard v. Starke, 3 Munf. 29.

An order entered at the term at which the decree is rendered, granting leave to file a petition for rehearing at a subsequent term will not keep it within the control of the court.

F. INTERLOCUTORY DECREES.—It is well settled that an interlocutory decree may be set aside⁵⁹ for cause shown⁶⁰ at a term subsequent to that in which it was rendered,⁶¹ or at any time⁶² before the entry of a final decree.⁶³

Upon the final hearing, all interlocutory decrees may be modified as the court sees fit.⁶⁴

The application for modification may be made by motion,⁶⁵ or petition,⁶⁶ or by rule to show cause;⁶⁷ not by appeal.⁶⁸

G. CONSENT DECREES.—Consent decrees cannot be set aside or altered,⁶⁹ except by the consent of the parties,⁷⁰ or for good cause shown.⁷¹

The decree should be opened and the cause continued. *Brady v. Hamlett*, 33 Ark. 105.

Where the suggestion of damages was filed before the entry of the final decree, the hearing and assessment thereon may be had at any subsequent term. *Havorka v. Hemmer*, 107 Ill. App. 312.

59. **U. S.**—*Baines v. Clarke*, 111 U. S. 789, 4 Sup. Ct. 671, 28 L. ed. 599; *Henry v. Travelers' Ins. Co.*, 34 Fed. 258. **Ala.**—*Pinkard v. Allen's Admr.*, 75 Ala. 73. **Ark.**—*Miller v. Hemphill*, 9 Ark. 488. **Ill.**—*Jeffery v. Robbins*, 167 Ill. 375, 47 N. E. 725. **N. C.**—*Miller v. Justice*, 86 N. C. 26. **Va.**—*Roberts v. Cocke*, 1 Rand. 121.

60. *Willimantic Linen Co. v. Clark Thread Co.*, 24 Fed. 799; *Hunler v. Carmichael*, 12 Smed. & M. (Miss.) 726.

61. **U. S.**—*Blythe v. Hinckley*, 84 Fed. 228. **Ill.**—*Jeffery v. Robbins*, 62 Ill. App. 190. **Va.**—*Com. v. Beaumarchais*, 3 Call. 122.

62. **U. S.**—*De Florez v. Reynolds*, 8 Fed. 434. **Ky.**—*Hays v. May*, 1 J. J. Marsh. 497. **Miss.**—*Davis v. Roberts*, 1 Smed. & M. Ch. 543. **Va.**—*Todd v. McFail*, 96 Va. 754, 32 S. E. 472; *Wayland v. Crank's Exr.*, 79 Va. 602; *Wright v. Strother*, 76 Va. 857. **W. Va.**—*Fowler v. Lewis' Admr.*, 36 W. Va. 112, 14 S. E. 447.

63. **U. S.**—*N. K. Fairbank Co. v. Windsor*, 124 Fed. 200, 61 C. C. A. 233; *Wooster v. Handy*, 21 Fed. 51; *Clark v. Blair*, 14 Fed. 812; *Pullman v. Cincinnati & C. Air-Line R. Co.*, 5 Biss. 237, 20 Fed. Cas. No. 11,462. **Ill.**—*Price v. Springer*, 241 Ill. 230, 89 N. E. 296; *Quinn v. McMahan*, 40 Ill. App. 593. **Md.**—*Barth v. Rosenfeld*, 36 Md. 604. **Mass.**—*Gibson v. Crehore*, 5 Pick. 146. **Miss.**—*Kimball v. Alcorn*, 45

Miss. 145; *Pattison v. Josselyn*, 43 *Miss.* 373; *Cook's Heirs v. Bay*, 4 *How.* 485. **Mo.**—*Warren v. Williams*, 25 *Mo.* App. 22. **N. Y.**—*Longfellow v. Longfellow*, 1 *Clarke Ch.* 344. **Ohio.**—*Kelley v. Stanbery*, 13 *Ohio* 408.

64. *Fourniquet v. Perkins*, 16 *How.* (U. S.) 82, 14 L. ed. 854; *Linder v. Lewis*, 4 *Fed.* 318; *Thompson v. White*, 76 *Cal.* 581, 18 *Pac.* 399.

65. *Banks v. Anderson*, 2 *Hen. & M.* (Va.) 20.

66. **Md.**—*Waring v. Turton*, 44 *Md.* 535. **N. C.**—*Runnion v. Ramsay*, 80 *N. C.* 60. **Va.**—*Banks v. Anderson*, 2 *Hen. & M.* 20. **W. Va.**—*Davis v. Demming*, 12 *W. Va.* 246.

67. *Spring v. Domestic Sew. Mach. Co.*, 13 *Fed.* 446.

68. *King v. Merchants' Exch. Co.*, 5 *N. Y.* 547.

If the interlocutory decree be partly final in its nature, to this extent its modification is to be governed by the rules applicable to final decrees. To this effect is *Morris v. Taylor*, 23 *N. J. Eq.* 131.

69. **U. S.**—*Anderson v. Jacksonville, P. & M. R. Co.*, 2 *Woods* 628, 1 *Fed. Cas.* No. 358. **Ark.**—*Peay v. Tannehill*, 27 *Ark.* 114. **Ill.**—*Frank v. Bruck*, 4 *Ill. App.* 627. **Ia.**—*Smith v. Baldwin*, 85 *Iowa* 570, 52 *N. W.* 495. **Mich.**—*Hammond v. Place*, *Harr.* 438.

70. **Fla.**—*White v. Walker*, 5 *Fla.* 478. **N. Y.**—*Leitch v. Cumpston*, 4 *Paige* 476. **N. C.**—*Kerchner v. McEachern*, 93 *N. C.* 447. **R. I.**—*Hyde v. Superior Court*, 28 *R. I.* 204, 66 *Atl.* 292; *Town of Bristol v. Bristol & Warren Waterworks*, 19 *R. I.* 631, 35 *Atl.* 884. **W. Va.**—*McGraw v. Traders' Nat. Bank*, 64 *W. Va.* 509, 63 *S. E.* 398.

71. **Mich.**—*Hews v. Hews*, 145 *Mich.*

The method of procedure to have the same set aside will depend upon the nature of the decree, which may be interlocutory⁷² or final.⁷³ In each case, consent decrees are the same as other interlocutory or final decrees.⁷⁴

H. CONTROL OF ENFORCEMENT.—The court may control the enforcement of a decree,⁷⁵ even in cases wherein, owing to the rules above noted, it could not alter the decree.⁷⁶

I. METHOD OF PROCURING ALTERATION.—1. General Rules.—There are certain generally accepted rules governing the procurement of an alteration of a decree. In rare cases, the court will of its own motion set aside the proceedings.⁷⁷

Mandamus is not recognized as a proper remedy to procure the setting aside of a decree⁷⁸ and the same is true of writs of restitution,⁷⁹ and of rules to show cause,⁸⁰ although in certain cases a bill of injunction will lie.⁸¹

An application to alter a decree should be made to the judge who rendered the same,⁸² or to an appellate court.⁸³

247, 108 N. W. 694. N. Y.—Monell v. Lawrence, 12 Johns. 521. N. C.—Rollins v. Henry, 78 N. C. 342. Tenn.—Jones v. Williamson, 5 Coldw. 371.

The cause was held insufficient in *Yonge v. Hooper*, 73 Ala. 119; *Charles v. Miller*, 36 Ala. 141.

72. *Edney v. Edney*, 81 N. C. 1.

73. Ga.—*Stapler v. Hardeman*, 91 Ga. 127, 16 S. E. 657. Ill.—*Hohenadel v. Steele*, 141 Ill. App. 218, judgment affirmed, 237 Ill. 229, 86 N. E. 717. S. C.—*Edgerton v. Muse*, 2 Hill Eq. 51. W. Va.—*Armstrong v. Wilson*, 19 W. Va. 108; *Rose v. Brown*, 17 W. Va. 649; *Manion v. Fahy*, 11 W. Va. 482.

74. In *Manion v. Fahy*, 11 W. Va. 482, it is held that an original bill may be used to set aside a consent decree, whether it is interlocutory or final; that if the decree is set aside the court should restore the condition existing before the decree had been entered. Moreover, this authority intimates that such decrees cannot be amended, except as to clerical errors, although the same may be set aside. Thus a consent decree is treated as analogous to a contract, which the courts may enforce or refuse to enforce, but cannot make for the parties.

75. U. S.—*Mootry v. Grayson*, 104 Fed. 613, 44 C. C. A. 83; *Witters v. Sowles*, 32 Fed. 765, 766; *Molyneux v. Marsh*, 1 Woods 452, 17 Fed. Cas. No. 9,703. Ala.—*Wright v. Phillips*, 56 Ala. 69. N. J.—*Woodbury Heights*

Land Co. v. Londonslager, 60 N. J. Eq. 403, 45 Atl. 630. N. C.—*Greenlee v. McDowell*, 39 N. C. 481. Tenn.—*Montgomery v. Whitworth*, 1 Tenn. Ch. 174.

76. Ala.—*Sewell v. Hoffman*, 157 Ala. 196, 47 So. 282; *Marshall v. McPhillips*, 79 Ala. 145. Md.—*Dawes v. Thomas*, 4 Gill. 333. Mich.—*Cadotte v. Cadotte*, 120 Mich. 667, 79 N. W. 932. S. C.—*Spann v. Spann*, 2 Hill Eq. 152.

77. *Pindle v. Pennsylvania, P. & N. E. R. Co.*, 1 Lehigh Val. L. Rep. (Pa.) 201.

78. *Coffin v. Ontonagon Circuit Judge*, 140 Mich. 420, 103 N. W. 835. See the title "Mandamus."

79. *Starke v. Lewis*, 23 Miss. 151.

80. *Long v. Cole*, 66 N. C. 381.

81. *Callaway v. Alexander*, 8 Leigh (Va.) 114, 31 Am. Dec. 640. See the title "Injunction."

While a third party may attack collaterally a judgment fraudulently obtained, the parties to the suit must institute direct proceedings for this purpose. *Dunlap v. Byers*, 110 Mich. 109, 67 N. W. 1067.

82. *Reece v. Reece*, 1 M. & C. 372, 40 Eng. Reprint 418.

83. *Deeds v. Deeds*, 1 G. Gr. (Ia.) 394; *In re Livingston*, 34 N. Y. 555; 32 How. Pr. 20, 2 Abb. Pr. (N. S.) 1.

It is competent for a judge other than the one who presided at the hearing of a cause, presiding at the same term of court, to amend the decree ren-

2. Necessity of Notice.—It is generally held that an alteration of a decree should not be allowed without such notice to the the opposite party as will give him an opportunity to be heard.⁸⁴

3. Necessity of Affidavit.—In many cases, the party seeking an alteration of the decree is required to support his motion,⁸⁵ or petition,⁸⁶ by an affidavit setting out the merits of his contention.⁸⁷

4. By Motion.—The authorities do not draw a distinct line between the use of motions and petitions for the alteration of decrees.⁸⁸ A motion is proper only when the alteration desired is of a minor and not of a material character.⁸⁹

A conflict of authority exists as to whether or not a motion for a new trial may be made for the purpose of modifying a decree.⁹⁰

dered upon the hearing, so as to show the true amount due. *Palmer v. Harris*, 100 Ill. 276.

84. U. S.—*Doggett v. Emerson*, 1 Woodb. & M. 1, 7 Fed. Cas. No. 3,961. **Ill.**—*Palmer v. Harris*, 100 Ill. 276; *Bryant v. Vix*, 83 Ill. 11; *Swift v. Allen*, 55 Ill. 303 (the opinion contains a discussion of the question); *Means v. Means*, 42 Ill. 50. **Ia.**—*Keeney v. Lyon*, 21 Iowa 277; *Throckmorton v. Stout*, 3 Iowa 580. **Mich.**—*Berry v. Innes*, 35 Mich. 189; *Brown v. Thompson*, 29 Mich. 72. **N. J.**—*Jarmon v. Wiswall*, 24 N. J. Eq. 68. **Va.**—*Coffman v. Sangston*, 21 Gratt. 263. **W. Va.**—*Shumate's Exrs. v. Crockett*, 43 W. Va. 491, 27 S. E. 240.

85. *West v. Miller*, 125 Ind. 70, 25 N. E. 143; *Oliver v. French*, 82 Hun 436, 31 N. Y. Supp. 740.

86. *Boyer v. Boyer*, 77 N. J. Eq. 144, 76 Atl. 309.

87. The form of such affidavits is discussed in *Goodhue v. Churchman*, 1 Barb. Ch. (N. Y.) 596; *Winship v. Jewett*, 1 Barb. Ch. (N. Y.) 173. See the title "Affidavits of Merits and Defense."

88. *Kendrick v. Whitney*, 22 Gratt. (Va.) 646.

89. **Ga.**—*Brown v. Bennett*, 55 Ga. 189. **Ind.**—*Goodwine v. Hedrick*, 29 Ind. 383; *Gullett v. Housh*, 5 Blackf. 33. **Miss.**—*Pipkin v. Haun*, 1 Freem. Ch. 254. **N. Y.**—*Radley v. Shaver*, 1 Johns. Ch. 200; *Clark v. Hall*, 7 Paige 382; *Ray v. Connor*, 3 Edw. Ch. 478; *Gardner v. Dering*, 2 Edw. Ch. 131. **Pa.**—*Verstine v. Yeane*, 210 Pa. 109, 59 Atl. 689. **R. I.**—*Lawrence v. Staigg*, 10 R. I. 581. **Va.**—*Marr v. Miller*, 1 Hen. & M. 204.

A decree in equity cannot be set

aside on motion, but the objection to the remedy may be waived; and if a motion made to set aside a decree be argued without objection and granted, it is then too late to raise the question as to the propriety of the remedy by motion. *Coston v. Dudley*, 65 Ga. 252.

90. Holding that this cannot be done are the following cases: **Conn.** *Samis v. King*, 40 Conn. 298. **Ga.** *Berry v. Turner*, 77 Ga. 58. **Ind.**—*McGregor v. Axe*, 10 Ind. 362. *Contra*, *McGurry v. Wall*, 122 Mo. 614, 27 S. W. 327.

A motion to re-open a decree is not a motion for a rehearing. *Campbell Printing Press & Mfg. Co. v. Marden*, 70 Fed. 339.

A final decree regularly entered (not enrolled) cannot be corrected on *special motion*; it must be done on a rehearing. *Picabia v. Everard*, 4 How. Pr. (N. Y.) 113, 2 Code Rep. 69.

A decree by default may be set aside on motion. *Beekman v. Peck*, 3 Johns. Ch. (N. Y.) 415.

"Further directions" are not given upon motion. They are only granted upon a rehearing after a master's report, or upon the case coming on again for the purpose, in pursuance of a former order or decree. *Gardner v. Dering*, 2 Edw. Ch. (N. Y.) 131.

A decree against a person not a party to the bill may be corrected on motion. *Boggess v. Robinson's Heirs*, 5 W. Va. 402.

Joint Parties.—A motion by a part of several defendants is not a bar to a motion by all. *Bleight v. McIlvoy*, 4 T. B. Mon. (Ky.) 142.

Filing not enough: the motion should be called to the court's attention.

5. By Petition.—A decree may be altered during the term at which it is rendered upon petition.⁹¹ A decree procured by fraud,⁹² or entered in improper form,⁹³ or upon default,⁹⁴ or interlocutory in character,⁹⁵ may be altered upon petition.⁹⁶

6. By Bill of Review.—After the expiration of the term at which a final decree is entered, it can be set aside only by appeal or by bill of review.⁹⁷

7. By Original Bill.—One of the customary methods of procuring the alteration of a decree is by means of an original bill.⁹⁸ An original bill may be filed to attack a decree procured by fraud,⁹⁹ or

Graham v. Swayne, 109 Fed. 366, 48 C. C. A. 411.

91. **U. S.**—Reeves v. Keystone Bridge Co., 2 Bann. & A. 256, 20 Fed. Cas. No. 11,661. **Fla.**—Finlayson v. Lipscomb, 15 Fla. 558. **R. I.**—Leach v. Jones, 11 R. I. 386. **Va.**—Parker v. Logan, 82 Va. 376, 4 S. E. 613.

A petition for a rehearing after the entry of a final decree is not an *ex parte* proceeding; it can only be presented on notice and can only be considered after the other side has had an opportunity to answer it.

"If the petition (for a rehearing) be filed during the term, the court will retain jurisdiction over the case and may subsequently decide upon the application." Giant Powder Co. v. California Vigorit Powder Co., 5 Fed. 197.

A petition to open a decree cannot be filed after the time within which an appeal can be taken therefrom. Sparks v. Fortescue, 75 N. J. Eq. 586, 73 Atl. 595.

92. Mallery v. Quinn, 88 Md. 38, 40 Atl. 1079.

93. **N. J.**—Lynde v. Lynde, 54 N. J. Eq. 473, 35 Atl. 641; Jarmon v. Wiswall, 24 N. J. Eq. 68. **N. Y.**—Radley v. Shaver, 1 Johns. Ch. 200. **Vt.**—Porter v. Vaughan, 22 Vt. 269.

94. Erwin v. Vint, 6 Munf. (Va.) 267.

95. **N. C.**—Wilcox v. McLain, 3 N. C. 368. **Va.**—Kendrick v. Whitney, 28 Gratt. 646. **W. Va.**—Smith v. McLain, 11 W. Va. 654.

96. "The application by petition in the cause to vacate the enrolment and open the decree is to be encouraged, if not exclusively prescribed, in all cases where such procedure will accomplish justice." White v. Smith, 72 N. J. Eq. 697, 65 Atl. 1017.

One not a party to the suit cannot

petition for a rehearing of the suit. His course is to petition for leave to file a petition for a rehearing. Doyle v. New York & N. E. R. Co., 14 R. I. 55.

Petitions, under statute, are discussed in Morgan v. Jones, 52 Fla. 543, 42 So. 242.

97. **Md.**—Stewart v. Beard, 3 Md. Ch. 227. **N. J.**—Cook v. Weigley, 69 N. J. Eq. 836, 65 Atl. 480. **N. Y.**—Goodhue v. Churchman, 1 Barb. Ch. 596. **Tenn.**—Prater v. Hoover, 1 Coldw. 544.

See the title "Bills of Review."

Before the adoption of the code, a decree duly enrolled could only have been impeached by a bill of review, and since the adoption of the code, only by a civil action commenced by summons. Thaxton v. Williamson, 72 N. C. 125.

As to effect of 88th rule in equity in cases where no appeal would lie from a decree of the circuit court, see Moelle v. Sherwood, 148 U. S. 21, 13 Sup. Ct. 426, 37 L. ed. 350.

A supplemental bill, in the nature of a bill of review, and not a petition for rehearing, is the proceeding by which a defendant after final decree pronounced, but not entered or recorded, may have a rehearing of the original cause, and a hearing of new matter of facts discovered since publication. Finlayson v. Lipscomb, 15 Fla. 558.

98. **N. J.**—Whittemore v. Coster, 4 N. J. Eq. 438. **Va.**—Hill v. Bowyer, 18 Gratt. 364. **W. Va.**—Stewart v. Tennant, 52 W. Va. 559, 44 S. E. 223.

See the title "Bills and Answers."

99. **U. S.**—Hendryx v. Perkins, 114 Fed. 801, 52 C. C. A. 435. **Ill.**—Teel v. Dunniho, 221 Ill. 471, 77 N. E. 906, 112 Am. St. Rep. 192. **Ky.**—Edmond-

unfair means,¹ at least after the same has been executed.² As a rule, but not invariably,³ if a motion,⁴ bill of review or appeal,⁵ will serve the purpose of the party aggrieved, he cannot resort to an original bill.⁶

8. By Appeal.—Only parties injuriously affected by a decree may appeal therefrom.⁷ Moreover, consent to a decree precludes an appeal therefrom.⁸ As a rule, no appeal lies from an interlocutory decree,⁹ except in cases in which the interlocutory decree is embodied in the final decree.¹⁰ In the appellate court, the presumption is in favor of the correctness of the decree.¹¹ Errors of form are disregarded.¹²

J. METHOD OF GRANTING RELIEF.—1. In General.—If the court orders a decree set aside, the order is interlocutory in character and not final.¹³ In some cases, the court will not, in the first instance, set the decree aside, but will allow the parties to proceed as if the decree had been set aside and reserve its decision as to whether or not the decree should be set aside.¹⁴ If a decree be erroneous, the court will attempt to restore the parties to the *status quo* prior to the rendition of the decree.¹⁵

son v. Moseby, 4 J. J. Marsh. 597. Md. United Lines Tel. Co. v. Stevens, 67 Md. 156, 8 Atl. 908. N. Y.—Loomer v. Wheelwright, 3 Sandf. Ch. 135; Wright v. Miller, 1 Sandf. Ch. 103. Ohio.—Lockwood v. Mitchell, 19 Ohio 448, 53 Am. Dec. 438.

1. Butler v. Peyton, 4 Hayw. (Tenn.) 88.

2. Morris v. White, 96 N. C. 91, 2 S. E. 254.

Where a final decree has been rendered in a proceeding, and carried into effect, the only mode of testing its validity is by a new action commenced by summons. England v. Garner, 84 N. C. 212.

3. Hill v. Bowyer, 18 Gratt. (Va.) 364.

4. Goodwine v. Hedrick, 29 Ind. 383; Long v. Cole, 72 N. C. 20.

5. Cocke v. Copenhaver, 126 Fed. 145, 61 C. C. A. 211.

6. To attack decrees or modify their operation, or show errors in them, the proceeding cannot be by original bill, where prosecuted by a party to the cause. It must be by rehearing, writ of error *coram nobis*, bill of review, appeal, or writ of error. Herd v. Bewley, 1 Heisk. (Tenn.) 524.

A new bill, of which a former bill that had been dismissed was made a part, cannot give the chancellor any power over the former decree. Brooks' Admr. v. Love, 3 Dana (Ky.) 7.

7. Fla.—Lenders v. Thomas, 35 Fla. 518, 17 So. 633, 48 Am. St. Rep. 255. Ky.—Heath v. Mitcherson, 1 J. J. Marsh. 547. Mich.—Brewer v. Dodge, 28 Mich. 359. N. Y.—Townsend v. Low, 4 Edw. Ch. 249. W. Va.—Coleman v. Waters, 13 W. Va. 278.

See the title "Appeals."

8. Armstrong v. Douglas Park Bldg. Assn., 60 Ill. App. 318.

9. Bellamy v. Bellamy, 4 Fla. 242.

10. Brand v. Webb, 2 A. K. Marsh. (Ky.) 574; Steenrod's Admr. v. Wheeling, P. & B. R. Co., 25 W. Va. 133.

11. Richardson v. Donehoo, 16 W. Va. 685.

12. Foote v. Lefavour, 6 Ind. 473.

The upper court may correct the decree and not reverse it if it be not seriously erroneous. Linsey v. McGannon, 9 W. Va. 154.

13. Hall v. Lamb, 28 Vt. 85.

14. Jermain v. Langdon, 8 Paige (N. Y.) 41; Platt v. Howland, 10 Leigh (Va.) 507.

15. Ralston v. Lahee, 8 Iowa 17, 74 Am. Dec. 291; Carneal v. Wilson, 3 Litt. (Ky.) 80.

If an order be made setting aside the decree and then this order is set aside, the decree is restored. Hurt v. Blount, 63 Ala. 327.

A decree may be set aside as to part but not as to all of the defendants. Moody v. McDuff, 58 Miss. 751.

2. Supplemental Decree. — The court may render a supplemental decree for the sake of completing the terms of the original decree.¹⁶

3. By Amendment. — In some cases the court will alter a decree by an amendment thereof.¹⁷

4. By Rehearing. — Where a review obtained upon a bill of review is proper after the term when a decree is enrolled, a rehearing is the remedy before such time.¹⁸ If a decree is to be materially altered, a rehearing is necessary.¹⁹ A rehearing should not be granted except for good cause shown.²⁰

5. Attaching Terms. — In the exercise of its discretion, the court may in many cases attach terms or conditions to the order setting aside the decree,²¹ and the court may enforce such terms.²²

16. *Walker v. Chicago Courier Co.*, 9 Ill. App. 418; *Oliver Finnie Groc. Co. v. Bodenheimer*, 77 Miss. 415, 27 So. 613.

The rectification of a decree or order is usually made by an alteration of the decree or order itself; but where this cannot conveniently be done, a supplemental order will be made. *Daniell, Ch. Pl. & Pr.*, p. 1030; 2 *Seton* 1548; *Hawker v. Buncombe*, 2 *Mad.* 391, 56 *Eng. Reprint* 379; *Skrymeher v. Northcote*, 1 *Swanst.* 573, 36 *Eng. Reprint* 507; *Tomlins v. Polk*, 1 *Russ.* 475, 38 *Eng. Reprint* 184; *Hughes v. Jones*, 26 *Beav.* 24, 53 *Eng. Reprint* 805; *Bird v. Heath*, 6 *Hare* 236, 67 *Eng. Reprint* 1154, 12 *Jur.* 861.

17. A decree in chancery cannot be amended, *nunc pro tunc*, at a subsequent term, except upon evidence which is matter of record, or quasi-record. *Kemp v. Lyon*, 76 *Ala.* 212.

A decree may be amended to allow what had not been granted, without a rehearing, if the parties consent. *McKenzie v. Bacon*, 40 *La. Ann.* 157, 4 *So.* 65.

If a decree be irregularly amended, it can be attacked directly but not collaterally. The original decree is a part of the amended decree. *Reynolds v. Reynolds*, 115 *Mich.* 378, 73 *N. W.* 425, wherein is a discussion concerning the amendment of decrees.

18. *Mickle v. Maxfield*, 42 *Mich.* 304, 3 *N. W.* 961; *Prater v. Hoover*, 1 *Coldw. (Tenn.)* 544. See the titles "Appeals;" "Rehearing."

19. *Ray v. Connor*, 3 *Edw. Ch. (N. Y.)* 478.

20. *Mickle v. Maxfield*, 42 *Mich.*

304, 3 *N. W.* 961; *Richardson v. Hatch*, 68 *N. J. Eq.* 788, 60 *Atl.* 52, *affirmed*, 64 *Atl.* 1134.

There must be such grounds as would authorize a new trial at law. *Giant Powder Co. v. California Vigorit Powder Co.*, 5 *Fed.* 197.

At one time in England, repeated rehearings were not uncommon and the consequent delays and expenses were so great as to lead to the interposition of parliament for correction. *Giant Powder Co. v. California Vigorit Powder Co.*, 5 *Fed.* 197.

A rehearing at a subsequent term granted to new parties, strangers to the original litigation, is erroneous. *Roanoke Nat. Bank v. Farmers' Nat. Bank*, 84 *Va.* 603, 5 *S. E.* 682.

On a rehearing, the party that complains of the decree, and seeks to have it corrected, is entitled to open and close the argument. *Sills v. Brown*, 1 *Johns. Ch. (N. Y.)* 444.

After affirmance on appeal, a final decree will not be modified on application by striking out words specially considered by the court. Such application amounts to an application for a rehearing. *Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co.*, 72 *N. J. Eq.* 555, 65 *Atl.* 870.

21. *Oram v. Dennison*, 13 *N. J. Eq.* 438; *Wooster v. Woodhull*, 1 *Johns. Ch. (N. Y.)* 539; *Watt v. Watt*, 2 *Barb. Ch. (N. Y.)* 371; *Gerard v. Gerard*, 2 *Barb. Ch. (N. Y.)* 73. See also 4 *STANDARD PROC.* 491.

22. *Pearce v. Daughdrill*, 54 *Ala.* 456; *Hoffman v. Treadwell*, 5 *Paige (N. Y.)* 82.

DEFAMATION. — See Libel and Slander.

DEFAULT

By E. E. BURNS,
Of the Wisconsin Bar.

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CROSS-REFERENCES:

Equity Jurisdiction	Jurisdiction;
and Procedure;	Process;
Judgment;	Service.

I. WHAT IS DEFAULT.—A. **STRICT SENSE.**—Default in an action at law in its strict original sense was a failure to appear in court. It was treated as a contempt, but did not admit the plaintiff's allegations.¹

At common law coercive measures were used to bring the defendant into court, where he was required to plead. If he did not then plead it amounted to an admission of the allegations.² The laws and the decisions of the courts of Illinois still maintain a distinction between default and *nil dicit*, though both amount to an admission.³

B. **FAILURE TO PLEAD.**—Default, in countries under the common law, now amounts to an admission of the facts as alleged.

In England the practice of compelling the defendant to appear was abolished in 1852 by the Common Law Procedure Act, and since then the courts there have treated default as an admission.⁴ Changes in the strict rule of the common law, that the party must be brought into court, had been previously introduced by statutes.⁵

By the statutes of the several states default after personal service amounts to admission.⁶

Default.—Failure to plead within the time required by law, either *with* or *without* appearance, is now designated default.⁷

In proceedings *in rem* the property is before the court by "arrest." Default in the original sense does not occur, but a failure to plead

1. There was no judgment by default at common law. *Schmidt v. Thomas*, 33 Ill. App. 109.

2. 3 Bl. Co. *296, 394, 396.

In courts of equity similar measures were taken. "Upon common bills, as soon as they are filed, process of *subpoena* is taken out, which is a writ commanding the defendant to appear and answer to the bill, on pain of 100*l*. But this is not all; for if the defendant, on service of the *subpoena*, does not appear within the time limited by the rules of the court, and plead, demur or answer to the bill, he is then said to be in *contempt*; and the respective processes of contempt are in successive order awarded against him." 3 Bl. Com. *443.

3. "These forms, however, are technical, we think, and the failure to observe them produces mere irregularities, and seldom become harmful errors, for which a judgment should be reversed." *Chicago, C. C. & St. L. R. Co. v. Bozarth*, 91 Ill. App. 68, 73.

4. Com. Law Prac. Act, 1852, §26.

5. The statute 12 Geo. I, ch. 29, §1, provided that in cases not arrestable on personal service of a copy of the process, appearance might be entered

for the defendant. The statute 5 Geo. II, ch. 25, in case of absconding defendants, that after publishing notice to appear in the London Gazette and reading the same in the parish church a bill may be taken *pro confesso*. 3 Bl. Com. *445. The acts 11 Geo. IV and 1 Wm. IV were likewise directed against absconding defendants.

6. See 1 *ENCYCLOPEDIA OF EVIDENCE* 490, *et seq*.

7. *Chicago, etc. R. Co. v. Bozarth*, 91 Ill. App. 68.

Pleading To One Count.—Where a declaration contained two counts and pleas were all directed to one count, which count was stricken out by court, default could be entered on the other count. *Hogan v. Ross*, 13 How. (U. S.) 171, 14 L. ed. 100.

Striking out answer and proceedings as of default is not due process of law. *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. ed. 215.

A default judgment rendered on striking out the answer for illegal reason is void. *American De Forest Wireless Tel. Co. v. Superior Court*, 153 Cal. 533, 96 Pac. 15, 126 Am. St. Rep. 125, 17 L. R. A. (N. S.) 1117.

in its behalf amounts to *nil dicit*, and is an admission of allegations against it.⁸

C. NON-APPEARANCE AFTER SUBSTITUTED SERVICE. — The failure of the owner of the property in attachment, garnishment, and other proceedings *quasi in rem* to appear and answer after substituted service is usually termed default and has some of its incidents. It will be referred to herein as default.⁹

D. NON-APPEARANCE AT TRIAL. — The failure of a party to appear at the trial after issues joined is usually called a default and will hereinafter be mentioned as such.¹⁰

II. WHO MAY BE IN DEFAULT. — A. NATURAL PERSONS. Natural persons *sui juris* being capable of making admissions can do so indirectly, when actually or constructively in court, by failure to answer the material allegations set out in the pleadings of the other party.¹¹

B. CORPORATIONS. — Corporations, private or public, being mere legal entities can be in court only through their officers. When in court through due process directed to their proper officers, as designated by law, they are as much subject to default as natural persons.¹²

C. PLAINTIFF. — The plaintiff is subject to default by failure to reply to new matter, except so far as relieved from pleading to it by code provisions, and generally where new matter is properly pleaded as a counterclaim he is not permitted to dismiss so as to prevent judgment thereon.¹³ And in England notwithstanding the termination of the action judgment may be entered.¹⁴

D. GARNISHEE. — In many jurisdictions a garnishee can admit his liability to the extent of the claim by default,¹⁵ and in case of

8. *Miller v. United States*, 11 Wall. (U. S.) 268, 20 L. ed. 135, 142; *Adm. Rule* 29.

9. *Stockwell v. McCracken*, 109 Mass. 84; *Lane v. White*, 140 Pa. 99, 21 Atl. 437.

Non-appearance in case of substituted service by publication does not generally admit the cause of action, but merely permits *ex parte* proof. See statutes of the several states.

10. After depositions "either party may be *subpoenaed* to hear judgment . . . if the defendant makes default, a decree will be made against him." 3 Bl. Com. *450.

A default occurs only in absence of answer. Non-appearance at trial not default to entitle party to extended time to apply for new trial. *Leahy v. Wayne Circuit Judge*, 144 Mich. 304, 107 N. W. 1060, 115 Am. St. Rep. 443.

11. "When the plaintiff hath stated his case in the declaration, it is incumbent on the defendant within a

reasonable time to make his *defense*, and to put in a *plea*, else the plaintiff will at once recover judgment by *default*, or *nihil dicit* of the defendant." 3 Bl. Com. *296.

An idiot is entitled to the best plea in his behalf that any one present can suggest. 3 Bl. Com. *25.

12. *Ala.*—*Talladega Ins. Co. v. McCullough*, 42 Ala. 667; *Oxford Iron Co. v. Spradley*, 42 Ala. 24. *Mo.*—*Cloud v. Inhab. of Pierce City*, 86 Mo. 357. *Wis.*—*Potter v. Brown Co.*, 56 Wis. 272, 14 N.W. 375.

See *infra*, II, H.

13. *Wilson v. Exchange Bank*, 122 Ga. 495, 50 S. E. 357, 69 L. R. A. 97, 101; *Adams v. Osgood*, 55 Neb. 766, 76 N. W. 446.

It rests in discretion of court to permit dismissal. *Yellow Pine Co. v. Lehigh Val. Creosoting Co.*, 52 N. Y. Super. 281.

14. *Roberts v. Booth*, L. R. (1893) 1 Ch. Div. 52.

15. *Whiteside v. Tunstall*, 17 Ill.

substituted service on the principal defendant, may incur liability to both parties in the principal action by suffering default.¹⁶

E. ADMINISTRATOR.—An administrator, where suits may be maintained against administrators for demands against estates, may by default admit assets of the deceased in his hands to the amount charged.¹⁷

F. INFANTS NOT LIABLE.—Infants cannot suffer default.¹⁸ Their own admissions and those of their guardians *ad litem* do not bind them.¹⁹

G. MARRIED WOMEN UNDER DISABILITY.—A married woman, where disabilities have not been removed by statute, is not subject to default.²⁰

H. STATE.—A state before the United States Supreme Court in an action where that court has original jurisdiction, it would seem, does not suffer default. Proof is required. But if it does not appear *ex parte* proceedings may be taken.²¹

In election cases of great importance to the people evidence may be required as to the contestant's right.²²

III. PROCEEDINGS ON DEFAULT.—**A. OBTAINING JURISDICTION.**²³—**1. In Personam.**—**a. Service of Process.**—In proceedings on default the most important point for consideration is whether or not jurisdiction has been obtained to determine the matter before the court. On it appearing that jurisdiction has not been obtained, a judgment becomes a nullity.²⁴ It may be stricken from the records

258; *Carter v. Lockwood*, 15 Ill. App. 73; *Wood v. Wall*, 24 Wis. 647.

16. **Ga.**—*Farmers', etc. Bank v. University Pub. Co.*, 9 Ga. App. 128, 70 S. E. 602. **Ind.**—*Louisville, N. A. & C. R. Co. v. Parish*, 6 Ind. App. 89, 33 N. E. 122. **Mich.**—*Hebel v. Amazon Ins. Co.*, 33 Mich. 400. **Mo.**—*Mercantile Co. v. Bettles*, 58 Mo. App. 384. **Wis.**—*Pierce v. Chicago & N. W. R. Co.*, 36 Wis. 283, 288.

17. *Dickson v. Wilkinson*, 3 How. (U. S.) 57, 11 L. ed. 491.

18. *O'Hara v. McConnell*, 93 U. S. 150, 23 L. ed. 840.

Full proof of facts must be made against infant defendants. *Bank of United States v. Ritchie*, 8 Pet. (U. S.) 128, 8 L. ed. 890.

No default or decree *pro confesso* can be taken against an infant. *Chaffin v. Kimball's Heirs*, 23 Ill. 33; *Reavis v. Fielden*, 18 Ill. 77.

19. **Ill.**—*Chaffin v. Kimball's Heirs*, 23 Ill. 33; *Reavis v. Fielden*, 18 Ill. 77. **Miss.**—*Ingersoll v. Ingersoll*, 42 Miss. 155. **W. Va.**—*Laidley v. Kline*, 8 W. Va. 218.

20. *O'Hara v. McConnell*, 93 U. S. 150, 23 L. ed. 840.

21. On failure of a state to appear and answer the court will proceed *ex parte* to hear the cause on the part of the complainant. *Massachusetts v. Rhode Island*, 12 Pet. (U. S.) 755, 9 L. ed. 1272; *New Jersey v. New York*, 5 Pet. (U. S.) 284, 8 L. ed. 127. Suggestions in earlier cases were not followed.

22. *Atty.-Gen. ex rel. Bashford v. Barstow*, 4 Wis. 567, 823.

23. Much of this section might be relegated to a later title but is included here in order that the attorney who is called upon to investigate the subject of default may be saved as far as possible the annoyance of cross-reference and delay. See further the titles "Jurisdiction;" "Process;" "Service of Process and Papers."

24. **U. S.**—*Earle v. McVeigh*, 91 U. S. 503, 23 L. ed. 398. **Minn.**—*Heffner v. Gunz*, 29 Minn. 108, 12 N. W. 342. **N. C.**—*Flowers v. King*, 145 N. C. 234, 58 S. E. 1074, 122 Am. St. Rep. 444. **Wis.**—*Pollard v. Wegener*, 13 Wis. 569.

on motion.²⁵ It affords no protection to a person proceeding pursuant thereto. It may be disregarded in other proceedings.²⁶

The right of a man to "his day in court" was most carefully guarded at common law.²⁷ To obtain jurisdiction to render a personal judgment in damages, there must be a personal service of the process upon the person within the jurisdiction.²⁸ The party served must be conscious of the act.²⁹ If there be a material amendment of the complaint after service of the process there must be new service.³⁰ Where there has been service of the process upon the person, the judgment will generally receive full recognition as determining the question in controversy in courts of other countries under the common law.³¹ And it is entitled to such recognition by the courts of other states by reason of the full faith and credit provision of the constitution.³²

In many states provision is made for service on corporations organized under the law of other states doing business within the state by service on an agent of such corporation, in management of its affairs within the state. But if such concern turns out to be a partnership

25. *Flowers v. King*, 145 N. C. 234, 58 S. E. 1074, 122 Am. St. Rep. 444.

26. *Flowers v. King*, 145 N. C. 234, 58 S. E. 1074, 122 Am. St. Rep. 444.

"That the return is a part of the record and must be noticed even by a purchaser, in connection with the judgment reciting service, is well established by respectable authority." *Hobby v. Bunch*, 83 Ga. 1, 13, 10 S. E. 113, 20 Am. St. Rep. 301.

27. *Hovey v. Elliott*, 167 U. S. 403, 416, 17 Sup. Ct. 841, 42 L. ed. 215.

"The Roman law requiring a citation at the least, and our common law never suffering any fact (either civil or criminal) to be tried until it had previously compelled an appearance by the party concerned." 4 Bl. Com. *283.

"Due notice to the defendant is essential to the jurisdiction of all courts, as sufficiently appears from the well-known legal maxim, that no one shall be condemned in his person or property without notice, and an opportunity to be heard in his defense." *Earle v. McVeigh*, 91 U. S. 503, 23 L. ed. 398; *Nations v. Johnson*, 24 How. (U. S.) 195, 16 L. ed. 628.

28. *National Exch. Bank v. Wiley*, 195 U. S. 257, 269, 25 Sup. Ct. 70, 49 L. ed. 184.

A personal judgment against a non-resident on substituted service is repugnant to the due process clause of

the constitution and void. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565.

Such a judgment was not permitted to be satisfied by execution against land of the defendant located in the state where rendered. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565.

Personal judgment by default cannot be entered on substituted service on non-resident defendant. *Elliott v. McCormick*, 144 Mass. 10, 10 N. E. 705, citing *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565, as modifying effect of statutes and overruling former decisions of Massachusetts supreme court.

29. Service on a sick man by laying the copy on his body when he was not conscious of the act is invalid. *People v. Judge*, 38 Mich. 310.

30. *Stewart v. Anderson*, 70 Tex. 588, 8 S. W. 295.

31. A default judgment by personal service on an American temporarily in England on eve of his departure is conclusive on the merits. *Fisher, Brown & Co. v. Fielding*, 67 Conn. 91, 34 Atl. 714, 52 Am. St. Rep. 270, 32 L. R. A. 236.

32. Judgments of other states are not domestic judgments for all purposes. The constitution gives them a general validity, and credit as evidence. *National Exch. Bank v. Wiley*, 195 U. S. 257, 269, 25 Sup. Ct. 70, 49 L. ed. 184.

such service does not confer jurisdiction to render a personal judgment against the partnership or the partners.³³

There is in many states a constructive personal service provided by statutes, by leaving the process at the domicile of the defendant with some member of his family of proper age and discretion, according to the terms of the statute. This is in general given the effect of personal service as to citizens of such state,³⁴ but it is not so for all purposes.³⁵

In New York before substituted personal service can be made at the domicile of the defendant, an order of the court must be obtained therefor, after showing diligence in attempting personal service.³⁶ Such service must be at the present place of abode within the state.³⁷ The fact of long absence, where there is an intention to return, does not invalidate the service.³⁸

Where a person has besides his regular residence one in which he habitually lives part of the year, in another state, process may be served by leaving at the last named residence, while he is residing there.³⁹

In England, where such substituted personal service has been introduced, a most elaborate series of proceedings to obtain it is provided by the rules of procedure in the high court.⁴⁰

33. *In re Grossmayer*, 177 U. S. 48, 20 Sup. Ct. 535, 44 L. ed. 665.

A person designated by as the proper officer of a corporation for service of process, is not thereby authorized to waive service. *Hebel v. Amazon Ins. Co.*, 33 Mich. 400.

34. *Settlemeir v. Sullivan*, 97 U. S. 444, 24 L. ed. 1110.

Where service was made on garnishee by leaving process at his usual place of residence, it was no defense that his agent paid over money with knowledge of such service before the garnishee returned home or had any knowledge of the service. *Conley v. Chilcote*, 25 Ohio St. 320.

35. Personal service for the purpose of entry by clerk does not include leaving process at the house. *Wis. St.*, §2891; *Moyer v. Cook*, 12 Wis. 335.

36. New York Code Civ. Proc. §§436, 437.

37. *Earle v. McVeigh*, 91 U. S. 503, 23 L. ed. 398.

"The usual or last place of residence" means the "actual residence of the defendant, in this state, at the time of service." *Pigg v. Pigg*, 43 Ind. 117; *Sturgis v. Fay*, 16 Ind. 429; *Madison County Bank v. Suman*, 79 Mo. 527.

"It is clear that the statute meant

his usual place of abode *eo instanti* . . . one of present abiding." *Capehart v. Cunningham*, 12 W. Va. 750.

Service on the wife at the domicile of her husband is sufficient. *Oglesby v. Sillom*, 9 Fed. 860.

It is not sufficient to leave a process at the domicile of the family, where the defendant has established another domicile for himself. *Schlawig v. DePeyster*, 83 Iowa 323, 49 N. W. 843, 32 Am. St. Rep. 308, 13 L. R. A. 785; *Amsbaugh v. Exchange Bank*, 33 Kan. 100, 5 Pac. 384. It does not mean last place of residence. *Earle v. McVeigh*, 91 U. S. 503, 23 L. ed. 394.

38. Where the copy was left with a member of the family, the fact that the defendant was absent for a long period of time in a distant state, without intention of changing his residence, did not invalidate the service. *Du Val v. Johnson*, 39 Ark. 182, 193.

39. *Harrison v. Farrington*, 35 N. J. Eq. 4.

Such service is not sufficient where the party is temporarily in the state. *Honeycutt v. Nyquist, Petersen & Co.*, 12 Wyo. 183, 74 Pac. 90, 109 Am. St. Rep. 975.

40. (1.) Three calls are made, (2.) at residence, unless the action related

Conformity to Statute. — Statutes allowing substituted personal service must be strictly pursued.⁴¹ The copy of the process must be left at the residence, not on the premises,⁴² with a person designated by the statute,⁴³ of the required age and understanding,⁴⁴ with such explanation of the nature of the process as the law requires.⁴⁵

b. *Appearance.* — A general appearance by a person *sui juris* confers jurisdiction, and cures defects in process, or in the service thereof.⁴⁶

to the business, (3.) on week days at reasonable hours; (4.) on separate days, (5.) stating purpose each time. (6.) The second and third calls are on appointment; (7.) made at a previous call or by letter; (8.) at an interval that will give the defendant a reasonable opportunity of keeping it. (9.) At each call inquiry must be made as to where defendant is likely to be found or when he will return; (10.) at the second and third call inquiry must be made whether defendant has received the copy. (11.) The affidavit should state the result of inquiring. (12.) On the first or second call a copy of process is left or sent in a letter making an appointment. (13.) The affidavit should state if the defendant is in jurisdiction, or if believed to be. (14.) It is not necessary, if an ordinary resident, to affirmatively show that he is in jurisdiction. (15.) The above requirements are a guide in ordinary proceedings. (16.) The ordinary mode of substituted service is by postpaid letter. Court rules.

41. "The substituted service in actions purely *in personam* was a departure from the rule of the common law, and the authority for it, if it could be allowed at all, must have been strictly followed." **U. S.**—*Settlemier v. Sullivan*, 97 U. S. 444, 24 L. ed. 1110. **Ill.**—*Wells v. Stumph*, 88 Ill. 56; *Bayland v. Bayland*, 18 Ill. 551. **Mo.**—*Madison County Bank v. Suman*, 79 Mo. 527; *Allen v. Singer Mfg. Co.*, 72 Mo. 326. **Eng.**—*Goggs v. Huntingtower*, 12 Mees. & W. 503.

"Statutes which dispense with the actual personal service of process and in its place provide that which is less certain and satisfactory, must be strictly pursued." *Pollard v. Wegener*, 13 Wis. 569.

42. "A distance of one hundred and twenty-five feet and in a corner of the yard is not a compliance with this re-

quirement." *Kibbe v. Benson*, 17 Wall. (U. S.) 624, 629, 21 L. ed. 741.

43. Where the statute provides that a copy of the process be left with a person "then resident therein," a judgment is void where the service is on a clerk of the defendant at the house, but who is not a "resident therein." *Heffner v. Gunz*, 29 Minn. 168, 12 N. W. 342.

A widowed mother residing with her son is a member of his family within the terms of the statute. *Ellington v. Moore*, 17 Mo. 424.

44. *Pollard v. Wegener*, 13 Wis. 569.

45. *Pollard v. Wegener*, 13 Wis. 569.

46. *Creighton v. Kerr*, 20 Wall. (U. S.) 8, 22 L. ed. 309. See the title "Appearances."

An appearance other than to contest jurisdiction is general. **Kan.**—*Burnham v. Lewis*, 65 Kan. 481, 70 Pac. 337. **Mich.**—*Audretsch v. Hurst*, 126 Mich. 301, 85 N. W. 746. **Neb.**—*Newlove v. Woodward*, 9 Neb. 502, 4 N. W. 237. **Wyo.**—*Honeycutt v. Nyquist, Peterson & Co.*, 12 Wyo. 183, 74 Pac. 90, 109 Am. St. Rep. 975.

Motion to set aside default on ground of excusable neglect waives defects of service. *Pfister v. Smith*, 95 Wis. 51, 69 N. W. 984.

A general appearance to set aside a void judgment on substituted service confers jurisdiction from the date of such appearance, but does not relate back to validate such judgment. *Simensen v. Simensen*, 13 N. D. 305, 100 N. W. 708; *Bennett v. Supreme Tent K. of M.*, 40 Wash. 431, 82 Pac. 744, 2 L. R. A. (N. S.) 389; *Woodham v. Anderson*, 32 Wash. 500, 73 Pac. 536.

Pleading in abatement confers jurisdiction after amendment of complaint in consequence of the plea being sustained. *Randolph v. Barrett*, 16 Pet. (U. S.) 133, 10 L. ed. 914.

A withdrawal of appearance leaves the court with jurisdiction of the party to enter a personal judgment,⁴⁷ especially where the withdrawal is "without prejudice to the plaintiff."⁴⁸

The party should expressly state in the moving papers that the appearance is special and should carefully confine himself to the purpose of his motion. Any participation in questions not jurisdictional will confer personal jurisdiction,⁴⁹ but not after judgment unless the judgment is vacated.⁵⁰

An infant or other person under disability cannot confer jurisdiction by appearance. Process should be served upon such defendant.⁵¹

A guardian *ad litem* cannot confer personal jurisdiction of non-resident infant by appearing for him.⁵²

2. **In Rem.**—a. *Arrest of Thing.*—In admiralty, jurisdiction of the *res* is obtained by "arrest." The property must be seized under process of the court.⁵³

b. *No Jurisdiction by Appearance of Owner.*—Appearance by the owner is not sufficient to confer jurisdiction *in rem*.⁵⁴

c. *No Jurisdiction of Owner by Appearance In Rem.*—The *res* is a distinct entity from the owner; and appearance by the owner

Jurisdiction is conferred by appeal. *Taylor v. Sledge*, 110 Tenn. 263, 75 S. W. 1074. *Contra*, *Rockman v. Ackerman*, 109 Wis. 639, 643, 85 N. W. 491; *Zimmerman v. Gerdes*, 106 Wis. 608, 82 N. W. 532.

47. *Rio Grande Irrig. & C. Co. v. Gildersleeve*, 174 U. S. 603, 19 Sup. Ct. 761, 43 L. ed. 1103; *Creighton v. Kerr*, 20 Wall. (U. S.) 8, 22 L. ed. 309.

48. *Creighton v. Kerr*, 20 Wall. (U. S.) 8, 22 L. ed. 309.

49. Moving papers should state that the appearance is special. *Woodham v. Anderson*, 120 Wash. 500, 73 Pac. 536.

In attacking a judgment by default directly on ground of want of jurisdiction of the person, the motion must be on that single ground, otherwise the appearance will be general and confer jurisdiction. **U. S.**—*Sugg v. Thornton*, 132 U. S. 524, 10 Sup. Ct. 163, 33 L. ed. 447. **Kan.**—*Cohen v. Trowbridge*, 6 Kan. 385. **Ohio.**—*Fee v. Big Sand Iron Co.*, 13 Ohio St. 563. **Wis.**—*Alderson v. White*, 32 Wis. 308, 309; *Grantier v. Rosecrance*, 27 Wis. 489, 491.

50. "The appearance of the defendant, by filing a petition to vacate it, does not, in the absence of any action upon his petition, give to the judgment more force, or make it different from what it was before. If it was *in rem* only, it so remained after the petition

to set it aside was dismissed." *Mayfield v. Bennett*, 48 Iowa 194. See also *Simensen v. Simensen*, 13 N. D. 305, 100 N. W. 708; *Bennett v. Supreme Tent K. of M.*, 40 Wash. 431, 82 Pac. 744, 2 L. R. A. (N. S.) 389; *Woodham v. Anderson*, 32 Wash. 500, 73 Pac. 536.

51. *Bonnell v. Holt*, 89 Ill. 71.

A judgment entered on such appearance is voidable, not void. *McAneer v. Epperson*, 54 Tex. 220, 38 Am. Rep. 625.

Where proceedings are instituted on behalf of a minor by her regularly appointed guardian, no process is necessary to bring her into court. *Mortgage Trust Co. v. Redd*, 38 Colo. 458, 88 Pac. 473, 120 Am. St. Rep. 132, 8 L. R. A. (N. S.) 1215.

52. *McAneer v. Epperson*, 54 Tex. 220, 38 Am. Rep. 625.

53. Adm. Rule 9; *Miller v. United States*, 11 Wall. (U. S.) 268, 20 L. ed. 135; *Cooper v. Reynolds*, 10 Wall. (U. S.) 308, 317, 19 L. ed. 931. See the title "Admiralty."

In proceedings *in rem* notice to the owner is not essential to jurisdiction. *Cooper v. Reynolds*, 10 Wall. (U. S.) 308, 19 L. ed. 931; *The Davis*, 10 Wall. (U. S.) 15, 19 L. ed. 875; *O'Brien v. Stephens*, 11 Gratt. (Va.) 610.

54. *The Brig Ann*, 9 Cranch (U. S.) 289, 3 L. ed. 735.

to defend does not confer jurisdiction on the court to enter personal judgment against him.⁵⁵

There are proceedings in admiralty courts, personal and *quasi in rem*, that must not be confounded in this respect with proceedings *in rem*.⁵⁶

3. Quasi In Rem. — a. *Attachment.* — Proceedings *quasi in rem* are founded on the power of states to control property, within their jurisdiction.⁵⁷

In case of real property, the location of the land within the state and the regular proceedings prescribed by law to subject it to the control of the court and to give notice are sufficient to bind non-resident owners as to the property, but no further.⁵⁸

In the case of personal property, its actual seizure under process of law regularly issued and notice to the owner strictly in the manner required by law is generally necessary in attachment,⁵⁹ but in some states it has been held that its *description* in the proceeding and actual location within the state are a sufficient substitute for seizure, except in certain instances.⁶⁰

b. *Garnishment.* — (I.) *Res in Control of Garnishee Within Jurisdiction.* It is necessary to jurisdiction in garnishment that there should be property *within* the state where proceedings are taken actually in control of the garnishee.⁶¹

(II.) *Debt Due Principal Defendant.* — It is now settled that a debt due a non-resident defendant is subject to garnishment, on substituted service on the owner, and that the courts of the state where the owner resides are bound to give full faith and credit to the judgment in an action by the defendant against the garnishee.⁶² A judgment debt is an exception to the rule; it is not liable to garnishment in another state.⁶³

55. Adm. Rules 12-19; *The Corsair*, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. ed. 727.

"*In rem* is a technical term, taken from the Roman law where it distinguished an action against the thing from one against the person." Anderson's Law Dict. "Res."

56. Adm. Rules 2-7, 12-19, 37.

57. In *quasi in rem* proceedings property in a state is subject to its laws. *Green v. Van Buskirk*, 7 Wall. (U. S.) 139, 19 L. ed. 109. See the title "*Attachment*."

58. *Fitch v. Huntington*, 125 Wis. 204, 102 N. W. 1066.

59. In proceeding *quasi in rem* on substituted service, if the property is not attached or otherwise brought within the jurisdiction of the court, it cannot be subjected to the payment of a claim against a non-resident, notwithstanding it is within the state. *Pen-*

noyer v. Neff, 95 U. S. 714, 720, 24 L. ed. 565.

60. It was held in Wisconsin that in proceedings on substituted service, property "described" in the proceedings and actually within the state supports the proceedings and is bound thereby if not sold to an innocent purchaser or removed from the state before execution. *Disconto Gesellschaft v. Terlinden*, 127 Wis. 651, 106 N. W. 821, 15 L. R. A. (N. S.) 1045, 1052.

61. Where no attachment has been made a *res* in control of the garnishee is absolutely essential to the jurisdiction. *State Bank of Chicago v. Thweatt*, 111 Ill. App. 599. See the title "*Garnishment*."

62. *King v. Cross*, 175 U. S. 396, 20 Sup. Ct. 131, 44 L. ed. 211; *Chicago, R. I., etc. R. Co. v. Sturm*, 174 U. S. 710, 17 Sup. Ct. 797, 43 L. ed. 1144.

63. *Wabash R. Co. v. Tourville*, 179

c. *Substituted Service on Owner*.—In order that there be jurisdiction to subject the property to the satisfaction of the claim against the owner in proceedings *quasi in rem*, there must, in general, be notice to such owner strictly in the manner required by law.⁶⁴ There have been contrary rulings, placing *quasi in rem* proceedings on the same basis as those *in rem*, where notice is not necessary, but the general rule is now as stated above.⁶⁵

By statute in the several states provision is generally made for notice by publication, and, if the address of the defendant is known or can be ascertained, for mailing him a copy of the summons and complaint.⁶⁶ As an alternative for publication and mailing, personal service on the defendant beyond the jurisdiction is generally provided, but this in effect is strictly substituted service.⁶⁷

In general, proceedings for publication before attachment of property are void.⁶⁸

In case of a non-resident infant defendant, the publication and other proceedings to give notice must be complete before the court

U. S. 322, 21 Sup. Ct. 113, 45 L. ed. 210, 214. This case was like *Chicago, R. I. etc. R. Co. v. Sturm*, 174 U. S. 710, 17 Sup. Ct. 797, 43 L. ed. 1144, except that it was on a judgment debt.

64. See cases cited in III, C, 2.

The affidavit for publication should state the facts on which the right to publication rests. It is not enough to merely recite the language of the statute. *Ricketson v. Richardson*, 26 Cal. 149.

Strict compliance with the statutes is necessary. **Ark.**—*Baker v. York*, 65 Ark. 142, 45 S. W. 57. **Cal.**—*People v. Applegarth*, 64 Cal. 229, 30 Pac. 805. **Colo.**—*Frybarger v. McMillen*, 15 Colo. 349, 25 Pac. 713. **Fla.**—*Shrader v. Shrader*, 36 Fla. 502, 18 So. 672. **Idaho.**—*Strode v. Strode*, 6 Idaho 67, 52 Pac. 161. **Ill.**—*McChesney v. People*, 145 Ill. 614, 34 N. E. 431. **Ind.**—*Vizzard v. Taylor*, 97 Ind. 90. **Ia.**—*Guise v. Early*, 72 Iowa 283, 33 N. W. 683. **Ky.**—*Carr's Admr. v. Carr*, 92 Ky. 552, 18 S. W. 453, 36 Am. St. Rep. 614. **La.**—*Botts v. New Orleans*, 9 La. Ann. 233. **Md.**—*Hardester v. Sharretts*, 84 Md. 146, 34 Atl. 1122. **Mich.**—*Adams v. Hosmer*, 98 Mich. 51, 56 N. W. 1051. **Minn.**—*Corson v. Shoemaker*, 55 Minn. 386, 57 N. W. 134. **Miss.**—*Moore v. Williams*, 44 Miss. 61. **Mo.**—*Harness v. Cravens*, 126 Mo. 233, 28 S. W. 971. **Neb.**—*Frazier v. Miles*, 10 Neb. 109, 4 N. W. 930; *Atkins v. Atkins*, 9 Neb. 191, 2 N. W. 466. **Nev.**—*Coffin v. Bell*, 22 Nev. 169, 37 Pac. 240, 58 Am. St.

Rep. 738. **N. C.**—*Bacon v. Johnson*, 110 N. C. 114, 14 S. E. 508. **Ore.**—*Northcut v. Lemery*, 8 Ore. 316. **Tenn.**—*Bleidorn v. Pilot Mountain Coal, etc. Co.*, 89 Tenn. 166, 15 S. W. 737. **Tex.**—*Byrnes v. Sampson*, 74 Tex. 79, 11 S. W. 1073. **Wash.**—*Garrison v. Cheeney*, 1 Wash. Ter. 489. **Wis.**—*Beaupre v. Brigham*, 79 Wis. 436, 48 N. W. 596.

65. In *Cooper v. Reynolds*, 10 Wall. (U. S.) 308, 19 L. ed. 931, where the question was before the court on failure to give proper notice, it was held that the notice by publication required by law was not necessary to the validity of *quasi in rem* proceedings, that seizure, as *in rem*, gave the court jurisdiction.

66. See cases cited below and in III, C, 2, and court rules in many states.

67. See cases cited below and in III, C, 2.

68. *Breon v. Miller Lumb. Co.*, 83 S. C. 221, 65 S. E. 214, 137 Am. St. Rep. 803, 24 L. R. A. (N. S.) 276. See the title "*Attachment*."

In some states it is sufficient that the defendant has property within the state, as where attachment proceedings were permitted on property described in moving papers. **Kan.**—*Zimmerman v. Barnes*, 56 Kan. 419, 43 Pac. 764. **N. C.**—*Spiers v. Halstead*, 71 N. C. 209. **Ore.**—*Colburn v. Barrett*, 21 Ore. 27, 26 Pac. 1008. **Wis.**—*Manning v. Heady*, 64 Wis. 630, 25 N. W. 1.

can appoint a guardian *ad litem* to represent the infant in proceedings *quasi in rem*.⁶⁹

Substituted service is resorted to because personal service cannot be made within the jurisdiction. The fact that it cannot be so made should appear affirmatively in the record.⁷⁰

In service by publication the filing of an affidavit should precede the order for publication.⁷¹ Mailing previous to the order of publication is insufficient.⁷² The order of publication must follow the affidavit within a reasonable time.⁷³ The order should direct publication in a newspaper named,⁷⁴ should fix the time of publication,⁷⁵ which should be that required by law,⁷⁶ and should direct the mailing of copies⁷⁷ addressed to the defendant at the proper address specified.⁷⁸ If the address of the defendant cannot be ascertained, there should be a finding in the order to that effect.⁷⁹

In the alternative the order may provide for the personal service of the summons without the state.⁸⁰

If the petition be amended setting up a new cause of action there must be new service.⁸¹

d. *Appearance*.—An appearance in a proceeding *quasi in rem* converts it into one *in personam*.⁸²

69. *Ingersoll v. Ingersoll*, 42 Miss. 155.

70. The affidavit for publication should show that the defendant is a non-resident, if that is the ground of the substituted service, and cannot with due diligence be found within the state. **N. Y.**—*Kennedy v. Lamb*, 182 N. Y. 228, 74 N. E. 834, 108 Am. St. Rep. 800. **N. C.**—*Luttrell v. Martin*, 112 N. C. 593, 17 S. E. 573. **Wis.**—*Gallun v. Weil*, 116 Wis. 236, 243, 92 N. W. 1091.

It is not enough to show merely that he is a non-resident. *Kennedy v. Lamb*, 182 N. Y. 228, 74 N. E. 834, 108 Am. St. Rep. 800.

The affidavit for publication should show the defendant's place of residence if known (**Cal.**—*Ligare v. California S. R. Co.*, 76 Cal. 610, 18 Pac. 777. **Ill.**—*Schafer v. Kienzel*, 123 Ill. 430, 15 N. E. 164. **Miss.**—*Winston v. McLendon*, 43 Miss. 254), or if unknown, that with due diligence the plaintiff is unable to discover it (**Ark.**—*Turnage v. Fisk*, 22 Ark. 280. **Cal.**—*Brady v. Seaman*, 30 Cal. 610. **Ill.**—*Malaer v. Damron*, 31 Ill. App. 572. **Miss.**—*Foster v. Simmons*, 40 Miss. 585).

71. *Bryan v. Univ. Pub. Co.*, 112 N. Y. 382, 19 N. E. 825, 2 L. R. A. 638; *Rockman v. Ackerman*, 109 Wis. 639, 85 N. W. 491.

72. *Rockman v. Ackerman*, 109 Wis. 639, 85 N. W. 491.

73. **Cal.**—*Cohn v. Kember*, 47 Cal. 144. **Ill.**—*Foster v. Illinski*, 3 Ill. App. 345. **Wis.**—*Zahorka v. Geith*, 129 Wis. 498, 109 N. W. 552; *Rockman v. Ackerman*, 109 Wis. 639, 85 N. W. 491.

A delay of fifteen days between the making of the affidavit and the order is too long. *Cohn v. Kember*, 47 Cal. 144. Eleven days too long. *Foster v. Illinski*, 3 Ill. App. 345. Fourteen days too long. *Roosevelt v. Land & R. Imp. Co.*, 108 Wis. 653, 84 N. W. 157.

74. *Otis v. Epperson*, 88 Mo. 131.

75. *McCrea v. Haraszthy*, 51 Cal. 146; *Roosevelt v. Ulmer*, 98 Wis. 356, 74 N. W. 124.

76. *Park v. Higbee*, 6 Utah 414, 24 Pac. 524.

77. **Miss.**—*Ingersoll v. Ingersoll*, 42 Miss. 155. **Utah.**—*Park v. Higbee*, 6 Utah 414, 24 Pac. 524. **Wis.**—*Beaupre v. Brigham*, 79 Wis. 436, 48 N. W. 596.

78. *Ingersoll v. Ingersoll*, 42 Miss. 155; *Brooke v. Saylor*, 44 Hun (N. Y.) 554.

79. *O'Malley v. Fricke*, 104 Wis. 280, 80 N. W. 436.

80. *In re Field*, 131 N. Y. 184, 30 N. E. 48.

81. *Stewart v. Anderson*, 70 Tex. 588, 8 S. W. 295.

82. *Cooper v. Reynolds*, 10 Wall. (U. S.) 308, 19 L. ed. 931, 932. See the title "*Appearance*."

4. **Divorce.** — a. *Jurisdiction of the Rem.* — In divorce proceedings the jurisdiction of the status of the parties for full jurisdictional purposes is in the state in which the marriage domicile is located. Here the courts have power to decree a divorce on substituted service that is entitled to full faith and credit in every state.⁸³ The husband may establish the marriage domicile and the wife must abide where it is so established,⁸⁴ but the husband abandoning the wife leaves the marriage domicile with the deserted wife.⁸⁵

b. *Jurisdiction of the Status of One Party.* — A husband or wife can establish a separate domicile in another state than that of the marriage domicile.⁸⁶

The courts of a state where one party to a divorce proceeding is domiciled, can, by reason of their jurisdiction to determine the status of persons residing within the state, grant a divorce on substituted service on the other party.⁸⁷

Courts of the state containing the domicile of the other party to such action, can, by reason of their power to determine such party's personal status, give full faith and credit to such decree, or they can entirely disregard it in collateral proceedings.⁸⁸

A decree of divorce granted on substituted service in a state not containing the marriage domicile, nor that of either party, is void everywhere.⁸⁹

83. *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. ed. 867, 5 Am. & Eng. Anno. Cas. 1; *Atherton v. Atherton*, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. ed. 794. See the title "Divorce."

84. *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. ed. 867; *Atherton v. Atherton*, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. ed. 794.

85. *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. ed. 867; *Barber v. Barber*, 21 How. (U. S.) 582, 16 L. ed. 226.

86. *Haddock v. Haddock*, *supra*.

87. *Haddock v. Haddock*, *supra*.

88. *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. ed. 867. In this case the dissenting opinion summed up the holdings of the various courts in such cases. "The law of this country then may be summarized as follows: In Maine, Massachusetts, Rhode Island, Kentucky, California, Tennessee, Ohio, Missouri, Kansas, Louisiana, Wisconsin, Alabama, Iowa, Indiana, Maryland, Minnesota, Illinois and New Jersey, the validity of a divorce obtained in another state by a party there domiciled, in a proceeding where constructive service upon the defendant only is

obtained, is fully recognized. In Ohio, Iowa and Minnesota, and perhaps also Louisiana and Alabama, her right to alimony and to dower is preserved.

. . . The only states in which it is held that a party domiciled in another state may not obtain a divorce by constructive service are New York, Pennsylvania, North and South Carolina."

The courts of New York will not recognize a divorce in another state against one of the citizens of that state, residing at the marriage domicile, on substituted service, and children of a subsequent marriage are illegitimate as to property in New York. *Olmsted v. Olmsted*, 190 N. Y. 458, 83 N. E. 569, 123 Am. St. Rep. 585.

89. *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. ed. 867, 5 Am. & Eng. Anno. Cas. 1.

A divorce obtained by constructive service in a state where neither party is domiciled is not entitled to faith and credit. *Haddock v. Haddock*, *supra*, citing *Bell v. Bell*, 181 U. S. 175, 21 Sup. Ct. 551, 45 L. ed. 804; *Streitwolf v. Streitwolf*, 181 U. S. 179, 21 Sup. Ct. 553, 45 L. ed. 807.

c. *Jurisdiction of the Defendant.*—*Alimony.*—On the personal side of a divorce proceeding the rules in actions *in personam* apply. A decree for alimony, suit money, or costs, is strictly personal in its effect and cannot be made on substituted service.⁹⁰

B. GENERAL EFFECT OF DEFAULT ON SUBSEQUENT PROCEEDINGS. The general effect of default on subsequent proceedings may be summed up as follows:

1. **Actual Service.**—a. *Appearance.*—Where the defendant appears, default admits all the material allegations.⁹¹ The party in default after appearance is entitled to notice of all proceedings of which notice is required under the law or the rules of court.⁹² He has a right to contest by cross-examination and the introduction of evidence in mitigation, the amount of unliquidated damages claimed.⁹³

b. *Non-Appearance.*—After personal service and non-appearance of the defendant, *ex parte* proceedings may be taken.⁹⁴ All material allegations are as fully admitted as on appearance.⁹⁵

Unliquidated damages must be proved. The seeming exceptions under some statutes, where the complaint is verified or sworn statement filed, refer to manner of proof of damages.⁹⁶

c. *Actions In Rem.*—*In rem* on default the allegations of the libel are taken *pro confesso* unless the court requires proof.⁹⁷ Unliquidated damages must be proved.⁹⁸

d. *Answer by Part of the Defendants.*—Where part of the defendants have answered, those in default abide the result, in case of joint liability. If the answering defendants are successful, the defendants in default receive full benefit of the verdict.⁹⁹ A defendant in default is deprived of any defense special to himself.¹

2. **Substituted Service, Quasi In Rem.**—Proceedings *quasi in rem* are necessarily *ex parte*.² In general there should be full proof of

90. Cal.—*Baker v. Baker*, 136 Cal. 302, 68 Pac. 971. Ill.—*Proctor v. Proctor*, 215 Ill. 275, 74 N. E. 145, 106 Am. St. Rep. 168, 69 L. R. A. 673. Ia. *Rea v. Rea*, 123 Iowa 241, 98 N. W. 787. Vt.—*Smith v. Smith*, 74 Vt. 20, 51 Atl. 1060, 93 Am. St. Rep. 882.

91. *Thomson v. Wooster*, 114 U. S. 104, 5 Sup. Ct. 788, 29 L. ed. 105; *O'Hara v. McConnell*, 93 U. S. 150, 23 L. ed. 840. See II, F, 1, a, *infra*.

92. *Lindauer v. Clifford*, 44 Wis. 597. See III, E, *infra*.

93. *Bartelt v. Braunsdorf*, 57 Wis. 1, 14 N. W. 869. See III, G, 1, a, *infra*.

94. *Sache v. Wallace*, 101 Minn. 169, 112 N. W. 386, 118 Am. St. Rep. 612, 11 L. R. A. (N. S.) 803.

95. *Stradley v. Bath Portland Cement Co.*, 228 Pa. 108, 77 Atl. 242, 139 Am. St. Rep. 993.

96. Unliquidated damages must be

proved on default. Ala.—*Ledbetter & Co. v. Vinton*, 108 Ala. 644, 18 So. 692. Miss.—*Boykin v. State*, 50 Miss. 375. Wis.—*Roberts v. White*, 3 Wis. 414.

Under the code in actions on contract for the payment of money only where the complaint is verified, there is an exception. *Schobacher v. Germantown, etc. Ins. Co.*, 59 Wis. 86, 17 N. W. 969.

97. Adm. Rule 29; *Rostron v. The Water Witch*, 44 Fed. 95.

98. *The Lopez*, 43 Fed. 95.

99. *Frow v. De La Vega*, 15 Wall. (U. S.) 552, 21 L. ed. 60; *Kingsland v. Koeppel*, 137 Ill. 344, 28 N. E. 48, 13 L. R. A. 649; *Pease v. Appleton*, 75 Ill. App. 346.

1. *Swanzy v. Parker*, 50 Pa. 441, 88 Am. Dec. 549.

2. Appearance converts actions *quasi in rem* into actions *in personam*. *Cooper*

facts. The defendant is not personally in court, or constructively so, for the purpose of admission. The manner of proof is generally provided by statutes.³ All damages should be proved.⁴

3. Non-Appearance at Trial.—In case of non-appearance at trial, the trial continues *ex parte*.⁵ The facts being at issue must be established by proof, and all damages, not liquidated and thus involved in the issues, must be also proved.⁶

There are a few cases that seem to sustain proceedings as of default on non-appearance at trial.⁷ Where the answer consists entirely of affirmative matter, default judgment may be taken on non-appearance of the defendant at the trial.⁸

C. PROOF OF SERVICE OF PROCESS.—1. Personal Service.—a. How Made.—On default, the return by the officer of the process served or other proof of service becomes an essential part of the record.⁹ It controls recitals in the judgment.¹⁰ This is held by courts

v. Reynolds, 10 Wall. (U. S.) 308, 19 L. ed. 931, 932.

3. See statutes of the several states. See also III, F, 3.

4. See statutes of the several states.

5. *Love v. Hall*, 76 Ind. 326.

6. "The failure of those who had pleaded to appear at the trial did not take out their pleading as the withdrawal of their appearance would. *Carver v. Williams*, 10 Ind. 267; *Sloan v. Wittbank*, 12 Ind. 444; *Cox v. Davis*, 16 Ind. 378; *Woodward v. Wous*, 18 Ind. 296. Those who had pleaded had the right to have the issues joined tried, and the court proceeded, accordingly, to try them." *Love v. Hall*, 76 Ind. 326.

"The defendant was called, and, not appearing, the court, without taking any evidence, ordered judgment for the plaintiff, as prayed for in the complaint, and judgment was so entered. This was error and not a mere irregularity in practice." *Strong v. Comer*, 48 Minn. 66, 50 N. W. 936.

7. "Something more is required by a defendant than the mere filing of an answer. He is presumed to be in court, and ready to see his rights protected, to call the attention of the court to his answer, and demand proof of plaintiff's claim." In this case no application was made to the court below for a new trial. *Lytle v. Custead*, 4 Tex. Civ. App. 490, 23 S. W. 451.

8. "As the plaintiff in error (the defendant) held the affirmative of all the issues, and did not appear to substantiate them, it was perfectly proper to render judgment by default against

him without regarding his pleas." *Schooler v. Asherst*, 1 Litt. (Ky.) 216, 13 Am. Dec. 232.

9. "In this state, service of legal process, when made by the sheriff or deputy sheriff, is evidenced by an official return. Such is the uniform practice, and there is no provision of law for verifying official service by any other means." *Hobby v. Bunch*, 83 Ga. 1, 10 S. E. 113, 20 Am. St. Rep. 301.

An officer to make a due return according to law must state in his return "substantially all of his doings within the scope of proper execution." *Gibson v. Holmes*, 78 Vt. 110, 62 Atl. 11, 4 L. R. A. (N. S.) 451.

Where no proof of service of process exists of record, a judgment by default should be set aside on motion and defendant permitted to answer. *Shanholtzer v. Thompson*, 24 Okla. 193, 103 Pac. 595, 138 Am. St. Rep. 877.

10. "When the judgment recites service and there is a return, the recital is always (in this state) based upon the return and the two are construed together. . . . All this appeared and still appears on the face of the record, that is, on what is termed in some jurisdictions, 'the judgment roll.'" *Hobby v. Bunch*, 83 Ga. 1, 10 S. E. 113, 20 Am. St. Rep. 301.

The return is a part of the record. *Settlemier v. Sullivan*, 97 U. S. 444, 24 L. ed. 1110; *Galpin v. Page*, 18 Wall. (U. S.) 350, 21 L. ed. 959. It must be noticed even by a purchaser. *Hobby v. Bunch*, 83 Ga. 1, 10 S. E. 113, 20

that exclude outside evidence that contradicts the return.¹¹ There are cases holding that where the return is fatally defective, and the judgment recites due service, it will be presumed on collateral attack that other and sufficient proof of service was made.¹²

Proof of personal service of a process should be made by a return by the officer making it, certified to as *such* officer, if within his *jurisdiction*, and should recite time, place and manner of service as required by law.¹³ If the service is on a corporation the return should show the relation of the person served to the corporation.¹⁴ If the proof

Am. St. Rep. 301. It controls recitals. **Colo.**—*Stubbs v. McGillis*, 44 Colo. 138, 96 Pac. 1005, 130 Am. St. Rep. 116, 18 L. R. A. (N. S.) 405. **Ill.**—*Hemmer v. Wolfer*, 124 Ill. 435, 16 N. E. 652; *Botsford v. O'Conner*, 57 Ill. 72. **Ia.** *Mayfield v. Bennett*, 48 Iowa 194. **Mo.** *Cloud v. Inhab. of Pierce City*, 86 Mo. 357. **W. Va.**—*Town of Point Pleasant v. Greenlee & Harden*, 63 W. Va. 207, 60 S. E. 601, 129 Am. St. Rep. 971. **Wis.**—*Pollard v. Wagener*, 13 Wis. 569.

"The judgment contains the following recital: 'Now, at this day, comes on to be heard this cause, and the plaintiff appearing by attorney, and the defendant, though duly served with process of summons more than fifteen days before the first day of this term of court, comes not, but makes default.' . . . It is insisted that the manner of service cannot be shown to contradict the recitals of the judgment. If the entry of the judgment upon the books of the court constituted all the record in the case, the contention would have weight. That is not the case. The return of the sheriff is as much a part of the record as the judgment entry. The recitals of the service, contained in the judgment, cannot import greater verity than the return itself shows." *Laney v. Garbee*, 105 Mo. 355, 16 S. W. 831, 24 Am. St. Rep. 391.

11. Where the record reciting proof of service is *silent* as to the kind of service it cannot be attacked collaterally, but if the service is set out it controls the recitals. *Coan v. Clow*, 83 Ind. 417; *Crown R. E. Co. v. Rogers Com.*, 132 Ky. 790, 117 S. W. 275, 136 Am. St. Rep. 202.

"This case does not hold that the finding itself is absolutely conclusive, but limits the inquiry to an inspection of the whole record, excluding all evi-

dence *dehors* the record to impeach it." *Bannon v. People*, 1 Ill. App. 496. See also *Harris v. Lester*, 80 Ill. 307; *Barnett v. Wolf*, 70 Ill. 76.

12. **Cal.**—*Reily v. Lancaster*, 39 Cal. 354; *Hahn v. Kelly*, 34 Cal. 391. **Ill.** *Bradley v. Drone*, 187 Ill. 175, 58 N. E. 304, 79 Am. St. Rep. 214. **Me.** *Blaisdell v. Pray*, 68 Me. 269.

In the opinion in *Cloud v. Inhab. of Pierce City*, 86 Mo. 357, it is said: "In the cases just cited (*Hahn v. Kelly*, 34 Cal. 391; *Reily v. Lancaster*, 39 Cal. 354) the findings as to service had been couched in the general and ordinary terms courts are accustomed to use. The case of *Hahn v. Kelly*, *supra*, was followed in that of *Blaisdell v. Pray*, 68 Me. 269. It is difficult to see if the doctrine announced in the cases referred to is to prevail, what possible benefit it would be to a party desiring to attack a judgment collaterally to introduce the whole record, showing thereby no service of process or one unwarranted by law, if he is to be met at the very threshold of investigation by a general recital of service, conclusive in its nature, which arrests investigation and cuts off debate." *Cloud v. Inhab. of Pierce City*, 86 Mo. 357.

13. The return should identify the person served as the party to the action. *Meanor v. Goldsmith*, 216 Pa. 489, 65 Atl. 1084, 10 L. R. A. (N. S.) 342.

If on a corporation it should give the name of the officer and his official designation. *Southern Indiana R. Co. v. Indianapolis & L. R. Co.*, 168 Ind. 360, 81 N. E. 65, 13 L. R. A. (N. S.) 197.

14. *Oxford Iron Co. v. Spradley*, 42 Ala. 24; *Talladega Ins. Co. v. McCullough*, 42 Ala. 667.

Relation of person served to corporation must be such that service on

is made by any other person than an officer of the law, within his jurisdiction, all the essential facts must affirmatively appear in the affidavit. It must show that the person serving is such as is authorized by law.¹⁵ If the service is made under a statutory provision for leaving a copy at the residence of the defendant, the return must show a strict compliance and reasons for resorting to such service.¹⁶

b. *When Made*.—Proof of service should be made and filed before any steps are taken on default.¹⁷

2. **Substituted Service**.—a. *Publication*.—Proof of publication should be by affidavit by the person designated by law, and should recite that he is such person and should show the time of publication and should have a copy of the summons or notice attached.¹⁸ Amend-

him is equivalent to service on the corporation, and this must be shown in the record. *Cloud v. Inhabitants of Pierce City*, 86 Mo. 357.

15. *Linott v. Rowland*, 119 Cal. 452, 51 Pac. 687; *Williamson v. Cummings Rock Drill Co.*, 95 Cal. 652, 30 Pac. 762; *Horton v. Gallardo*, 88 Cal. 581, 26 Pac. 375; *German Mut., etc. Ins. Co. v. Decker*, 74 Wis. 556, 43 N. W. 500; *Reed v. Catlin*, 49 Wis. 686, 6 N. W. 326; *Sayles v. Davis*, 20 Wis. 302.

Time and place of service must appear. *People's Mut. Ben. Soc. v. Wayne Cir. Judge*, 97 Mich. 627, 56 N. W. 944; *Allen v. McIntyre*, 56 Minn. 351, 57 N. W. 1060.

The manner of service must be stated. *Mich.*—*People's Mut. Ben. Soc. v. Wayne Cir. Judge*, 97 Mich. 627, 56 N. W. 944. *Minn.*—*Allen v. McIntyre*, 56 Minn. 351, 57 N. W. 1060. *N. Y.* *Spaulding v. Lyon*, 2 Abb. N. C. 203.

16. *U. S.*—*Settlemyer v. Sullivan*, 97 U. S. 444, 24 L. ed. 1110. *Ia.*—*LeGrand v. Fairall*, 86 Iowa 211, 53 N. W. 115. *Wis.*—*Heinemann v. Pier*, 110 Wis. 185, 85 N. W. 646.

Where the law requires that the process be left at "the usual place of abode" it is insufficient if the return is that it was left at the "last place of abode." *Earle v. McVeigh*, 91 U. S. 503, 23 L. ed. 398.

Where the law required that the process be left "with some person of the age of ten years or upwards to whom the nature of such process shall be explained," a failure of the return to show that it was so left and so explained renders the judgment of no effect. *Pollard v. Wegener*, 13 Wis. 569.

It was held in Illinois that a return that the summons was left with the defendant's husband was not equivalent to stating it was left with "a person of the family" because possibly the husband may have been living apart. Judgment was held void. *Wells v. Stumple*, 88 Ill. 56.

Unnecessary qualifying words may make a return bad, as "at his usual place of abode when in Kanawha county" or at defendant's "last usual place of abode in the county of Barton." *Me.*—*Sanborn v. Stickney*, 69 Me. 343. *Mo.*—*Madison County Bank v. Suman*, 79 Mo. 527. *W. Va.*—*Capehart v. Cunningham*, 12 W. Va. 750.

Where the return is of service at the usual place of abode the return should show that the defendant "was not found." *Matteson v. Smith*, 37 Wis. 333.

17. If proof of service is defective, entry of default judgment is not void if the service was in fact made. It is the service not the proof that gives jurisdiction. *Herman v. Santee*, 103 Cal. 519, 37 Pac. 509, 42 Am. St. Rep. 145.

"Benedict would clearly have the right to show (on motion to set aside judgment) that the process had been legally executed, either by having the sheriff's return thereof amended according to the very truth, or by evidence *alunde*." *Capehart v. Cunningham*, 12 W. Va. 750.

18. "By the affidavit of the printer or publisher, or his foreman or principal clerk." *N. Y. Code Civ. Proc.* §444; *Rev. St. (N. Y.)* §32.

Where the "proprietor" is used in the affidavit it is held that it is synonymous with "printer" in the statute.

ment of proof of publication showing facts existing at the time of publication has been permitted.¹⁹

b. *Mailing*.—Proof of mailing should be by affidavit of the person depositing the letter in the post-office. It should show the fact of so depositing, the time, the address, and that it was post paid.²⁰

c. *Personal Service Beyond the Jurisdiction*.—Proof of personal service without the jurisdiction should be made by the affidavit of the person making the service.²¹ Admission of service by defendant in a divorce proceeding outside the jurisdiction is bad practice.²²

D. ENTERING DEFAULT.—1. **Formal Entry**.—On default a formal entry should be made.²³ Default should not be entered against an infant or other person under disability.²⁴ Default may be entered against one defendant where others have answered, but there the matter should rest until final determination of the issues.²⁵

Woodward v. Brown, 119 Cal. 283, 51 Pac. 2, 63 Am. St. Rep. 108.

19. The court sustaining the action of the trial court in permitting an amendment of the proof of publication after judgment said: "Ordinarily all amendments of the proof of publication should be allowed in order to show the real facts in the case." Hackett v. Lathrop, 36 Kan. 661, 14 Pac. 220.

"While the code requires proof by affidavit to be filed within six months after the event sought to be proved, yet such restriction does not prohibit the court, when in furtherance of justice, from permitting additional proof to be filed to establish the actual facts in a case." Britton v. Larson, 22 Neb. 806, 37 N. W. 681.

20. See statutes of several states.

Proof of mailing "must be made by the affidavit of the person who deposited" the paper. N. Y. Code Civ. Proc. §441; Rev. St. (N. Y.) §32.

21. Proof of service without the state should be made by affidavit when made by an officer as well as when made by a private person. Morrell v. Kimball, 4 Abb. Pr. (N. Y.) 356.

22. Ingram v. Ingram, 143 Ala. 129, 42 So. 24, 111 Am. St. Rep. 31. In this case there was a claim that the signature was forged.

A written admission of service of summons without the state is not sufficient to give jurisdiction where no order of publication has been made. Weatherbee v. Weatherbee, 20 Wis. 499.

23. A judgment is not void if entered before formal entry of default.

The purpose of default is to limit the time for answer. Herman v. Santee, 103 Cal. 519, 37 Pac. 509, 42 Am. St. Rep. 145.

The assessment of damages and entry of final judgment after a default is not authorized where no default has been entered. Lehr v. Vandever, 48 Ill. App. 511.

24. It is error to take a decree *pro confesso* against an infant or a married woman who has not appeared. O'Hara v. McConnell, 93 U. S. 150, 23 L. ed. 840.

When an idiot is brought into court "the judges are bound to take care of his interests, and they shall admit the best plea in his behalf that any one present can suggest." 3 Bl. Com. *25.

25. "The true mode of proceeding where a bill makes a joint charge against several defendants, and one of them makes default, is simply to enter a default and a formal decree *pro confesso* against him, and proceed with the cause upon the answers of the other defendants. The defaulting defendant has merely lost his standing in court. He will not be entitled to service of notices in the cause, nor to appear in it in any way. He can adduce no evidence, he cannot be heard at the final hearing. But if the suit should be decided against the complainant on the merits, the bill will be dismissed as to all the defendants alike—the defaulter as well as the others." Frow v. De La Vega, 15 Wall. (U. S.) 552, 21 L. ed. 60.

Default judgment cannot be entered in proceedings to quiet title under the provisions of some statutes; full proof is required.²⁶

2. Affidavit of no Answer.—In jurisdictions where issues are joined by service of the pleading without filing in court, an affidavit of no demurrer or answer is necessary.²⁷

E. NOTICE TO PARTY APPEARING.—**1. Assessment of Damages.** When a party has appeared he is entitled to notice of proceedings which affect his interests, and it is an irregularity to proceed without such notice, where the law requires notice to be given to such party.²⁸ Notice of assessment of unliquidated damages should be given, except in those summary proceedings where it is dispensed with by statute.²⁹

2. Application for Judgment.—A party in default is interested in the nature of the judgment to be entered on the facts admitted and is entitled to notice of application when he has appeared.³⁰

3. Taxation of Costs.—A party in default who has appeared is entitled to notice of the taxation of costs, or to service of a copy of the bill when that is according to the practice of the court.³¹

F. PROOF OF FACTS.—**1. In Personam.**—*a. Default and Pro Confesso.*—In general, no proof of facts is required on default.³² Where allegations are uncertain, proof may be required and a decree *pro confesso* not allowed to stand.³³

Proof of facts is required by statute in some states in mandamus.³⁴

b. Infants, Full Proof and Record.—There must be full proof of

26. California Code Civ. Proc. §751.

27. Proof of no answer must be filed with the clerk before judgment by default. Fla.—Fagan v. Burn, 14 Fla. 53. Mich.—Steers v. Holmes, 79 Mich. 430, 44 N. W. 922. N. Y.—Philips v. Prescott, 9 How. Pr. 430. Wis.—Reed v. Catlin, 49 Wis. 686, 6 N. W. 326.

28. Ashcraft v. Powers, 22 Wash. 440, 61 Pac. 161; Cornell Univ. v. Denney Hotel Co., 15 Wash. 433, 46 Pac. 654; Brockway v. Newton, 49 Wis. 406, 5 N. W. 781.

29. Craig v. McKenney, 72 Ill. 305; Lindauer v. Clifford, 44 Wis. 597.

30. Craig v. McKinney, 72 Ill. 305; Day v. Mertlock, 87 Wis. 577, 58 N. W. 1037 (not where appearance is withdrawn); Egan v. Sengpiel, 46 Wis. 703, 1 N. W. 467; Lindauer v. Clifford, 44 Wis. 597.

No notice of application for judgment is necessary where the complaint is verified and the action is for the payment of money only. Egan v. Sengpiel, 46 Wis. 703, 1 N. W. 467; Lindauer v. Clifford, 44 Wis. 597.

31. Hoffman v. Skinner, 5 Paige Ch.

(N. Y.) 526; Ackerly v. Vilas, 23 Wis. 628.

32. No proof of allegation is necessary on default. Thomason v. Wooster, 114 U. S. 104, 5 Sup. Ct. 788, 29 L. ed. 105.

Under equity rules 18 and 19 a bill may be taken *pro confesso*. O'Hara v. McConnell, 93 U. S. 150, 23 L. ed. 840.

Default in divorce is taken as an admission as to facts concerning alimony. See 4 ENCYCLOPÆDIA OF EVIDENCE, p. 784.

The court may require proof of all facts where a bill is taken *pro confesso* (Stephens v. Bichnell, 27 Ill. 444, 81 Am. Dec. 242; Smith v. Trimble, 27 Ill. 152), or enter a decree without proof (Harmon v. Campbell, 30 Ill. 25; Smith v. Trimble, 27 Ill. 152; Stephens v. Bichnell, 27 Ill. 444, 81 Am. Dec. 242).

33. Ohio Central R. Co. v. Central Tr. Co., 133 U. S. 83, 10 Sup. Ct. 235, 33 L. ed. 561; Thomson v. Wooster, 114 U. S. 104, 5 Sup. Ct. 788, 29 L. ed. 105.

34. California Code Civ. Proc. §1088.

facts made against infant defendants.³⁵ A record of such proof should be made and filed.³⁶ No admission by a guardian can take the place of proof.³⁷ Proof should be made against other persons under disability.³⁸

c. *Cases of Public Concern.*—In original jurisdiction of the United States Supreme Court, proof must be made in actions against states.³⁹ In election cases proof is required in some cases.⁴⁰

d. *Inferior Courts.*—Full proof of facts is frequently required by law in case of default in inferior courts.⁴¹

2. *In Rem.*—a. *No Proof Required.*—In proceedings *in rem* the libel is admitted by failure to answer and the allegations may be taken *pro confesso*.⁴²

b. *Court May Order.*—The court may order proof taken.⁴³

3. *Quasi In Rem.*—Proof is required to be made on default after substituted service by statutory provisions practically the same in many states.⁴⁴

35. No default or bill *pro confesso* can be taken against an infant. **U. S.** Bank of United States *v.* Ritchie, 8 Pet. 128, 8 L. ed. 890. **Ill.**—Chaffin *v.* Kimball's Heirs, 23 Ill. 33; Reavis *v.* Fulden, 18 Ill. 77. **W. Va.**—Laidley *v.* Kline, 8 W. Va. 218.

The court fails to discharge its duty when it does not carefully guard the interests of an infant defendant. Chaffin *v.* Heirs of Kimball, 23 Ill. 33.

In Bank of United States *v.* Ritchie, 8 Pet. (U. S.) 128, 144, 8 L. ed. 890, Marshall, C. J., says: "In all suits brought against infants, whom the law supposes to be incapable of understanding and managing their own affairs, the duty of watching over their interests devolves, in a considerable degree, upon the court."

36. Chaffin *v.* Kimball's Heirs, 23 Ill. 33; Reavis *v.* Fielden, 18 Ill. 77.

No presumption can be indulged that proof was made against an infant defendant unless it is shown by the record. Reavis *v.* Fielden, 18 Ill. 77.

37. **U. S.**—Bank of United States *v.* Ritchie, 8 Pet. 128, 8 L. ed. 890. **Ill.**—Chaffin *v.* Kimball's Heirs, 23 Ill. 33; Reavis *v.* Fielden, 18 Ill. 77. **W. Va.** Laidley *v.* Kline, 8 W. Va. 218.

The allegations must be proved with the same strictness as if the answer had interposed a direct and positive denial of their truth. Reavis *v.* Fielden, 18 Ill. 77.

38. 3 Bl. Com. 25.

39. Massachusetts *v.* Rhode Island, 12 Pet. 755, 9 L. ed. 1272; New Jersey

v. New York, 5 Pet. 284, 8 L. ed. 127. Suggestions in earlier cases were not followed.

40. Atty. Gen. *ex rel.* Bashford *v.* Barstow, 4 Wis. 567, 823.

41. Proof must be such as would entitle the plaintiff to recover against a general denial. Humphrey *v.* Persons, 23 Barb. (N. Y.) 313. It must be legal proof. Squier *v.* Gould, 14 Wend. (N. Y.) 159; Northrup *v.* Jackson, 13 Wend. (N. Y.) 85; Warnick *v.* Crane, 4 Denio (N. Y.) 460. Justices must hear proofs. Hassa *v.* Junget, 15 Wis. 598; Roberts *v.* Warren, 3 Wis. 736.

42. Default in admiralty admits the libel. 1 ENCYCLOPÆDIA OF EVIDENCE 248; Adm. Rule 29; Miller *v.* United States, 11 Wall. (U. S.) 268, 20 L. ed. 135, 142; Cape Fear Towing & Trans. Co. *v.* Pearsall, 90 Fed. 435; Rostron *v.* The Water Witch, 44 Fed. 95.

43. 1 ENCYCLOPÆDIA OF EVIDENCE 248; Adm. Rule 29.

44. "In actions where the service of the summons was by publication . . . the court must thereupon require proof to be made of the demand mentioned in the complaint; and if the defendant be not a resident of the state, must require the plaintiff or his agent to be examined on oath respecting any payments that have been made to the plaintiff," etc. Cal. Code Civ. Proc., §585. See also New York Code of Civ. Proc., §1216.

Default to a certain extent seems to

4. Garnishee's Liability.—In many states in such proceedings against the principal defendant a garnishee by failure to answer admits assets in his hands to the amount of the principal defendant's debt.⁴⁵ In other states the default of the garnishee on *scire facias* is made absolute at the next term.⁴⁶ In other states the garnishee is liable to a separate suit with costs, if he fail to answer.⁴⁷

In England the order may be made absolute on default by garnishee.⁴⁸

G. ASSESSMENT OF DAMAGES.—1. In Personam.—a. *At Common Law.*—In actions at common law, where the defendant failed to plead, if unliquidated damages were claimed, the assessment of them devolved on the judge. A jury when called was to aid the conscience of the court.⁴⁹ A constitutional right to a jury to assess damages does not exist under the usual general clause.⁵⁰

The general rule is that a defendant in default may introduce evidence in mitigation of damages, even to the reduction to mere nominal damages.⁵¹

b. *Under Statutes.*—Under provisions common to many states the court may, on default, assess the damages, order a reference, or order

admit case in substituted service in Wisconsin. Wisconsin St., §2891, §3.

45. Ill.—Whiteside v. Turnstall, 17 Ill. 258; Carter v. Lockwood, 15 Ill. App. 73. Tenn.—McDaniell v. Bell, 3 Hayw. 258. Wis.—Wood v. Wall, 24 Wis. 647.

46. Tillis v. Prestwood, 107 Ala. 618, 18 So. 134; Carter v. Lockwood, 15 Ill. App. 73.

Not necessary to enter conditional judgment where garnishee does not appear. Carter v. Lockwood, 15 Ill. App. 73.

47. Broadway Ins. Co. v. Wolters, 128 Cal. 162, 60 Pac. 766; Marshall v. McCormick, 27 R. I. 357, 62 Atl. 212.

48. Rules.

49. No jury was required in default at common law to assess damages. U. S.—United States v. Clarke, 20 Wall. 92, 22 L. ed. 320. Ore.—Deane v. Willamette Bridge R. Co., 22 Ore. 167, 29 Pac. 440, 15 L. R. A. 614. R. I. Dyson v. Rhode Island Co., 25 R. I. 600, 57 Atl. 771, 65 L. R. A. 236.

"An inquest is sometimes employed to assess damages; but a jury to find facts is never required where there is no traverse of those alleged, and where a defendant has defaulted." United States v. Clarke, 20 Wall. (U. S.) 92, 22 L. ed. 320.

At common law the inquest was to inform the conscience of the court. Deane v. Willamette Bridge Co., 22

Ore. 167, 29 Pac. 440, 15 L. R. A. 614.

In early times the number of such jury varied from two to as high as fifteen, six and eight being frequently the number. Dyson v. Rhode Island Co., 25 R. I. 600, 57 Atl. 771, 65 L. R. A. 236.

Their verdict when rendered was advisory only and subject to modification by the court. Deane v. Willamette Bridge R. Co., 22 Ore. 167, 29 Pac. 440, 15 L. R. A. 614; Dyson v. Rhode Island Co., 25 R. I. 600, 57 Atl. 771, 65 L. R. A. 236.

50. There is no constitutional right, under a general clause declaring that the right to a jury shall remain inviolable, to assessment of damages by jury. Deane v. Willamette Bridge R. Co., 22 Ore. 167, 29 Pac. 440, 15 L. R. A. 614; Dyson v. Rhode Island Co., 25 R. I. 600, 57 Atl. 771, 65 L. R. A. 236.

51. A defendant in default who has appeared may introduce evidence in mitigation of unliquidated damages. Conn.—Nugent v. New Haven St. R. Co., 73 Conn. 139, 46 Atl. 875. Ga. Pittman v. Colbert, 120 Ga. 341, 47 S. E. 948; O'Connor v. Brucker, 117 Ga. 451, 43 S. E. 731. Ind.—Bush v. Van Isdol, 75 Ind. 186; Fish v. Baker, 47 Ind. 534. Mich.—Grinnell v. Bebb, 126 Mich. 157, 85 N. W. 467. N. Y. Foster v. Smith, 10 Wend. 377. Vt.

the damages assessed by a jury.⁵² It is likewise provided that the clerk may assess damages on an instrument for payment of money only.⁵³

2. In Rem.—In proceedings in admiralty, unliquidated damages are found by the court on testimony taken.⁵⁴

3. Quasi In Rem.—There should be an assessment of damages made and filed in all cases where they are not contained in findings.⁵⁵

II. FINDINGS OF FACT.—1. In Personam.—Assessment of Damages.—In actions *in personam* where the allegations are admitted by default they constitute the facts without formal findings, but if unliquidated damages are claimed there should be an *assessment* made and filed.⁵⁶ Where proof is required findings should be filed of record, unless by express provision of law they are made unnecessary. In divorce, default admits allegations relating to alimony and findings on that subject may not be necessary.⁵⁷

2. In Rem.—*In rem* the failure to answer admits the allegations, but, as is generally the case, if court orders proof taken, the testimony of the libellant and exhibits become part of the record.⁵⁸

3. Quasi In Rem.—In actions *quasi in rem* proof is generally required by law, and findings of all facts necessary to support the cause of action and justify the proceeding taken should be made and filed, including the assessment of damages.⁵⁹

I. ENTRY OF JUDGMENT.—1. Under Directions of Court.—Where no answer has been served or filed, the judgment, on the required notice, if there has been an appearance, may be entered on the allegations of the plaintiff and assessment of unliquidated damages.⁶⁰

Collins v. Smith, 16 Vt. 9. Wis.—Bartelt v. Braunsdorf, 57 Wis. 1, 14 N. W. 869.

52. California Code Civ. Proc. §585. In some cases where there are unliquidated damages demanded, a judgment for them in certain cases may be entered on verified complaint, under statutes. Gorman v. Ball, 18 Wis. 24; Trumbull v. Peck, 17 Wis. 265.

53. Wisconsin St., §2891.

54. Cape Fear Towing & Transp. Co. v. Pearsall, 90 Fed. 435.

55. Gorman v. Ball, 18 Wis. 24.

56. Matters averred and not denied need not be found. *In re Cook*, 77 Cal. 220, 230, 17 Pac. 923, 19 Pac. 431, 11 Am. St. Rep. 267; *Fox v. Fox*, 25 Cal. 587.

Findings of fact in default cases are not necessary and do not form a part of the judgment roll. *In re Cook*, 77 Cal. 220, 230, 17 Pac. 923, 19 Pac. 431, 11 Am. St. Rep. 267.

"There were no findings of fact, and in such case where there is no issue,

none need be made.'" *Potter v. Brown County*, 56 Wis. 272, 14 N. W. 375.

There must be an assessment of unliquidated damages in case of default, except where dispensed with by statute. They are as necessary as a verdict or finding where issues are joined. *Gorman v. Ball*, 18 Wis. 24.

57. Default is taken as an admission as to facts concerning alimony. 4 ENCYCLOPEDIA OF EVIDENCE, p. 784.

58. Adm. Rule 52.

59. Failure to make specific findings does not constitute a reversible error. *Farmer v. St. Croix Power Co.*, 117 Wis. 76, 93 N. W. 830, 98 Am. St. Rep. 914. There should be an assessment of damages. *Gorman v. Ball*, 18 Wis. 24.

60. It is irregular to take default judgment where an answer has been put in after time without striking out. *Maxwell v. Jarvis*, 14 Wis. 506.

There must be an assessment of unliquidated damages made and filed in

Under the provisions of some statutes the judgment roll in default consists of the summons with proof of service and complaint with memorandum of default endorsed thereon, and the judgment.⁶¹ Where service is by publication the affidavit for publication and order therefor is added to the judgment roll.⁶² The judgment should strictly conform to the facts alleged or it will be erroneous. These facts must constitute a cause of action.⁶³ Judgments on default in proceedings *quasi in rem* are general in form, but contain recitals which designate them as not personal in character, such as publication, mailing, non-appearance, non-residence, etc.⁶⁴

2. **By Clerk.** — Authority to enter judgment by the clerk is of statutory origin and must be strictly limited to the express provisions of law.⁶⁵

IV. PROCEEDINGS FOR RELIEF. — A. EFFECT OF DEFAULT AS CONTROLLING ACTION BY DEFENDANT. — 1. **In Personam.** — a. *Question Presented by Default.* — The practical question of whether to appear and defend or to suffer default presents itself in many instances where the proceedings are begun remote from proof or under circumstances especially favorable to the party instituting them. The general effect of default will be considered.

b. *Matters That Might Have Been Proved.* — A judgment by default is just as conclusive on material matters necessary to support it as one at the end of a contest.⁶⁶ But it does not estop as to mat-

taking judgment by default. *Gorman v. Ball*, 18 Wis. 24.

61. California Code Civ. Proc. §670.

62. California Code Civ. Proc. §670.

63. A judgment by default does not admit the sufficiency of the facts alleged to constitute a cause of action. If on looking through the records there appears grounds for arrest of judgment, the court should not grant it. *Madison Co. v. Smith*, 95 Ill. 328.

In taking a bill *pro confesso* the complainant is not entitled to a decree according to the prayer, but only such as is proper under the statements of the bill. *Thomson v. Wooster*, 114 U. S. 104, 5 Sup. Ct. 788, 29 L. ed. 105, 108.

64. Where the affidavit of publication shows that the defendant could not be found it designates the judgment as one *in rem* on which execution against the defendant cannot be issued. *Mayfield v. Bennett*, 48 Iowa 194.

65. In actions on contract for the recovery of money only clerk may enter judgment by default. Wis. St., §2891.

Personal service for the purpose of

entry of judgment by the clerk does not include leaving the process at the domicile. *Moyer v. Cook*, 12 Wis. 335.

66. Default is conclusive on all allegations of petition except value and damages. *Slater v. Skirving*, 51 Neb. 108, 70 N. W. 493, 66 Am. St. Rep. 444.

Judgment by default is just as conclusive on matters before the court as "if the case had been fought out to the bitter end." Judgment by default for one month's salary estops defendant from denying validity of contract of employment in a suit for remainder. *Stradley v. Bath Portland Cement Co.*, 228 Pa. 108, 77 Atl. 242, 139 Am. St. Rep. 993.

A default judgment on county bonds estops denial of their issue by county in mandamus proceedings to compel tax levy for payment of judgment. The estoppel extends to facts involved in the default judgment. A judgment is none the less conclusive because it was rendered by default. *United States v. County Court of Knox County*, 122 U. S. 306, 7 Sup. Ct. 1171, 30 L. ed. 1152.

ters that might have been submitted as affirmative defense and which are not inconsistent with the cause of action stated.⁶⁷ And the issues are not subject to be enlarged by the introduction of evidence and amendment made, or considered as though made, to meet the proof.⁶⁸

2. **In Rem.**—In proceedings *in rem* the owner can appear and defend without giving the court personal jurisdiction.

Whether *personal* attendance would give an opportunity for service of process in an independent action may be questioned.⁶⁹

3. **Quasi In Rem.**—a. *Right To Open.*—In proceedings *quasi in rem* the non-appearance of the defendant leaves the original question of liability open. An action to quiet title against a mortgage leaves the question of the continued existence of the debt open to future litigation.⁷⁰ In *quasi in rem* proceedings the right, within the time limited, to appear and defend may be considered.⁷¹ Where notice is actually received the question of diligence in proceeding must be considered, in connection with the future right to appear.⁷²

An infant defendant must necessarily be represented by a guardian

67. A judgment by default for services is not a bar to a suit for malpractice against a physician and surgeon. **Ind.**—Goble *v.* Dillon, 86 Ind. 327, 44 Am. Rep. 308. **Minn.**—Jordahl *v.* Berry, 72 Minn. 119, 75 N. W. 10, 71 Am. St. Rep. 469, 45 L. R. A. 541. **W. Va.**—Lawson *v.* Conaway, 37 W. Va. 159, 16 S. E. 564, 38 Am. St. Rep. 17, 18 L. R. A. 627. **Wis.**—Resseque *v.* Byers, 52 Wis. 650, 9 N. W. 779, 38 Am. Rep. 775.

But courts do not agree in the application of the rule. It has been held that a default judgment for freight is a bar for damages for failure to transport. **Dunham v. Bower**, 77 N. Y. 76, 33 Am. Rep. 579.

It has been held that a default judgment for services as physician and surgeon is a bar to a suit for malpractice. **Blair v. Bartlett**, 75 N. Y. 150, 31 Am. St. Rep. 455.

"The particular matter in controversy in the adverse suit was a triangular piece of ground, which is not the matter of dispute in this action. The judgment in that case is therefore not conclusive in this as to matters which might have been decided, but only as to matters which were in fact decided." **Last Chance Min. Co. v. Tyler Min. Co.**, 157 U. S. 683, 15 Sup. Ct. 733, 39 L. ed. 859.

68. "The withdrawal by defendants of their answer may have prevented any judicial determination as

to the special facts set up therein in defense or avoidance of plaintiff's claim. . . . But such withdrawal was not operative to take out of the case the complaint, or the allegations of fact therein contained, or to prevent judicial determination of those facts." **Last Chance Min. Co. v. Tyler Min. Co.**, 157 U. S. 683, 15 Sup. Ct. 733, 39 L. ed. 859.

69. In collision cases in admiralty proceedings may be joined against the ship and master but not against the ship and owner. **Adm. Rule 15.**

A person temporarily in a state as a party or witness in a suit is by the policy of the law exempt from service of civil process. **Breon v. Miller Lumb. Co.**, 83 S. C. 221, 65 S. E. 214, 137 Am. St. Rep. 803, 24 L. R. A. (N. S.) 276.

70. **Fitch v. Huntington**, 125 Wis. 204, 102 N. W. 1066.

71. **Schobacher v. Germantown, etc. Ins. Co.**, 59 Wis. 86, 17 N. W. 969.

72. "If the defendant wished to be relieved from the judgment through the mistake, inadvertence, surprise, or excusable neglect of any of its officers, agents or attorneys, the application should have been made within one year after notice of the entry thereof. §2832 R. S. Such notice does not mean written notice, but simply knowledge of the judgment." **Schobacher v. Germantown, etc. Ins. Co.**, 59 Wis. 86, 17 N. W. 969.

ad litem in quasi in rem proceedings on substituted service, and this without the effect of personal estoppel in future litigation.⁷³

b. *Garnishee's Liability*.—A garnishee may not suffer default judgment even where his liability to the principal defendant is indisputable. He owes certain duties to his creditor, as well as his bailor, to protect him from irregular proceedings and in enjoyment of statutory exemptions, and a jurisdictional defect will destroy the protection afforded to the garnishee in an action by the principal defendant.⁷⁴

4. **Divorce**.—a. *On Marriage Relation*.—A divorce on substituted service has no effect in the absence of appearance without the state of the marriage domicile or that of at least one of the parties.⁷⁵

b. *As to Alimony*.—A wife in case of divorce by substituted service at suit of the husband is, in many states recognizing such divorce, entitled thereafter to an independent suit for alimony within her own state.⁷⁶

B. **EXCUSABLE NEGLIGENCE AS GROUND FOR RELIEF**.—1. **What Is Excusable Neglect**.—The laws of many states provide for the relief of a party from the effects of accident, mistake, inadvertence and excusable neglect in the discretion of the court. Default is one of the consequences which is relieved.⁷⁷

There are many cases reported in which the action of the court below has been affirmed in granting or refusing relief from default,

73. A guardian *ad litem* cannot confer personal jurisdiction on a non-resident infant. *McAnear v. Epperson*, 54 Tex. 220, 38 Am. Rep. 625.

74. It is the duty of a garnishee to claim exemptions at law of the debt in favor of the principal defendant. *Burns v. Marland Mfg. Co.*, 14 Gray (Mass.) 487; *Pierce v. Chicago & N. W. R. Co.*, 36 Wis. 283, 288. See the title "**Garnishment**."

Courts will not lend their assistance to the evasion of exemption laws of sister states—"a proceeding which the rule of comity existing between the states should not, and will not permit." *Drake v. Lake Shore & M. S. R. Co.*, 69 Mich. 168, 177, 37 N. W. 70, 13 Am. St. Rep. 382.

Bankruptcy of principal defendant may be shown by garnishee. *Farmers'*, etc. *Bank v. University Pub. Co.*, 9 Ga. App. 128, 70 S. E. 602.

Some courts have held that a garnishee cannot interpose the defense of exemption. *Osborne v. Schutt*, 67 Mo. 712; *Conley v. Chilcote*, 25 Ohio St. 320.

If service is not made on the principal defendant in the manner pre-

scribed by law a judgment against the principal defendant affords no protection to garnishee against recovery by such defendant. **Ga.**—*Farmers'*, etc. *Bank v. University Pub. Co.*, 9 Ga. App. 128, 70 S. E. 602. **Ind.** *Louisville, N. A. & C. R. Co. v. Parish*, 6 Ind. App. 89, 33 N. E. 122. **Mich.** *Hebel v. Amazon Ins. Co.*, 33 Mich. 400. **Mo.**—*Mercantile Co. v. Bettles*, 53 Mo. App. 384.

Hebel v. Amazon Ins. Co., *supra*, was a case of acceptance of service by an alleged officer of the company without service upon him.

It is too late to attack the main judgment after it has been entered. *Farmers'*, etc. *Bank v. University Pub. Co.*, *supra*.

75. See II, A, 1, b. See also the title "**Divorce**."

76. **Ala.**—*Turner v. Turner*, 44 Ala. 437. **Mich.**—*Wright v. Wright*, 24 Mich. 180. **Minn.**—*Thurston v. Thurston*, 58 Minn. 279, 59 N. W. 1017. **Ohio.**—*Cox v. Cox*, 19 Ohio St. 502, 2 Am. St. Rep. 415. **Wis.**—*Cook v. Cook*, 56 Wis. 195, 14 N. W. 33, 43 Am. Rep. 706.

77. *Schobacher v. Germantown*, etc. *Ins. Co.*, 59 Wis. 86, 17 N. W. 969.

where the appellate court would have sustained the opposite ruling as well.

The seeming conflict of rulings on similar facts in many of these cases is referable to the general rule that an appellate court will not interfere with the exercise of discretion by the courts below except for manifest abuse.⁷⁸

In general it is a mistake of fact that seems to be contemplated in the statutes as a basis of relief,⁷⁹ but the courts have reversed as an abuse of discretion refusals to relieve from default judgments suffered as a consequence of mistakes of law, especially on the part of the defendant himself.⁸⁰ Want of any notice of a fact where the party had no means of obtaining it, or where he has reasonable right to expect that it will be given him, is a sufficient excuse.⁸¹ Failure to answer or to appear through causes outside the control of the party are sufficient excuse.⁸² The discretion required to be exercised by the court is sound legal discretion. A party is entitled to relief on sufficient excuse.⁸³ The action of the court below will be reversed where it appears that the court did not exercise its discretion on the facts.⁸⁴

Some courts do not review orders on motions to set aside default judgments.⁸⁵ At common law the action of the trial court on an

78. The court will usually sustain the action of the court below upon the same facts whether the decision is for or against the motion. *O'Brien v. Leach*, 139 Cal. 220, 72 Pac. 1004, 96 Am. St. Rep. 105; *Evans v. Mohn*, 55 Iowa 302, 7 N. W. 593.

79. *Main v. McLaughlin*, 78 Wis. 449, 47 N. W. 938.

80. *Whereatt v. Ellis*, 70 Wis. 207, 35 N. W. 314, 5 Am. St. Rep. 164.

Where an endorser of a note under the mistaken advice of his attorney did not interpose a defense on the belief that the defense of the other parties would protect him, the judgment should have been set aside. *Baxter v. Chute*, 50 Minn. 164, 52 N. W. 379, 36 Am. St. Rep. 633.

Defendant not understanding the requirements of law, continued to negotiate for a settlement with plaintiffs without employing an attorney until too late to answer, and until judgment was taken, and did not know judgment could be taken and understood he was to have more time. Court below refused to open. *Griswold Linsseed Oil Co. v. Lee*, 1 S. D. 531, 47 N. W. 955, 36 Am. St. Rep. 761.

81. *Mont.*—*Anaconda Min. Co. v. Saile*, 16 Mont. 8, 39 Pac. 909, 50 Am. St. Rep. 472. *Neb.*—*Anthony & Co. v. Karbach*, 64 Neb. 509, 90 N. W. 243,

97 Am. St. Rep. 662. *N. D.*—*Nichells v. Nichells*, 5 N. D. 125, 64 N. W. 73, 57 Am. St. Rep. 540, 33 L. R. A. 515. *Wash.*—*Douglas v. Badger State Mine*, 41 Wash. 266, 83 Pac. 173, 4 L. R. A. (N. S.) 196.

82. *Knowlton v. Smith*, 163 Ind. 294, 71 N. E. 895; *Nietert v. Trentman*, 104 Ind. 390, 4 N. E. 306; *Chicago, R. I. & P. R. Co. v. Eastham*, 26 Okla. 605, 110 Pac. 887, 30 L. R. A. (N. S.) 740.

83. "In a plain case this discretion has no office to perform, and its exercise is limited to doubtful cases where an impartial mind hesitates." *Miller v. Carr*, 116 Cal. 378, 48 Pac. 324, 58 Am. St. Rep. 180.

"Such discretion must be a legal discretion, and where the application is made in time, and presents a case of 'mistake, inadvertence, surprise, or excusable neglect' accompanied by a verified answer alleging a good defense on the merits, it is a manifest abuse of discretion not to open the judgment upon reasonable terms." *Cleveland v. Hopkins*, 55 Wis. 387, 13 N. W. 225.

84. *Marsh v. Griffin*, 123 N. C. 660, 31 S. E. 840; *Kingsley v. Steiger*, 141 Wis. 447, 123 N. W. 635, 31 L. R. A. (N. S.) 1068.

85. *Ala.*—*Colley v. Spivey*, 127 Ala.

application to open a default judgment is not subject to review.⁸⁶

2. Abuse of Discretion.—Where default has been opened a stronger case of abuse of discretion is required for reversal, than where a trial on the merits has been denied.⁸⁷ Most of the cases reversed for abuse of discretion have been for refusal to set aside default.⁸⁸ The action of a court in setting aside a default judgment will not be disturbed after successful defense.⁸⁹

In some of the cases reversed, where judgments by default have been opened, irregularities have entered into the application to set it aside, as failure to give proper notice to the plaintiff's counsel.⁹⁰ It has been held an abuse of discretion not to set aside a default judgment where the default was obtained by reason of papers, sent in time, having miscarried in the mail,⁹¹ and where there was a mistake of one day in date of service indorsed by defendant on papers,⁹² and where the defendant misunderstood his attorney as to date of trial,⁹³ and where the attorney's signature was so illegible as to mislead the defendant's attorney, causing him to attempt service in the wrong place,⁹⁴ and where the defendant's attorney was misinformed by the clerk of the court.⁹⁵ Where judgment was obtained through

109, 28 So. 574; *Ledbetter, etc. Assn. v. Vinton*, 108 Ala. 644, 18 So. 692; *Truss v. Birmingham L. G. & M. R. Co.*, 96 Ala. 316, 11 So. 454; *Allen v. Lathrop & Hatton Lumb. Co.*, 90 Ala. 490, 8 So. 129. Ill.—*McRae v. Adams*, 85 Ill. App. 528. N. J.—*Smith v. Livesey*, 67 N. J. L. 269, 51 Atl. 453.

86. *Smith v. Livesey*, 67 N. J. L. 269, 51 Atl. 453.

87. Ia.—*Evans v. Mohn*, 55 Iowa 302, 7 N. W. 593; *Westphal, Hinds & Co. v. Clark*, 46 Iowa 262. Neb.—*Bigler v. Baker*, 40 Neb. 325, 58 N. W. 1026, 24 L. R. A. 255. Tex.—*Watts v. Bruce*, 31 Tex. Civ. App. 347, 72 S. W. 258.

88. *Westphal, Hinds & Co. v. Clark*, 46 Iowa 262.

89. *City of Chicago v. Adams*, 24 Ill. 492; *Coos Bay R. & E. R. & Nav. Co. v. Endicott*, 34 Ore. 573, 57 Pac. 61.

90. *Reilly v. Ruddock*, 41 Cal. 312, 313 (failure to give proper notice to opposing counsel); *Sandowitz v. Duane*, 62 N. Y. Supp. 744 (failure to file affidavit of merits).

"It is well settled that an applicant must not only show a reasonable ground for opening the default, but the burden is upon him to establish his good faith otherwise than simply by an affidavit of merits." *Davis v. Solomon*, 25 Misc. 695, 28 Civ. Proc. 420, 56 N. Y. Supp. 80.

"The judge below evidently found

that this was a case of excusable neglect. . . . But it is impossible to see how far the exercise of his discretion was influenced by the erroneous opinion the judge expressed as to the nature of the action and the necessity of filing a bond." *Marsh v. Griffin*, 123 N. C. 660, 31 S. E. 840.

91. Miscarriage of papers in mail where sent in time to have reached clerk of court before default, is an "accident" for which relief should be granted. *Chicago, R. I. & P. R. Co. v. Eastham*, 26 Okla. 605, 110 Pac. 887, 30 L. R. A. (N. S.) 740.

92. A refusal to set aside a judgment by default taken in consequence of a mistake of one day indorsed on the papers, reversed for abuse of discretion. *Miller v. Carr*, 116 Cal. 378, 48 Pac. 324, 58 Am. St. Rep. 180.

93. Where defendant misunderstood his attorney, believing that Tuesday of the next week was meant instead of that week, and failed to attend, it was an abuse of discretion not to set aside a default judgment. *Hanthorn v. Oliver*, 32 Ore. 57, 51 Pac. 440, 67 Am. St. Rep. 518.

94. *Wheeler v. Castor*, 11 N. D. 347, 92 N. W. 381, 61 L. R. A. 746.

95. It is excusable neglect when attorney was informed by clerk that no business would be transacted until a certain date and did not attend, and meanwhile his demurrer was overruled,

dishonesty of the defendant's attorney, it was an abuse of discretion not to set it aside,⁹⁶ and where obtained through an act of retaliation of defendant's attorney.⁹⁷ Where an attorney residing at a distance, relied, without promise, on the other attorney for notice of a ruling, held an abuse of discretion not to set a default judgment aside;⁹⁸ and where an attorney neglected to file a pleading through absorption in a murder trial.⁹⁹ So where the process did not reach the party,¹ and where a party was misled by a statement of the court while his attorney was sick.²

It is an abuse of discretion to open a default without merit or excuse shown,³ or without notice to plaintiff's attorney.⁴

C. IRREGULARITIES AS GROUND FOR RELIEF. — 1. In Service of Process. — a. *Appearing of Record.* — If it appears from the record that the process was not served on the defendant the judgment is void. It may be set aside on motion or disregarded in collateral proceedings.⁵ If, however, the record is silent as to service, the judgment for this defect is an irregularity and may be attacked without further showing in direct proceedings only. In direct proceedings there is no presumption of jurisdiction, even in courts of general jurisdiction.⁶

no abuse in opening. *Anaconda Min. Co. v. Saile*, 16 Mont. 8, 39 Pac. 909, 50 Am. St. Rep. 472.

96. *Anthony & Co. v. Karbach*, 64 Neb. 509, 90 N. W. 243, 97 Am. St. Rep. 662.

97. Where defendant's attorney withdraws appearance and answer in retaliation for non-payment of fees, the defendant as a matter of right, and not as of favor within the discretion of the court, may have the default judgment set aside. *Nichells v. Nichells*, 5 N. D. 125, 64 N. W. 73, 57 Am. St. Rep. 540, 33 L. R. A. 515.

98. In Washington, a divided court held it an abuse of discretion to refuse to open a default where an attorney residing at a distance relied on the opposite attorney, without promise, to notify him of the court's ruling on a motion, no law requiring such notice, only professional courtesy. *Douglas v. Badger State Mine*, 41 Wash. 256, 83 Pac. 178, 4 L. R. A. (N. S.) 196.

99. The neglect of an attorney to file pleading in time through absorption in murder trial, where no fault of party appears, is an excuse upon which the default judgment should have been vacated. *Citizens' Nat. Bank v. Branden* (N. D.), 126 N. W. 102, 27 L. R. A. (N. S.) 858.

1. Where a process was sent to the wrong house and party moved in di-

rect proceedings to have the default set aside, it was an abuse of discretion to refuse. There is no better excuse than want of notice. *Knowlton v. Smith*, 163 Ind. 294, 71 N. E. 895; *Nietert v. Trentman*, 104 Ind. 390, 4 N. E. 306.

2. Where an attorney was sick and absent on leave of court, and defendant heard court announce that none of attorney's cases would be tried, refusal to set aside default was reversed. *Harrison v. McArthur*, 87 Ga. 478, 13 S. E. 594, 13 L. R. A. 689.

3. *Sandowitz v. Duane*, 62 N. Y. Supp. 744; *Davis v. Solomon*, 25 Misc. 695, 28 Civ. Proc. 420, 56 N. Y. Supp. 80; *Marsh v. Griffin*, 123 N. C. 660, 31 S. E. 840.

4. Default is improperly set aside where there was no service of the moving papers or notice on plaintiff's attorney. *Reilly v. Ruddock*, 41 Cal. 312, 313.

5. *Flowers v. King*, 145 N. C. 234, 58 S. E. 1074, 122 Am. St. Rep. 444.

6. Cal.—*Schloss v. White*, 16 Cal. 65. Ill.—*Brady v. Washington Ins. Co.*, 67 Ill. App. 159. Ind.—*Elzroth v. Voris*, 74 Ind. 459.

Where no proof of service of process exists of record, a judgment by default should be set aside on motion and defendant permitted to answer. Refusal was reversed on appeal. *Shan-*

If a party is personally served by the wrong name, he should appear, suggest the misnomer and interpose his defense, or he will be bound by the default, if he is the party intended.⁷

b. *Appearing by Extrinsic Proof.*—If the return of the officer shows due personal service, when in fact there has been none, there is a conflict of authority as to whether extrinsic proof can be introduced to contradict the return in collateral attack on a domestic judgment.⁸ Some courts holding that such return is conclusive on collateral attack will admit affidavits in contradiction, within the term or statutory period, to show want of service as an *excuse* for opening the default.⁹ In case of judgments of other states it is generally permissible to contradict the record on the one question of jurisdiction.¹⁰ Where it is permitted to contradict the return, a default judgment, where there has been no service of process, may be set aside at any time.¹¹

2. *In Service by Publication.*—In substituted service by publication great particularity will be required, especially on direct attack.¹²

holtzer v. Thompson, 24 Okla. 198, 103 Pac. 595, 138 Am. St. Rep. 877.

7. Return of service on "Jack Veasey, the defendant" supports default judgment against A. J. Veasey on appeal. *Veasey v. Brigman*, 93 Ala. 548, 9 So. 728, 13 L. R. A. 541.

If the defendant is sued and served by wrong name he will be bound by judgment on default if it appear that he was the person intended. He should appear and set up misnomer. *Cal. Brum v. Ivins*, 154 Cal. 17, 96 Pac. 876, 129 Am. St. Rep. 137. *Colo.*—*Van Buren v. Posteraro*, 45 Colo. 588, 102 Pac. 1067, 132 Am. St. Rep. 199. *W. Va.*—*Stout v. Baltimore, etc. R. Co.*, 64 W. Va. 502, 63 S. E. 317, 131 Am. St. Rep. 940.

In collateral matters the fact of a different name raises the presumption of a different person, but the identity may be shown by extrinsic proof. *Brum v. Ivins*, 154 Cal. 17, 96 Pac. 876, 129 Am. St. Rep. 137.

Mistakes in names are cured by personal service, but not by publication in absence of appearance. *Schmidt v. Thomas*, 33 Ill. App. 109.

8. See cases cited in note to III, G, 1, b.

9. "As a practical question, we know of no better excuse for the non-appearance of a party at the proper time than that he had never in any way received actual notice of the pendency of the suit." *Knowlton v. Smith*, 163 Ind. 294, 71 N. E. 895; *Nietert v. Trentman*, 104 Ind. 390, 4 N. E. 306.

10. *German Sav. Soc. v. Dormitzer*, 192 U. S. 125, 24 Sup. Ct. 221, 48 L. ed. 373; *Ingram v. Ingram*, 143 Ala. 129, 42 So. 24, 111 Am. St. Rep. 31.

11. *Stubbs v. McGillis*, 44 Colo. 138, 96 Pac. 1005, 130 Am. St. Rep. 116, 18 L. R. A. (N. S.) 405; *Flowers v. King*, 145 N. C. 234, 58 S. E. 1074, 122 Am. St. Rep. 444.

A judgment by default where service was on the wrong party is a nullity and may be set aside without any suggestion of merit, or disregarded when and wherever the entire lack of jurisdiction is made to appear. *Flowers v. King*, 145 N. C. 234, 58 S. E. 1074, 122 Am. St. Rep. 444.

12. "The statute which permits the property of a non-resident to be seized and subjected to judicial sale upon notice by publication only is a most drastic remedy, and not infrequently results in oppression and injustice. Recognizing this fact, the courts quite uniformly hold that all of the statutory requirements for the institution and prosecution of such proceedings, and especially such as are of a jurisdictional character, must be strictly and literally observed, in order that the judgment entered therein shall be of legal force and validity." *Empire Real Estate, etc. Co. v. Beechley*, 137 Iowa 7, 114 N. W. 556, 126 Am. St. Rep. 248.

Where two allegations in an affidavit for publication are so inconsistent that both cannot be true (as "the defendant is a non-resident of this state or he has absconded or absented him-

Improprieties not forbidden by statute have been held fatal to jurisdiction.¹³ In service by publication a mistake in the name or omission of part of it renders the proceedings void.¹⁴ Service by publication in the correct name of a partnership has been upheld where there was no statute permitting suits in the firm name.¹⁵

self from his usual place of abode in this state"). "The one allegation contradicts, counteracts and nullifies the other as completely as if neither had ever been written." Held void in ejectment where record of divorce was offered to show disability to convey under subsequent marriage. *Hinkle v. Lovelace*, 204 Mo. 208, 102 S. W. 1015, 120 Am. St. Rep. 698, 11 L. R. A. (N. S.) 730.

Failure to show by affidavit that a non-resident cannot be served within the state is fatal to a judgment by default on substituted service where such requirement is contained in the statute. *Kennedy v. Lamb*, 182 N. Y. 228, 74 N. E. 834, 108 Am. St. Rep. 800 (purchaser refused title because of defect in proceedings by publication); *Simensen v. Simensen*, 13 N. D. 305, 100 N. W. 708.

Failure to publish as required by law will enable the defaulting party to reverse the judgment by writ of error. *Kearney v. City of Chicago*, 163 Ill. 293, 45 N. E. 224.

Where the order directs the mailing forthwith of a copy of the summons and complaint, a delay of fifteen days is fatal. *Back v. Crussell*, 2 Abb. Pr. (N. Y.) 386.

Mailing the second day is sufficient (*Lyon v. Comstock*, 9 Iowa 306), and a delay of four days not unreasonable (*Van Wyck v. Hardy*, 20 How. Pr. (N. Y.) 222).

13. When a default judgment was taken on substituted service in attachment, and the affidavit for publication was made before the plaintiff as notary public, the judgment was held void on collateral attack, though no statute prohibited the act. *Empire Real Est., etc. Co. v. Beechley*, 137 Iowa 7, 114 N. W. 556, 126 Am. St. Rep. 248.

14. In a suit to quiet title, the notice of publication was to ——— Whitney and ——— Whitney, his wife. After publication petition was amended by inserting "Florence 'I.'" as name of wife. A motion was made by Flor-

ence D. Whitney, unmarried, to set aside judgment. The motion was denied by the trial court. Reversed. The judgment was void and was ordered set aside as to appellant. *Whitney v. Masemore*, 75 Kan. 522, 89 Pac. 914, 121 Am. St. Rep. 442, 11 L. R. A. (N. S.) 676.

In a partition suit there was publication of defendant's name as George "H." Leslie instead of George "W." in substituted service. The mistake was fatal on collateral attack. Errors in name are not fatal where the court has jurisdiction of party. Some courts hold that mistake in initial or other error in defendant's name are not within the rule of *idem sonans* in substituted service by publication, and are fatal to jurisdiction. While the court is not prepared to say omission would be fatal, the giving of a wrong initial is misleading. "It would be straining the rule requiring a strict observance of the statute permitting service of process in this manner to hold an error so likely to mislead and prejudice an irregularity only." *D'Autremont v. Anderson Iron Co.*, 104 Minn. 165, 116 N. W. 357, 124 Am. St. Rep. 615, 17 L. R. A. (N. S.) 236.

It has been held, however, that a judgment is valid against "D. C. Seaver" on publication of summons to "D. C. Seavers;" the court holding the names "are substantially the same." *Seaver v. Fitzgerald*, 23 Cal. 85.

The transposing of the initials of a married woman in service by publication where she was also described as the wife of her husband and was better known by that description, was held not fatal to jurisdiction. *Fanning v. Krapf*, 68 Iowa 244, 26 N. W. 133.

15. In modern ruling in suits against partnerships, substituted service by publication in name of partnership is not such an irregularity as to render the proceeding void (so held in absence of statute permitting pleading in

In direct attack nothing will be left to inference which is necessary to lay the foundation for service by publication.¹⁶

On collateral attack on a default judgment on service by publication, if a substantial compliance with all the requirements of law can be *reasonably inferred* from the record, though not *expressly stated* it will be sufficient.¹⁷

3. In Proceedings.—Irregularities in proceedings, if at all substantial, are ground for opening default judgment, if taken in time. While it is error to refuse to open the judgment, the judgment is not void.¹⁸ A mistake in a notice of trial giving a wrong date confers a right to have the default judgment set aside.¹⁹ When the service of a process has not been made the required time before return day, the defendant is entitled as a matter of right to have the default judgment set aside. A refusal will be ground for reversal.²⁰

firm name). Reversed. *Ord v. Neiswanger*, 81 Kan. 63, 105 Pac. 17, 29 L. R. A. (N. S.) 287.

16. *Chapman v. Moore*, 151 Cal. 509, 91 Pac. 324, 121 Am. St. Rep. 130; *Finn v. Howard*, 77 Kan. 421, 94 Pac. 801, 127 Am. St. Rep. 420.

17. That matters necessary can be reasonably inferred from the statements in the affidavit will be sufficient on collateral, but not on direct attack. *Chapman v. Moore*, 151 Cal. 509, 91 Pac. 324, 121 Am. St. Rep. 130.

When the affidavit did not state specifically the statute under which it was brought, but did inferentially, the judgment was upheld after three years; the statutory period for opening having expired. "The statement 'quieting title in plaintiff' to certain lands is a phrase that is well understood, and, while that phrase alone would be a meager and defective statement of a cause of action, it is one which any person who is familiar with legal terms would not misunderstand." *Finn v. Howard*, 77 Kan. 421, 94 Pac. 801, 127 Am. St. Rep. 420, 423.

18. If a defendant has had his day in court, the failure to give statutory notice in subsequent proceedings is an error in the exercise of jurisdiction and not in obtaining it, and does not subject the judgment to collateral attack. In doubtful cases courts as a safer course treat defective proceedings as irregularities rather than as nullities. *Mortgage Trust Co. v. Redd*, 38 Colo. 458, 88 Pac. 473, 120 Am. St. Rep. 132, citing *Salter v. Hilgen*, 40 Wis. 363.

An order improperly entering a de-

fault is an irregularity and not directly appealable. An order refusing to set it aside is appealable. *Thompson v. Alford*, 128 Cal. 227, 60 Pac. 686.

A premature judgment is irregular, not void. *Schobacher v. Germantown Ins. Co.*, 59 Wis. 86, 17 N. W. 969.

Summons and complaint not filed in default judgment do not render it invalid. *Day v. Mertlock*, 87 Wis. 577, 584, 58 N. W. 1037.

A judgment is not void for want of notice where defendant has general notice of the proceedings—merely irregular. *Day v. Mertlock*, *supra*.

"The other grounds added to this main ground are very flimsy irregularities or errors which do not affect the substantial rights of the defendant (Sec. 2829 R. S.) and should have been disregarded." *Day v. Mertlock*, 87 Wis. 577, 582, 58 N. W. 1037.

19. The defendant received notice of trial as set for the 17th instead of 13th. Default entered. Motion to open. "On mistake of this kind evidently appearing, we cannot refuse the motion." *Jackson v. Vanhorn*, 1 Dall. (U. S.) 241, 1 L. ed. 118.

20. A judgment by default on appeal was reversed because the return did not show as to one of the defendants that it was served twenty days before return day. Proof must be made at the time of judgment or entry or not at all. *Lawrence v. Stone*, 160 Ala. 382, 49 So. 376, 135 Am. St. Rep. 105, reversed and ordered set aside as to both defendants.

Where default judgment was entered on writ not returned fourteen days be-

It is an error if the record fails to show that the justice waited the required time before entering a default judgment.²¹

Relief in case of judgment against a lunatic should be sought as an irregularity in the court where rendered. The law, as to them, is less favorable than in case of infants.²²

D. ERROR IN JUDGMENT.—1. Judgment in Excess of Demand. When the judgment by default exceeds the demand there is a conflict of authority as to whether it is merely erroneous and appealable or void and subject to collateral attack.²³ It is provided in the codes of some states that judgment shall not exceed demand, and in such cases it is held void.²⁴

2. Judgment in Excess of Allegations.—A judgment which goes beyond the allegations of the complaint is invalid. It may be set aside by direct proceedings, and is void on collateral attack;²⁵ but where part is within the allegations and can be easily separated it may be upheld as to that part.²⁶

3. On Facts Not Constituting a Cause of Action.—It is necessary to the validity of a default judgment that the complaint state a cause of action.²⁷ A judgment on default not supported by the allegations of the complaint is erroneous on appeal,²⁸ and such a judg-

fore term as required by law. *Dobyns & Morton v. United States*, 3 Cranch (U. S.) 241, 2 L. ed. 427.

21. *People v. Barry*, 93 Mich. 542, 53 N. W. 785, 18 L. R. A. 337.

22. Judgment without appointment of guardian *ad litem*, against a lunatic, is not void and not subject to collateral attack. *Ala.*—*Wilkinson v. Lehman-Durr Co.*, 150 Ala. 464, 43 So. 857, 124 Am. St. Rep. 75. *Ill.*—*Maloney v. Dewey*, 127 Ill. 395, 19 N. E. 848, 11 Am. St. Rep. 131. *Wash.* *Pollock v. Horn*, 13 Wash. 626, 43 Pac. 885, 52 Am. St. Rep. 66.

It is an irregularity. See note to *Allison v. Taylor*, 6 Dana (Ky.) 87, 32 Am. Dec. 68, 70.

23. A judgment by default exceeding demand is erroneous but not void. *Mach v. Blanchard*, 15 S. D. 432, 90 N. W. 1042, 91 Am. St. Rep. 698, 58 L. R. A. 811. See further III, G, 3.

24. *California Code Civ. Proc.* §580.

A judgment in excess of demand contrary to statute is void. *Russell v. Shurtleff*, 28 Colo. 414, 65 Pac. 27, 89 Am. St. Rep. 216.

25. If a judgment in default goes outside the issues submitted to the court it is void. *Sache v. Wallace*, 101 Minn. 169, 112 N. W. 386, 118 Am. St. Rep. 612, 11 L. R. A. (N. S.) 803;

Lincoln Nat. Bank v. Virgin, 36 Neb. 735, 55 N. W. 218, 38 Am. St. Rep. 747.

26. A judgment by default is void as to matter outside the issues. If the whole judgment is void when all the matters adjudicated are outside the issue, then, when two matters are adjudicated and one is outside the issue and easily separable, that may be held void. *Belford v. Woodward*, 158 Ill. 122, 41 N. E. 1097, 29 L. R. A. 593. This was a judgment for payment in gold coin where no contract provision therefor.

27. *Sache v. Wallace*, 101 Minn. 169, 112 N. W. 386, 118 Am. St. Rep. 612, 11 L. R. A. (N. S.) 803; *Spoors v. Coen*, 44 Ohio St. 497, 502, 9 N. E. 132.

28. A decree *pro confesso* concludes the party only as to the averments and not as to the sufficiency of the bill. Reversed on appeal with directions to dismiss. *North Chicago St. R. Co. v. Ackley*, 171 Ill. 100, 49 N. E. 222, 44 L. R. A. 177; *Cerveny v. Chicago Daily News Co.*, 139 Ill. 345, 28 N. E. 692, 13 L. R. A. 864; *Madison County v. Smith*, 95 Ill. 328; *Chicago & N. W. R. Co. v. Coss*, 73 Ill. 394 (in this case the allegations did not show absence of contributory negligence as required in Illinois).

ment may be collaterally attacked and called in question.²⁹

E. DISABILITY AS GROUND FOR RELIEF. — If a default judgment is entered against a person under disability, the fact of disability is ground for relief. In case of an infant the motion may be made after the term, during minority, or within reasonable time thereafter.³⁰ In case of an insane person the motion in his behalf should be made within the term or statutory period. Thereafter relief should be sought in equity.³¹ A default judgment against an infant or against an insane person is not void, if the court had jurisdiction of the defendant.³²

F. DIRECT PROCEEDINGS. — 1. By Motion Within Term or Statutory Period on Excuse. — *a. Excuse Shown.* — In absence of statute or rule of court a default judgment will not be set aside after the term in which it was rendered.³³ In many states statutes have provided within what time a motion to set aside a default judgment for excuse may be made, most of them extending the time for application beyond the term.³⁴

29. *Sache v. Wallace*, 101 Minn. 169, 112 N. W. 386, 118 Am. St. Rep. 612, 11 L. R. A. (N. S.) 803; *Spoors v. Coen*, 44 Ohio St. 497, 502, 9 N. E. 132. *Contra.*—Not subject to collateral attack. *Frankfurth v. Anderson*, 61 Wis. 107, 20 N. W. 662.

30. *Wilkinson v. Lehman-Durr Co.*, 150 Ala. 464, 43 So. 857, 124 Am. St. Rep. 75; *Teel v. Dunnihoo*, 230 Ill. 476, 82 N. E. 844, 120 Am. St. Rep. 319.

31. *Ala.*—*Wilkinson v. Lehman-Durr Co.*, 150 Ala. 464, 43 So. 857. *Ill.*—*Maloney v. Dewey*, 127 Ill. 395, 19 N. E. 848, 11 Am. St. Rep. 131. *Ky.*—*Alison v. Taylor*, 6 Dana 87, 32 Am. Dec. 68. *Wash.*—*Pollock v. Horn*, 13 Wash. 626, 43 Pac. 885, 52 Am. St. Rep. 66.

32. A decree against a minor is not subject to collateral attack if the court had jurisdiction of the minor. *Teel v. Dunnihoo*, 230 Ill. 476, 82 N. E. 844, 120 Am. St. Rep. 319.

A decree against a lunatic is not void and not subject to collateral attack. *Ala.*—*Wilkinson v. Lehman-Durr Co.*, 150 Ala. 464, 43 So. 857, 124 Am. St. Rep. 75. *Ill.*—*Maloney v. Dewey*, 127 Ill. 395, 19 N. E. 848, 11 Am. St. Rep. 131. *Wash.*—*Pollock v. Horn*, 13 Wash. 626, 43 Pac. 885, 52 Am. St. Rep. 66.

33. *Bronson v. Schulten*, 104 U. S. 410, 415, 26 L. ed. 797; *Stuart v. City of St. Paul*, 63 Fed. 644; *Austin v.*

Riley, 55 Fed. 833; *Allen v. Wilson*, 21 Fed. 881.

In his opinion in *Spafford v. Janesville*, 15 Wis. 474, 477, *Dixon, C. J.*, says: "Except in cases of mistake, inadvertence, surprise or excusable neglect, mentioned in the statute, where relief may be granted within one year after notice, we know of no law, statute or common, authorizing the court upon motion, *after* the term at which it was entered to vacate a judgment for error in law or fact committed in rendering it, or occurring before it was pronounced. If such a practice were tolerated, no one knows where it would end. Parties would never be secure in their rights, and judgments would be of as little account as the course of the wind."

Some exceptions have crept into practice with not well defined limits, having foundation on the English writ of *coram nobis*, as death of a party, infancy and coverture. *Bronson v. Schulten*, 104 U. S. 410, 416, 26 L. ed. 797.

In *Pennsylvania* the courts are not confined to the term in case of default judgments. *Pennsylvania State Co.'s Appeal*, 225 Pa. 178, 73 Atl. 1107, 133 Am. St. Rep. 875.

34. In general the statutes provide that the courts may relieve a party from a judgment or other proceeding taken against him through "his mistake, inadvertence, surprise or excus-

The application should proceed on motion, on due notice to the other party, accompanied by copies of moving papers and prepared answer.³⁵ The motion should be based on an affidavit setting out the facts showing excuse.³⁶ The notice of a motion to set aside a judgment by default need not state the facts in detail; it is sufficient if it state the grounds.³⁷ Counter affidavits may be received on a motion to set aside a default judgment contradicting matters of excuse.³⁸ While an officer's return cannot be contradicted in some states to defeat jurisdiction, it may be to show excuse for default.³⁹

b. *Merits Shown*.—An affidavit of merits by the party in default should accompany the application.⁴⁰ A verified answer setting out facts constituting a valid defense on the merits has been held in some code practice states to dispense with an affidavit of merits.⁴¹

able neglect" within the time fixed. Six months on personal service; one year on publication (Cal. Code Civ. Proc. §473); one year after notice (New York Code Civ. Proc. §724); one year after notice, knowledge; same on publication, but not later than three years after rendition (Wisconsin St. §§2832, 2833).

By the statute of Illinois a court may set aside a default judgment within the term for excuse. Rev. St. (Ill.) ch. 110, §58.

In California application must be made within ten days after notice of the entry of judgment. Code Civ. Proc. (Cal.) §859.

In admiralty the court may open default within ten days after the decree has been entered. Adm. Rule 40.

A decree in default may be set aside under U. S. Equity Rule 88. *Moelle v. Sherwood*, 148 U. S. 21, 13 Sup. Ct. 426, 37 L. ed. 350.

35. An order setting aside a judgment made without notice to the other party is invalid. *Ill.*—*Bradley v. Washington Ins. Co.*, 67 Ill. App. 159. *Ind.* *Jenkins v. Corwin*, 55 Ind. 21. *Ia.* *Ellis v. Remley*, 115 Iowa 381, 88 N. W. 819.

It has been held that a motion to set aside must be made by all the defendants jointly interested. *Boyd v. Munson*, 56 Neb. 269, 76 N. W. 552.

36. See III, B, 1 and 2, *supra*.

37. *O'Brian v. Leach*, 139 Cal. 220, 72 Pac. 1004, 96 Am. St. Rep. 105.

38. *Swigart v. Holmes*, 96 Ill. App. 43; *Lake v. Jones*, 49 Ind. 297.

39. *Serafield v. Sheeler*, 18 Ill. App. 507.

40. There should be an affidavit of merits with a motion to set aside a judgment. *Silver Peak Gold Min. Co. v. Harris*, 116 Fed. 439; *Block v. Kearney*, 132 Cal. xviii, 64 Pac. 267; *Nevada Bank of California v. Dresbach*, 63 Cal. 324. See the title "*Affidavits of Merits and Defense*."

It is an abuse of discretion to open a default without a showing of merits. *Sandowitz v. Duane*, 62 N. Y. Supp. 749; *Davis v. Solomon*, 25 Misc. 695, 28 Civ. Proc. 420, 56 N. Y. Supp. 80; *Marsh v. Griffin*, 123 N. C. 660, 31 S. E. 840.

There must be an affidavit of merits to set aside a judgment by default regularly signed. *Farden v. Richter*, L. R. 23 Q. B. D. (Eng.) 124.

"In applications to set aside a default, we regard the point of a meritorious defense as altogether the more important of the two required, and where a judgment is evidently unjust a certain degree of neglect may, especially as terms can be imposed, be held excusable." *Waugh v. Suter*, 3 Ill. App. 271.

An affidavit of merits by an attorney has been held insufficient. *Davis v. Solomon*, 25 Misc. 695, 28 Civ. Proc. 428, 56 N. Y. Supp. 80.

A counter affidavit disputing merits on application to set aside default judgment for excusable neglect is entirely irrelevant and must be disregarded by courts. *Lake v. Jones*, 49 Ind. 296; *Griswold Linseed Oil Co. v. Lee*, 1 S. D. 531, 47 N. W. 955, 36 Am. St. Rep. 761.

41. *Town of Omro v. Ward*, 19 Wis. 232.

c. *Answer Tendered*.—An answer setting up a meritorious defense should be tendered with the moving papers to entitle a party to have a default judgment set aside for matters of excuse.⁴² It must be of a nature that defeats the plaintiff's claim. A recoupment is sufficient.⁴³ A mere cross-action does not entitle the defendant to relief.⁴⁴

d. *Diligence*.—Application to open a default judgment on the ground of mistake, inadvertence, surprise or excusable neglect should be made at the earliest opportunity after notice. The affidavit should show diligence where based on excuse.⁴⁵

e. *Terms*.—By express provisions of many statutes terms may be imposed in the discretion of the court in opening default judgments.⁴⁶

2. **By Motion Within Term for Irregularities**.—a. *Relief as a Right*.—In absence of a statute, irregularities in the proceedings in taking the judgment, which are not jurisdictional, must be remedied by an application within the term.⁴⁷ When such application is made

42. *Bristor v. Galvin*, 62 Ind. 352; *Marsh v. Bast*, 41 Mo. 493.

It should be duly verified. *Bigler v. Baker*, 40 Neb. 325, 58 N. W. 1026, 24 L. R. A. 255.

Discharge in bankruptcy is a meritorious defense. *Citizens' Nat. Bank v. Branden* (N. D.), 126 N. W. 102, 27 L. R. A. (N. S.) 858.

The statute of limitations is now regarded as a meritorious defense.

It has been held that an affidavit of merits may be accepted as sufficient substitute for a verified answer. *Wheeler v. Castor*, 11 N. D. 347, 92 N. W. 381, 61 L. R. A. 746.

43. Where the defense includes matter of recoupment, the judgment may be set aside for sufficient cause. *Slack v. Casey*, 22 Ill. App. 412.

44. *Slack v. Casey*, 22 Ill. App. 412.

45. Diligence required in setting aside default judgment allows a reasonable time to search records for data and to prepare papers. *Wheeler v. Castor*, 11 N. D. 347, 92 N. W. 381, 61 L. R. A. 746.

Waiting the determination of another motion will in some cases excuse delay in making a motion to set aside a judgment. *Robbins v. Kountz*, 44 Wis. 558.

46. It is in the sound discretion of the trial court to impose terms on opening a default for excuse. No abuse to impose terms of \$25. *Meiners v. Frederick Miller Brew. Co.*, 78 Wis. 364, 47 N. W. 430, 10 L. R. A. 586.

Terms may be imposed and a judg-

ment, deprived of its *res judicata* features, may be retained as security in opening a default judgment, in case of excusable neglect. *Griswold Linseed Oil Co. v. Lee*, 1 S. D. 531, 47 N. W. 955, 36 Am. St. Rep. 761.

47. A court having jurisdiction may exercise its power irregularly but not erroneously, in which case it must be corrected by motion. *Paine's Lessee v. Mooreland*, 15 Ohio 435, 45 Am. Dec. 585.

Relief for irregularities cannot be granted after term. *Day v. Mertlock*, 87 Wis. 577, 583, 58 N. W. 1037; *McBride v. Wright*, 75 Wis. 306, 43 N. W. 955.

If the defendant has had his day in court, the failure to give statutory notices in subsequent proceedings is an irregularity. *Salter v. Hilgen*, 40 Wis. 363.

A default judgment prematurely entered will not be vacated at a subsequent term, it being merely an irregularity (*Pier v. Amory*, 40 Wis. 571; *Salter v. Hilgen*, 40 Wis. 363), but if the judgment is void a motion no matter when made should be granted (*Salter v. Hilgen, supra*; *Landon v. Burke*, 33 Wis. 452).

A judgment will not be set aside for irregularities, where it is not void, after the term, except where otherwise provided by statute. **Ariz.**—*In re Zeckendorf's Estate*, 7 Ariz. 328, 64 Pac. 492. **Ky.**—*Delker v. Evans' Admr.*, 23 Ky. L. Rep. 2451, 67 S. W. 837; *Bickel v. Kraus*, 100 Ky. 728, 39 S. W. 414. **Mo.**—*Ozark Co. v. Tate*,

within the time allowed, it becomes a matter of right and not a favor and must be allowed.⁴⁸

A party should proceed with diligence.⁴⁹

b. *Merits.*—*Answer.*—It is not generally necessary to show merits in asking relief from a default judgment obtained through irregularities. The cause not arising from an act or neglect of the defendant, he has not to overcome the suspicion of a technical defense. This distinction has not always been preserved, especially in statutes.⁵⁰

3. **By Motion After Term.**—a. *Clerical Error in Judgment.*—A judgment may be corrected where a clerical mistake appears, after the term, or statutory period. It should correspond with that pronounced by the court.⁵¹

109 Mo. 265, 18 S. W. 1088, 32 Am. St. Rep. 664. **N. Y.**—*MacNabb v. Porter Air-Lighter Co.*, 60 N. Y. Supp. 694.

At common law the court did not vacate a judgment after the term. *People v. Denver*, 33 Colo. 405, 80 Pac. 1065.

A judgment irregularly taken by default is not subject to collateral attack. *Reed v. Nicholson*, 158 Mo. 624, 59 S. W. 977.

48. *Branstetter v. Rives*, 34 Mo. 318, 322; *Roberts v. Pawley*, 50 S. C. 491, 27 S. E. 913.

49. In case of irregularity the party complaining must take the first reasonable opportunity after notice. *Staunton Coal Co. v. Menk*, 197 Ill. 369, 64 N. E. 278.

50. No affidavit of merits is required in case of irregularities. *Branstetter v. Rives*, 34 Mo. 318; *Knowls v. Fritz*, 58 Wis. 216, 16 N. W. 621.

Where the judgment is regular "it is only natural that the court should suspect that the object of the applicant is to set up some mere technical case." *Farden v. Richter*, L. R. 23 Q. B. Div. (Eng.) 124.

"It is obvious that the rule (requiring merit to be shown) must have some exceptions, as it is easy to conceive of cases, as, for instance, where a default is taken against a defendant before the expiration of the time allowed him to plead, where every possible presumption of law that a default could raise against him would be entirely removed by merely pointing out such gross irregularity." *Browning v. Roane*, 9 Ark. 354, 50 Am. Dec. 218.

In England merit must be shown if the judgment has been regularly signed. *Farden v. Richter*, L. R. 23 Q. B. Div. (Eng.) 124; *Hammond v. Schofield*, L. R. (1891) 1 Q. B. (Eng.) 455.

In some courts it has been held that there must be a showing of merit to vacate a judgment for irregularity. *Heffner v. Gunz*, 29 Minn. 108, 12 N. W. 342; *Scott v. Mutual Reserve Fund Life Assn.*, 137 N. C. 515, 50 S. E. 221.

Irregularity is included in some statutes in cases where merits must be shown. *Schuler v. Fowler*, 63 Kan. 98, 64 Pac. 1035; *Follett v. Alexander*, 58 Ohio St. 202, 50 N. E. 720.

The affidavit to set aside a default judgment for irregularity must show that defendant has been prejudiced. *Everett v. Reynolds*, 114 N. C. 366, 19 S. E. 233.

No answer is required on an application to set aside a default judgment for irregularity. *Knowls v. Fritz*, 58 Wis. 216, 16 N. W. 621.

51. *Boro v. Holtzhauer*, 23 Ky. L. Rep. 2317, 67 S. W. 30.

Mistake does not refer to mistake of court. Clerical mistakes in judgment may be corrected at any time while the judgment remains unexecuted. *McClure v. Bruck*, 43 Minn. 305, 45 N. W. 438; *Bohlen v. Metropolitan Elev. R. Co.*, 121 N. Y. 546, 24 N. E. 932.

Errors or mistakes not of the judge may be corrected after the term so as "to make the record conform to the judgment actually pronounced." *Scheer v. Keown*, 34 Wis. 349, 353.

b. *Decree in Equity*.—Courts of equity retain power over their decrees beyond the term in which they were rendered.⁵²

c. *Void Judgment*.—A void judgment may be set aside at any time, without showing merits or offering to answer.⁵³

4. *By Motion After Substituted Service*.—a. *Diligence*.—There is no presumption of laches against the defendant on application to open a default judgment on substituted service.⁵⁴ The question of

52. Under Act of 2 Geo. IV and Wm. IV, ch. 36, decree taken *pro confesso* did not become absolute against an absconding defendant until seven years. Under Gen. Orders it may be made absolute after three years. 1 Danl. Ch. Pl. & Pr. *529, 530.

Under Rule XIX of Rules of Practice for the courts of equity of the United States a "decree entered shall be deemed absolute, unless the Court shall at the same term set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant."

Where a defendant personally served had entered his appearance and no notice was served on his solicitors and decree was entered in 1884, the decree was opened and petition for a bill of review filed in 1889 and leave granted and the bill filed in 1890. *Cook v. French*, 96 Mich. 525, 56 N. W. 101.

"It is well settled that opening a decree, and permitting a defendant to come in and defend, is a matter within the sound discretion of the court, when applied for within a reasonable time." *Low v. Mills*, 61 Mich. 35, 44, 27 N. W. 877; *Brewer v. Dodge*, 28 Mich. 360.

"The Court will open a decree, regularly obtained by default, even after enrollment, for the purpose of giving a defendant an opportunity to make his defense, where such defense is meritorious, and he has not been heard in relation to it, either through mistake, accident or surprise." *Mutual Life Ins. Co. v. Sturges*, 32 N. J. Eq. 678, 680; s. c., 33 N. J. Eq. 328.

"In *Cawley v. Leonard*, 1 Stew. Eq. 467, the appellants had petitioned for similar relief three years after sheriff's conveyances were executed, and the chancellor had refused the prayer. On appeal to this court, the relief asked for was given on the ground of surprise and merits." *Mutual Life Ins.*

Co. v. Sturges, 33 N. J. Eq. 328, 331.

53. If judgment is void, remedy by motion in court where rendered at any time. *Murdock v. DeVries*, 37 Cal. 527.

An affidavit of merits is not necessary to relief from a judgment based on want of service. *Stubbs v. McGilliss*, 44 Colo. 138, 96 Pac. 1005, 130 Am. St. Rep. 116, 18 L. R. A. (N. S.) 405.

"Lapse of time is not a bar to granting a motion" to set aside a judgment void for want of jurisdiction. Merits need not be shown. *Heffner v. Gunz*, 29 Minn. 108, 12 N. W. 342.

A judgment by default for service on the wrong party is a nullity and may be set aside without any suggestion of merits, or disregarded when and wherever the entire lack of jurisdiction is made to appear. *Flowers v. King*, 145 N. C. 234, 58 S. E. 1074, 122 Am. St. Rep. 244.

If a court act without jurisdiction, its act or judgment is wholly void and is as though it had not been done. *Paine's Lessee v. Mooreland*, 15 Ohio 435, 45 Am. Dec. 585.

The party is demanding a right not asking a favor. *Roberts v. Pawley*, 50 S. C. 491, 27 S. E. 913.

No merits need be shown on motion to set aside a void judgment. *Dixon v. Pluns*, 98 Cal. 384, 33 Pac. 268, 35 Am. St. Rep. 180, 20 L. R. A. (N. S.) 698; *Bennett v. Supreme Tent K. of M.*, 40 Wash. 431, 82 Pac. 744, 2 L. R. A. (N. S.) 389.

The court may vacate a void judgment after the term in which it was rendered. *MacFarland v. Saunders*, 25 App. Cas. (D. C.) 438; *Scheer v. Keown*, 34 Wis. 349, 353; *Aetna Life Ins. Co. v. McCormick*, 20 Wis. 265, 269.

54. *Frankoviz v. Smith*, 35 Minn. 278, 28 N. W. 508.

diligence when raised is addressed to the discretion of the trial court.⁵⁵

In case of substituted service under the statute the party applying within the time fixed has an absolute right to have the default judgment set aside, if diligent.⁵⁶

b. *Meritorious Defense*.—Under the requirements of the statutes merits should be shown and an answer tendered setting out a meritorious defense.⁵⁷

5. **By Motion for New Trial After Default at Trial**.—A motion to set aside the judgment and for a new trial based on excusable neglect is the appropriate means of relief from a default at trial after issue joined.⁵⁸

6. **Appeal**.—a. *Direct for Error in Judgment*.—If an error enters into the judgment by default, an appeal may be taken direct from the judgment without the intervention of a motion in the trial court.⁵⁹

b. *After Motion for Irregularities*.—A motion must be made in the court below to set aside a default judgment for irregularities in proceedings.⁶⁰

55. *Long v. Long*, 112 Minn. 400, 128 N. W. 464, 140 Am. St. Rep. 495.

56. *Long v. Long*, 112 Minn. 400, 128 N. W. 464, 140 Am. St. Rep. 495; *Pier v. Millerd*, 63 Wis. 33, 22 N. W. 759.

A judgment by default on substituted service may be opened within the statutory period by a subsequent purchaser of the property, on proper showing. A case of quieting title opened by a purchaser of a mortgage. *Leslie v. Gibson*, 80 Kan. 504, 103 Pac. 115, 133 Am. St. Rep. 219, 26 L. R. A. (N. S.) 1063.

57. *Rauer's L. & C. Co. v. Gilleran*, 138 Cal. 352, 354, 71 Pac. 445; *Fulweiler v. Hog's Back C. M. Co.*, 83 Cal. 126, 129, 23 Pac. 65. See also IV, F, 1, b, *supra*.

58. *McArthur v. Slauson*, 60 Wis. 293, 19 N. W. 45.

59. A decree *pro confesso* must be confined to matter in the bill or it will be subject to appeal. *Ohio Cent. R. Co. v. Central Trust Co.*, 133 U. S. 83, 10 Sup. Ct. 235, 33 L. ed. 561.

A judgment by default not justified by the facts and prayer is appealable. *Northern Trust Co. v. Albert Lea College*, 68 Minn. 112, 71 N. W. 9.

If a judgment is void on the face of the records on jurisdictional grounds, a motion should be made in the court below. On appeal from a void judg-

ment the court has nothing on which to act. *Armour Packing Co. v. Howe*, 62 Kan. 587, 64 Pac. 42.

60. "So long as a party has a right to apply to the court of original jurisdiction for the correction of errors, he cannot invoke the powers of an appellate tribunal." *McLean v. Territory*, 8 Ariz. 195, 71 Pac. 926, 930.

Motion to set aside a default judgment for irregularities must first be made in court below. Then, if refused, the order will be reversed. *Reed v. Nicholson*, 158 Mo. 624, 59 S. W. 977 (not open to collateral attack for irregularities); *Lawther v. Agee*, 34 Mo. 372.

The practice in North Dakota is to attack all irregularities in the entry of a default judgment by a motion in the court below to set it aside. Questions as to error in relief granted are never reviewed on motion to set it aside. *Nichells v. Nichells*, 5 N. D. 125, 64 N. W. 73, 57 Am. St. Rep. 540, 33 L. R. A. 515.

"Generally, relief from irregularities in the entry of judgment should be first sought in the trial court; but an entry of judgment as for default, when there is no default in fact, is too grave an irregularity not to be taken notice of upon appeal from the judgment." *Reichert v. Lonsberg*, 87 Wis. 543, 58 N. W. 1030.

G. COLLATERAL ATTACK.—1. Want of Jurisdiction.—a. Appearing of Record.—When any judgment or decree is presented as the foundation of a legal right and the face of the record affirmatively shows want of jurisdiction, it is held generally that the judgment or decree may be disregarded.⁶¹

The question of jurisdiction has been previously considered in this article.⁶² The officer's return is a part of the record and controls the recitals of the judgment on the question of jurisdiction by service of process.⁶³ There are some cases holding that the recitals are conclusive notwithstanding the return is defective.⁶⁴ If the record of a court is silent on the question of jurisdiction and the court is one of general jurisdiction, it will be presumed that jurisdiction was obtained.⁶⁵ In inferior courts the opposite rule applies and the jurisdictional facts must affirmatively appear.⁶⁶

b. Extrinsic Proof.—Where a judicial record contains a return by an officer of the court showing due service of a process on a party against whom a judgment by default has been rendered, there is a conflict of authority, in case of domestic judgments, as to whether or not extrinsic proof can be introduced in a collateral proceeding to contradict such return.⁶⁷ Where the return of service is by a per-

61. The want of due personal service is the want of due process of law. *National Exch. Bank v. Wiley*, 195 U. S. 257, 270, 25 Sup. Ct. 70, 49 L. ed. 184.

When a return is open to two constructions one of which is valid and consistent with the recitals of the judgment, the judgment is not subject to collateral attack. *Point Pleasant v. Greenlee & Harden*, 63 W. Va. 207, 60 S. E. 601, 129 Am. St. Rep. 971. See the title "Judgment."

62. See *supra*, III, A; III, C; IV, C; IV, D.

63. U. S.—*Settlemeir v. Sullivan*, 97 U. S. 444, 24 L. ed. 1110; *Galpin v. Page*, 18 Wall. 350, 21 L. ed. 959. **Colo.**—*Stubbs v. McGillis*, 44 Colo. 138, 96 Pac. 1005, 130 Am. St. Rep. 116, 18 L. R. A. (N. S.) 405. **Ga.**—*Hobby v. Bunch*, 83 Ga. 1, 10 S. E. 113, 20 Am. St. Rep. 301. **Ill.**—*Hemmer v. Wolfer*, 124 Ill. 435, 16 N. E. 652; *Botsford v. O'Conner*, 57 Ill. 72. **Ia.** *Mayfield v. Bennett*, 48 Iowa 194. **Mo.**—*Cloud v. Inhab. of Pierce City*, 86 Mo. 357. **W. Va.**—*Town of Point Pleasant v. Greenlee*, 63 W. Va. 207, 60 S. E. 601, 129 Am. St. Rep. 971. **Wis.**—*Pollard v. Wegener*, 13 Wis. 569. See the titles "Process;" "Service of Process and Papers."

64. Cal.—*Reily v. Lancaster*, 39 Cal. 354; *Hohn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742. **Ill.**—*Bradley v. Drone*, 187 Ill. 175, 58 N. E. 304, 79 Am. St. Rep. 214. **Me.**—*Blaisdell v. Pray*, 68 Me. 269.

See criticism of above cases in *Cloud v. Inhab. of Pierce City*, 86 Mo. 357.

65. *Coan v. Clow*, 83 Ind. 417; *Crown R. E. Co. v. Rogers Com.*, 132 Ky. 790, 117 S. W. 275, 136 Am. St. Rep. 202. See the titles "Judgment;" "Jurisdiction."

66. *Crown R. E. Co. v. Rogers Com.*, 132 Ky. 790, 117 S. W. 275, 136 Am. St. Rep. 202.

67. The recital of service in the record of a domestic judgment is conclusive on collateral attack. **U. S.** *Colt v. Colt*, 48 Fed. 385; *Doe ex dem Sargeant v. State Bank*, 4 McLean 339, 346, 21 Fed. Cas. No. 12,360. **Cal.** *Harsh v. Bramer*, 71 Cal. 155, 11 Pac. 888; *Eitel v. Foote*, 39 Cal. 439. **Conn.**—*Bridgeport Sav. Bank v. Eldredge*, 28 Conn. 556, 73 Am. Dec. 688. **Ill.**—*Osgood v. Blackmore*, 59 Ill. 261, 265. **Mo.**—*Lingo v. Burford*, 18 S. W. 1081; *Rumfelt v. O'Brian*, 57 Mo. 569, 572. **Tenn.**—*Harris v. McClanahan*, 11 Lea 181, 185. **Tex.**—*Letney v. Marshall*, 79 Tex. 513, 15 S. W. 586. **Va.** *Marrow v. Brinkley*, 85 Va. 55, 6 S. E. 605.

son not an officer his affidavit thereof is not conclusive.⁶⁸

"It is the settled law of this state that the judgment of a court of competent jurisdiction cannot be collaterally attacked unless the record affirmatively shows lack of jurisdiction (*Williams v. Haynes*, 77 Tex. 284, 13 S. W. 1029, 19 Am. St. Rep. 752); and that a recital in a judgment of service of citation on a defendant involves absolute verity in a collateral proceeding." *Douglas v. State*, 58 Tex. Cr. 122, 124 S. W. 933, 137 Am. St. Rep. 930. This was a case of an attempt to exclude a divorced wife's testimony against the defendant in a murder trial on the ground that the divorce proceeding was void for want of service of the process.

This doctrine seems to be based on the common law rule that in the case of a mesne or of a final process the return of the sheriff was conclusive and the defendant was required to resort to his action against the sheriff. *Watson v. Watson*, 6 Conn. 334.

Jurisdictional questions were not involved in many cases followed because jurisdiction depended at common law on the actual presence of the defendant in court. 3 Bl. Com. 292.

"The Roman law required citation at least, and our common law never suffering any fact (either civil or criminal) to be tried till it had previously compelled appearance of the party concerned." 4 Bl. Com. 283.

At common law on the question of the conclusiveness of the sheriff's return it has been said: "If the sheriff returns a man outlawed of felony, he may aver against the return." 19 Vin. Abr. 196. And "*in praecepto quod reddat*, at the summons returned, defendant may say that his name is T. B. and that he was summoned by the name of J. B. *because otherwise he shall lose the land by default*." 19 Vin. Abr. 196. And "because now they are in another action, the party may say he was not warned, though his averment be contrary to the return of the sheriff." 19 Vin. Abr. 197. And, as a reason for holding the return conclusive, that a man cannot aver contrary to the return of a sheriff in a mesne process without an action against him because he is only an officer of the court and *has no day*

in court to answer the party. 19 Vin. Abr. 201.

There are high authorities holding that a party may contradict the sheriff's return by extrinsic proof. *U. S. Secrist v. Green*, 3 Wall. 744, 18 L. ed. 153. *Cal.*—*McMinn v. Whelan*, 27 Cal. 300. *Conn.*—*Watson v. Watson*, 6 Conn. 334. *Ill.*—*Goudy v. Hall*, 30 Ill. 109.

"It is the rule in this state that the return of an officer as to service of process may be impeached by extrinsic evidence." *Goble v. Breneman*, 75 Neb. 309, 106 N. W. 440, 121 Am. St. Rep. 813; *Ferguson v. Crawford*, 70 N. Y. 253, 26 Am. Rep. 589; *Adams v. Saratoga & W. R. Co.*, 10 N. Y. 328.

"If the defendant had not proper notice of, and did not appear to the original action, all the state courts, with one exception, agree in opinion that the paper introduced as to him is no record; but if he cannot show, even against the pretended record that fact, on the alleged ground of the uncontrollable verity of the record, he is deprived of his defense by a process of reasoning that is to my mind little less than sophistry. The plaintiffs in effect declare to the defendant: The paper declared on is a record, because it says you appeared, and you appeared because the paper is a record. This is reasoning in a circle." *Starbuck v. Murray*, 5 Wend. (N. Y.) 148.

In his opinion in *Pollard v. Wegener*, 13 Wis. 569, *Dixon, C. J.*, says: "To say in such a case, what all must admit, that the power of the court to proceed or to create a record depended upon the fact that the subpoena had been properly served, and at the same time to say that the defendant in the action is concluded, by a false allegation that it was so served, from showing that it was not, is certainly a most fallacious mode of reasoning . . . It is, as Judge Marcy says in *Starbuck v. Murray*, 5 Wend. (N. Y.) 148, reasoning in a circle."

68. "The return of personal service not being made by an officer, but by a private person, his affidavit of such service is open to contradiction by the defendant and he is at liberty to show that no such service was made

In case of judgments of another state the courts in nearly every state permit the recitations of the record as to jurisdiction to be contradicted by extrinsic evidence.⁶⁰

2. Irregularities in Substituted Service. — Certain irregularities in obtaining substituted service will render proceedings, not simply erroneous, but void and subject to collateral attack.⁷⁰ There are cases that place proceedings *quasi in rem* on the same basis as proceedings *in rem* which depend on seizure alone to confer jurisdiction.⁷¹ If matter which forms the basis of proceedings *quasi in rem* can be reasonably inferred, though not expressly stated, as required on direct attack, it will sustain the proceedings on collateral attack.⁷² In stating the name of the defendant the utmost exactness must be used for

upon him." *Detroit Free Press Co. v. Baggs*, 78 Mich. 650, 44 N. W. 149.

"The practice of allowing process to be served by persons other than an officer of the law or his deputy, acting under oath, is a relaxation of the common law rule, and no presumption is to be indulged in such cases upon facts which are not wholly inconsistent with any other hypothesis than that the service was legally and properly made." *Sayles v. Davis*, 20 Wis. 302.

69. Recitations in record of jurisdictional facts may be disputed on collateral attack in another state than that in which the judgment is rendered in default judgments. In this respect there is a difference in the conclusiveness of judgments on collateral attack in the state where rendered. If want of jurisdiction in collateral attack is not made to appear the judgment is just as conclusive as in its own state. *Estate of Hancock*, 156 Cal. 804, 106 Pac. 58, 134 Am. St. Rep. 177. See the title "Judgment."

It may be shown collaterally that jurisdiction did not exist in case of judgments of other states. "Speaking by Mr. Justice Bradley this court adjudged in the language of Story, that the Constitution 'did not make the judgments of other states domestic judgments to all intents and purposes, but only gave a general validity, faith and credit to them as evidence' and, upon an elaborate review of previous cases, that 'the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provision of the fourth article of the Constitution and

law of 1790 (Rev. Stat. §905 *et seq.*), and notwithstanding the averments contained in the record of the judgment itself." *National Exch. Bank v. Wiley*, 195 U. S. 257, 269, 25 Sup. Ct. 70, 49 L. ed. 184.

70. Where two allegations in an affidavit for publication are so inconsistent that both cannot be true, "one allegation contradicts, counteracts and nullifies the other," and the judgment is void. *Hinkle v. Lovelace*, 204 Mo. 208, 102 S. W. 1015, 120 Am. St. Rep. 698, 11 L. R. A. (N. S.) 730.

Failure to show by affidavit that a non-resident cannot be served with process within the state where required by statute was held to render proceedings in petition void when collaterally brought in question. *Kennedy v. Lamb*, 182 N. Y. 228, 74 N. E. 834, 108 Am. St. Rep. 800.

71. Jurisdiction depends on seizure; notice in proceedings *quasi in rem* is not necessary to jurisdiction. *Cooper v. Reynolds*, 10 Wall. (U. S.) 308, 317, 19 L. ed. 931; *Paine's Lessee v. Mooreland*, 15 Ohio 435, 45 Am. Dec. 585. This was a case of attachment of real property. Held that the court had jurisdiction and exercised it erroneously where notice was not given to owner.

72. *Chapman v. Moore*, 151 Cal. 509, 91 Pac. 324, 121 Am. St. Rep. 130; *Finn v. Howard*, 77 Kan. 421, 94 Pac. 801, 127 Am. St. Rep. 420. See *supra*, III, C, 2.

Not Every Irregularity Is Fatal. In condemnation proceedings the fact that one of the appraisers was not a freeholder was an irregularity not going to the jurisdiction. *Huling v.*

the reason that a mistake would be positively misleading.⁷³ If the middle initial of a name is used it must be right.⁷⁴

Certain improprieties, not specifically condemned by statute, but which tend to facilitate the perpetration of fraud, have been held to render proceedings void on collateral attack.⁷⁵ A judgment by default on facts not constituting a cause of action, or which goes outside the allegations, is subject to collateral attack.⁷⁶

Kaw Val. R. Co., 130 U. S. 559, 9 Sup. Ct. 603, 32 L. ed. 1045.

73. *D'Autremont v. Anderson Iron Co.*, 104 Minn. 165, 116 N. W. 357, 124 Am. St. Rep. 615, 17 L. R. A. (N. S.) 236.

In a suit to quiet title the notice of publication was directed to ——— Whitney and ——— Whitney, his wife. After publication the petition was amended by inserting "Florence I." as name of wife. Motion made by Florence D. Whitney, unmarried, to set aside judgment was denied. Reversed and judgment held void. *Whitney v. Masemore*, 75 Kan. 522, 89 Pac. 914, 121 Am. St. Rep. 442, 11 L. R. A. (N. S.) 676.

74. *D'Autremont v. Anderson Iron Co.*, 104 Minn. 165, 116 N. W. 357, 124 Am. St. Rep. 615, 17 L. R. A. (N. S.) 236. See the titles "Abbreviations;" "Names;" "Parties."

75. Where a default judgment was taken on an affidavit of publication sworn to before the plaintiff as a notary public, the judgment was held void in absence of statute disqualifying him to so act. *Empire Real Est. etc. Co. v. Beechley*, 137 Iowa 7, 114 N. W. 556, 126 Am. St. Rep. 248.

76. Minn.—*Sache v. Wallace*, 101 Minn. 169, 112 N. W. 386, 118 Am. St. Rep. 612, 11 L. R. A. (N. S.) 803. Miss.—*Armstrong v. Barton*, 42 Miss. 506; *Steele v. Palmer*, 41 Miss. 88. Neb.—*Lincoln Nat. Bank v. Virgin*, 36 Neb. 735, 55 N. W. 218, 38 Am. St. Rep. 747. N. J.—*Munday v. Rahway*, 43 N. J. L. 338; *Reynolds v. Stockton*, 43 N. J. Eq. 211, 10 Atl. 385, 6 Am. St. Rep. 877; *Williamson v. Probascio*, 8 N. J. Eq. 571 (this was a decree taken *pro confesso* against a prior mortgagor which notwithstanding statement in pleadings of priority of such mortgage decreed sale of premises to satisfy second mortgage). N. Y. *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706. Wis.—*Straight v. Harris*, 14

Wis. 509; *Strobe v. Downer*, 13 Wis. 11, 80 Am. Dec. 709.

"A judgment rendered by a court of competent jurisdiction in a case brought before it, however erroneously the jurisdiction may have been exercised, is one thing, and a judgment entered by a court of like jurisdiction in a case not before it, is another and a different thing. In the one case its judgment may be erroneous, in the other it is void. To bring a cause before a court, competent to adjudicate it, is not only necessary that the parties should be in *jus vocatio*, cited or summoned in the manner required by the law of procedure, but a case must also be made, or stated, affecting the party against whom relief is asked." *Spors v. Coen*, 44 Ohio St. 497, 502, 9 N. E. 132.

"The mere fact that the court has jurisdiction of the subject-matter of an action before it does not justify an exercise of a power not authorized by law, or a grant of relief to one of the parties the law declares shall not be granted. If the court may do so under the guise of 'jurisdiction of the subject-matter,' then it may commit all sorts of depredations upon the rights of parties, particularly in default cases." *Sache v. Wallace*, 101 Minn. 169, 112 N. W. 386, 118 Am. St. Rep. 612, 11 L. R. A. (N. S.) 803.

In *Sache v. Wallace*, 101 Minn. 169, 112 N. W. 386, 118 Am. St. Rep. 612, 11 L. R. A. (N. S.) 803, the action was to quiet title. The allegations were that the plaintiff was owner in fee simple, that the defendant claimed some interest. The prayer was that the plaintiff be adjudged owner, that the defendant be declared to have no interest. The judgment decreed, in addition to the demand in the complaint, that the interest of the defendant be transferred to and vested in the plaintiff. Judgment reversed on

3. Judgment Void on Records.—Where a judgment by default is in excess of the *demand* there is a conflict of authority as to whether it is void on collateral attack.⁷⁷

H. SUIT IN EQUITY.—A suit in equity while having the direct purpose of doing away with the effect of a judgment, is a proceeding outside the action in which the judgment was rendered and is generally considered a collateral attack.⁷⁸ Equity will not interfere if an adequate remedy exists at law.⁷⁹ A judgment obtained by default by fraud of the plaintiff acting in collusion with the returning officer will be set aside by a suit in equity, and in this case the return may be contradicted by extrinsic proof in all courts.⁸⁰

In some states, holding the officer's return conclusive as to service of process will permit contradiction in a suit in equity to enjoin its enforcement, although there is no claim that the plaintiff knew that the return was false.⁸¹ In Missouri, it is held that the return of an officer is conclusive in a suit in equity unless the plaintiff knew that the return was false, and that the sole remedy is an action for false return.⁸² On the subject of relief in equity from judgments by default where there is a want of notice, there is a conflict of authority as to whether merit must be first shown.⁸³ In case of an insane person, after the term at which the judgment was entered, relief must generally be sought in equity.⁸⁴

appeal, the court expressing an opinion that it was void on collateral attack.

77. A judgment in excess of the demand contrary to the statute is void. *Foley v. Foley*, 120 Cal. 33, 52 Pac. 122, 65 Am. St. Rep. 147; *Russell v. Shurtleff*, 23 Colo. 414, 65 Pac. 27, 89 Am. St. Rep. 216.

A judgment by default exceeding demand is erroneous but not void. *Mach v. Blanchard*, 15 S. D. 432, 90 N. W. 1042, 91 Am. St. Rep. 698, 58 L. R. A. 811.

78. See *Smoot v. Judd*, 184 Mo. 508, 83 S. W. 481.

79. When the time for a writ of certiorari has not expired there is no equitable remedy. *Texas-Mex. R. Co. v. Wright* (Tex. Civ. App.), 29 S. W. 1134.

Equity will not do a nugatory act by setting aside a void judgment. *St. Louis, I. M. & S. R. Co. v. Reynolds*,

89 Mo. 146, 1 S. W. 208; *Texas-Mex. R. Co. v. Wright*, *supra*.

80. *Smoot v. Judd*, 184 Mo. 508, 83 S. W. 481.

81. *Smoot v. Judd*, 184 Mo. 508, 83 S. W. 481.

82. *Smoot v. Judd*, 184 Mo. 508, 586, 83 S. W. 481. This case is referred to as marking the extreme position on the subject of conclusiveness of a sheriff's return, for its review of authorities, and for a vigorous dissenting opinion on the subject of extending the doctrine to include actions in equity to restrain enforcement of a judgment obtained on false return.

83. *Handley v. Jackson*, 31 Ore. 552, 50 Pac. 915, 65 Am. St. Rep. 839.

84. *Ala.*—*Wilkinson v. Lehman-Durr Co.*, 150 Ala. 464, 43 So. 857, 124 Am. St. Rep. 75. *Ky.*—*Allison v. Taylor*, 6 Dana 87, 32 Am. Dec. 68. *Wash.* *Pollock v. Horn*, 13 Wash. 626, 43 Pac. 885, 52 Am. St. Rep. 66.

DEFINITENESS.—See **Certainty in Pleading.**

DE INJURIA (plea).—See **Trespass.**

DE MINIMIS NON CURAT LEX (Application).—See **Maxims.**

DEMURRER

By H. R. BRILL, Jr.,
Of the Minnesota Bar.

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I. DEFINITION, NATURE AND DISTINCTION. — A. DEFINITION AND GENERAL NATURE. — A demurrer is an objection that the pleading against which it is directed is insufficient in law to support the action or defense.¹ It is a declaration that the party demurring will go no further because the other has not shown sufficient matter against him to require an answer.²

In equity the office of a demurrer is to accelerate the decision of the complainant's right, upon the confessed averments of his pleading, to maintain the bill as against the demurrant.³

Whether or not a pleading is a demurrer is to be determined from its substance rather than from the name given to it by the pleader.⁴ But where a pleading is denominated a demurrer and submitted as such the party interposing it cannot complain because the court so treats it.⁵

Exceptions in the civil law are means of defense used by the defendant to retard, prevent, or defeat the demand brought against him.⁶

1. "A demurrer is an objection by one party to his opponent's pleading, alleging that he ought not to answer it, for some defect in law in the pleading." Tyler v. Hand, 7 How. (U. S.) 573, 12 L. ed. 824.

"A demurrer is an objection that the pleading against which it is directed is insufficient in law to support the action or defense, and that the demurrant should not, therefore, be required to further plead." Wood v. Kennard, 144 N. C. 393, 57 S. E. 4.

It is a legal exception to the sufficiency of the opposing pleading to which it refers, and raises an issue of law. Mulvey v. Staab, 4 N. M. 172, 12 Pac. 699.

2. Hayden v. Anderson, 17 Iowa 158.

"To demur is to rest, or pause and the party who demurs in law, to (or upon) his adversary's pleadings, rests, or pauses upon it, as requiring no answer by reason of its supposed legal insufficiency." Will's Gould Pl., 570. Rice v. Rice, 13 Ore. 337, 10 Pac. 495.

"A demurrer (from the Latin *demorari*, or French *demorrei*, to wait, or stay) imports, according to its etymology, that the objecting party will not proceed with the pleading, because no sufficient statement has been made on the other side; but will wait the judgment of the court whether he is bound to answer." Andrews Steph.

Pl. (2nd ed.), §103, p. 189. See also Pickens's Exrs. v. Kniseley, 36 W. Va. 794, 15 S. E. 997.

3. Ellis v. Vandergrift (Ala.), 55 So. 781.

4. To determine whether a defense is a demurrer or an answer, it is only necessary to determine whether it requires that any facts should be proved or not. Struver v. Ocean Ins. Co., 16 How. Pr. (N. Y.) 422.

A pleading which simply controverts the legal positions taken in the complaint is to be regarded as a demurrer though not so denominated. Charlotte, C. & A. R. Co. v. Gibbes, 23 S. C. 370.

A pleading which merely disputes the sufficiency of an answer in law is a demurrer though called a reply. Thompson v. Voss, 16 Ind. 297.

In Wagner v. Boyce, 6 Ariz. 71, 52 Pac. 1122, a pleading setting up the statute of limitations was held to be an answer rather than a demurrer, though it had some of the characteristics of the latter.

In Leaves v. Bernard, 5 Mod. 131, 87 Eng. Reprint 564, a pleading was held to be a demurrer and not a plea in abatement as claimed.

5. Citizens' Nat. Bank v. Foreman's Assignee, 111 Ky. 206, 63 S. W. 454, 757, 56 L. R. A. 673.

6. "The word defense, in its more restricted acceptation, is only applied to such exceptions as go to the merits,

B. DISTINGUISHED FROM PLEADINGS AND MOTIONS. — Strictly speaking, a demurrer is not a pleading,⁷ nor a plea,⁸ nor an answer,⁹ but rather a refusal to plead.¹⁰ It is, however, frequently classed as a pleading by the codes,¹¹ and in many states is regarded as an answer

showing that the action is neither just nor well founded." La. Code Proc., §330.

An exception of no cause of action is in the nature of a demurrer. *Yarborough v. Blanks*, Man. Unrep. Cas. (La.) 144.

A peremptory exception is not an answer, though filed after default (*Bijou Co. v. Lehmann*, 118 La. 356, 43 So. 632), though it has sometimes been so treated under such circumstances, where the default was set aside and no other defense made (*Lea v. Terry*, 15 La. Ann. 159; *Citizens' Bank v. Beard*, 5 La. Ann. 41).

By moving to set aside the default on the filing of an exception, the defendant treats the exception as an answer. *Bijou Co. v. Lehmann*, 118 La. 356, 43 So. 632.

7. *Havens v. Hartford & N. H. R. Co.*, 26 Conn. 220.

"The word 'pleading,' when used in a large or general sense, comprehends, not only the declaration and special or other pleas, but demurrers. But the term 'plea' or 'to plead,' when used in a limited and appropriated sense, excludes the idea of a demurrer." *Welsh v. Blackwell*, 14 N. J. L. 344.

Though the statute calls it a pleading, it is not within the statutory provision requiring pleadings to be liberally construed. *Merrill v. Pepperdine*, 9 Ind. App. 416, 36 N. E. 921.

8. "But a demurrer to the declaration is not classed among *pleas* to the action—not only because it may be taken, as well to any other part of the pleadings, as to the declaration; but also because it neither affirms nor denies any matter of *fact*, and is, therefore, not regarded as strictly a *plea*, of any class; but rather as an excuse for not pleading." Will's Gould Pl. 102.

Though a general demurrer may be an issuable plea, within the usual terms of a rule or agreement to plead issuably, a special demurrer is not, at least, if it does not go to the merits of the case. *Welsh v. Blackwell*, 14 N. J. L. 344.

Though a demurrer may be, in a sense, a pleading, it is not a plea (*Mayor, etc. of Baltimore v. Thomas*, 115 Md. 212, 80 Atl. 726), but rather an excuse for not pleading (*Haiton v. Jeffreys*, 10 Mod. 280, 88 Eng. Reprint 728).

9. "In a very liberal sense, a demurrer is an answer to a complaint (*Broadhead v. Broadhead*, 4 How. 308). But it is so different from an answer that it can never be held to be included in the term answer unless the context or manifest purpose of the term shows that it was so intended." *Kelly v. Downing*, 42 N. Y. 71.

"A demurrer is an answer in law to the bill, though not in a technical sense an answer according to the common language of practice." *New Jersey v. New York*, 6 Pet. (U. S.) 323, 8 L. ed. 414.

10. *State v. Ryan*, 2 Mo. App. 303.

11. *Graff v. Dougherty*, 139 Mo. App. 56, 120 S. W. 661; *Barton Bros. v. Martin*, 54 Mo. App. 134.

Is a pleading within the meaning both of the statutes and the common law. *Mulvey v. Staab*, 4 N. M. 172, 12 Pac. 699.

In Arizona a demurrer to the complaint is treated as a defense, and is required to be incorporated in the answer, and hence is there regarded as a pleading. *Perrin v. Mallory Com. Co.*, 8 Ariz. 404, 76 Pac. 476.

For Purpose of Amendment. — Demurrers are pleadings within the statutory provisions relating to amendments. Cal.—*Hedges v. Dam*, 72 Cal. 520, 14 Pac. 133. Idaho.—*Dunbar v. Board of Comrs.*, 5 Idaho 407, 49 Pac. 409; *Kelly v. Leachman*, 3 Idaho 629, 33 Pac. 44. Ia.—*Morrison v. Miller*, 46 Iowa 84.

Provisions as to Irrelevant Matter. It is a pleading within the meaning of the code provision authorizing the striking out of irrelevant pleadings, or irrelevant and redundant matter in pleadings. *Davis v. Honey Lake Water Co.*, 98 Cal. 415, 33 Pac. 270.

Is Part of the Record Proper.—Board of County Comrs. *v. Harvey*, 5 Okla. 468, 49 Pac. 1006.

for certain purposes.¹² It is also generally held that a demurrer may be filed under a rule to plead,¹³ or answer.¹⁴

There is a conflict of authority as to whether it is an answer within the meaning of statutory provisions making the relief that may be granted dependent on whether an answer is filed,¹⁵ or as to whether a defendant in an equity case may demur under leave to answer.¹⁶

Distinguished from Motions.—There is a distinction between the functions performed by a demurrer and a motion to strike out,¹⁷ or

12. A demurrer to the whole of a bill may be treated as an answer, within the meaning of a statute providing that only parties who have answered may appeal from an order granting an injunction. *Mayor, etc. of Baltimore v. Weatherby*, 52 Md. 442.

Within a statute requiring the objection that the claim sued on is barred by limitations to be taken by answer. *Howell v. Howell*, 15 Wis. 55.

It is an answer within the meaning of a stipulation extending the time to answer. *Steele v. Moss*, 69 Wis. 496, 34 N. W. 237.

13. *Mulvey v. Staab & Co.*, 4 N. M. 172, 12 Pac. 699.

14. *Wieczorek v. Adamski*, 114 Ill. App. 161.

15. In Wisconsin it is so regarded. *Viles v. Green*, 91 Wis. 217, 64 N. W. 856.

In New York it has been held not to be. *Kelly v. Downing*, 42 N. Y. 71.

16. The federal supreme court has held that he may. *New Jersey v. New York*, 6 Pet. (U. S.) 323, 8 L. ed. 414.

In Maryland he may not. *Turpin v. Derickson*, 105 Md. 620, 66 Atl. 276.

17. **Ind.**—*Guthrie v. Howland*, 164 Ind. 214, 73 N. E. 259; *Ellison v. Branstatter*, 45 Ind. App. 307, 88 N. E. 963, 89 N. E. 513. **Mo.**—*Hubbard v. Slavens*, 218 Mo. 598, 117 S. W. 1104; *Ewing v. Vernon County*, 216 Mo. 681, 116 S. W. 518. **Mont.**—*Plymouth Gold Min. Co. v. U. S. Fidelity & Guaranty Co.*, 35 Mont. 23, 88 Pac. 565. **N. J.** *Haberman v. Kaufer*, 60 N. J. Eq. 271, 47 Atl. 480. **N. Y.**—*W. T. Hanson Co. v. Collier*, 104 N. Y. Supp. 787. **Ore.**—*The Victorian*, 24 Ore. 121, 32 Pac. 1040. **Wis.**—*Smith v. Kibling*, 97 Wis. 205, 72 N. W. 869.

An issue of law should be raised by demurrer rather than by motion to

strike a plea as sham or frivolous. *Bates v. Clark*, 95 U. S. 204, 24 L. ed. 471.

“A demurrer goes to the pleading as an entirety for insufficiency; while a motion to strike is applicable where the pleading as a whole or any part of it is wholly irrelevant or is for any reason improper.” *Ray v. Williams*, 55 Fla. 723, 46 So. 158. Quoted with approval in *Southern Home Ins. Co. v. Putnal*, 57 Fla. 199, 49 So. 922.

A demurrer goes to defects of substance and a motion to defects of form. *Brownell v. Salem Flouring Mills Co.*, 48 Ore. 525, 87 Pac. 770.

The motion to strike out irrelevant and redundant matter cannot be resorted to for the purpose of trying the sufficiency of the complaint. *Ware-Kramer Tobacco Co. v. American Tobacco Co.*, 178 Fed. 117.

Even if the court has power to order that a pending motion to strike a pleading from the files shall stand as a demurrer, he has no right to thereupon sustain such demurrer instant. It cannot, in such case, operate both as a motion and a demurrer and justify an order striking the pleading from the files. *Robinson v. Chicago Rys. Co.*, 174 Fed. 40, 98 C. C. A. 26.

If a pleading is insufficient in substance or form the remedy is by demurrer, and not by motion to strike. *Bemis v. Homer*, 145 Ill. 567, 33 N. E. 869; *Orne v. Cook*, 31 Ill. 238.

The legal sufficiency of defenses must be tested by demurrer rather than by motion to strike. *Gjerstaden v. Hartzell*, 8 N. D. 424, 79 N. W. 872.

A judgment on demurrer that a plea is insufficient cannot be treated as striking off or eliminating such plea. *Powers v. Rutland R. Co.*, 83 Vt. 415, 76 Atl. 110.

to expunge,¹⁸ or to dismiss,¹⁹ or to make more definite and certain,²⁰ or for judgment on the pleadings,²¹ or a statutory motion for a compulsory amendment,²² and they cannot be used interchangeably, though the same pleading may be open to attack both by motion and demurrer.²³

Motions to strike,²⁴ or to quash,²⁵ or to dismiss,²⁶ are sometimes

In *McNinch v. Northwestern Thrasher Co.*, 23 Okla. 386, 100 Pac. 524, it was held error to sustain a motion to strike a paragraph of the answer though it did not state facts sufficient to constitute a defense.

That the petition should have been attacked by demurrer rather than motion will not be considered on appeal, where the question is not presented. *Rhodabeck v. Blair Town Lot & Land Co.*, 62 Iowa 368, 17 N. W. 582.

18. *Donovan v. Davis* (Conn.), 82 Atl. 1025; *Freeman's Appeal*, 71 Conn. 708, 43 Atl. 185.

19. *Illinois Cent. R. Co. v. Adams*, 180 U. S. 28, 21 Sup. Ct. 251, 45 L. ed. 410.

"A motion to dismiss and a demurrer are not interchangeable. The former can be used to abate an action only when it is apparent from the record that the court has no jurisdiction; the latter admits the jurisdiction but attacks the pleadings. An order of dismissal is a finality. The action ends. Not so with the sustaining of a demurrer. There may still be opportunity for amendment and until further steps are taken, the action remains on the docket." *Littlefield v. Maine Cent. R. Co.*, 104 Me. 126, 71 Atl. 657.

A motion to dismiss the complaint because of defects which, under the statute, can properly be raised only by demurrer or answer, will be dismissed. *Symons-Krausman Co. v. Reno Wholesale Liquor Co.*, 32 Nev. 241, 107 Pac. 96.

"In statutory proceedings, where the jurisdiction of the court rests upon allegations and proof of statutory requirements, a motion to dismiss may serve the purpose of a demurrer, and the motion will lie where it appears that assuming the allegations to be true, the court has no jurisdiction, as in *Rines v. Portland*, 93 Me. 227; *Hayford v. Bangor*, 103 Me. 434." *Littlefield v. Maine Cent. R. Co.*, 104 Me. 126, 71 Atl. 657.

20. In *Ellis v. Reddin*, 12 Kan. 306, it was held error for the court to treat such a motion as a demurrer and to sustain it as such.

21. *Jones v. Proctor*, 3 Ohio C. C. (N. S.) 649.

Such a motion differs from a demurrer in that if it is sustained, judgment goes at once. *O'Day v. Sanford*, 138 Mo. App. 343, 122 S. W. 3; *Wertheimer-Swarts Shoe Co. v. McDonald*, 138 Mo. App. 328, 122 S. W. 5.

22. *Seaboard Air Line Ry. v. Rentz*, 60 Fla. 429, 54 So. 13.

23. *Southern Home Ins. Co. v. Putnal*, 57 Fla. 199, 49 So. 922; *Bausman v. Woodman*, 33 Minn. 512, 24 N. W. 198.

Where an answer contains no defense plaintiff may proceed either by motion or demurrer. *Howell v. Stewart*, 54 Mo. 400.

24. Ark.—*Adams v. Primmer*, 144 S. W. 522. Ia.—*Eckles v. Des Moines Casket Co.*, 130 N. W. 113; *Haworth v. Newell*, 102 Iowa 541, 71 N. W. 404. Mo.—See *Diener v. Star-Chronicle Pub. Co.*, 232 Mo. 416, 135 S. W. 6; *Shohoney v. Quincey, O. & K. C. R. Co.*, 231 Mo. 131, 132 S. W. 1059; *Paxon v. Talmage*, 87 Mo. 18. Wash. *Hays v. Peavey*, 43 Wash. 163, 86 Pac. 170.

On appeal it will be treated as a demurrer where so treated below. *The Victorian*, 24 Ore. 121, 32 Pac. 1040.

25. Is the better practice to raise objections to the petition in mandamus by demurrer or answer, rather than by motion to quash the citation. *State v. Jumbo Extension Min. Co.*, 30 Nev. 192, 94 Pac. 74.

26. Held to be in legal effect the same in a particular case. *Cofer v. Riseling*, 153 Mo. 633, 55 S. W. 235.

A motion to dismiss a bill for want of equity apparent on the face of the bill will be treated as a general demurrer. *Lavin v. Board of Comrs.*, 245 Ill. 496, 92 N. E. 291; *Leonard v. Arnold*, 244 Ill. 429, 91 N. E. 534.

treated as demurrers, however, and so called demurrers as motions to strike.²⁷

Distinguished From Pleas and Exceptions in Equity. — A demurrer is also to be distinguished from a plea,²⁸ and from exceptions²⁹ in equity.

C. THE DIFFERENT KINDS OF DEMURRERS AND EXCEPTIONS. — Demurrers are either general or special.³⁰

A general demurrer is one which does not specially assign any particular cause of demurrer, but merely asserts, in general terms, the legal insufficiency of the pleading to which it is directed.³¹

A special demurrer is one which assigns and points out specially some particular cause or causes for demurring.³²

A single demurrer may be both general and special.³³

The character of the demurrer rather than its form or the name given to it, controls in determining whether it is general or special.³⁴ If

Such a motion is, in effect, a demurrer. *Ivey v. Rome*, 129 Ga. 286, 58 S. E. 852.

27. *Frazer v. Andrews*, 134 Iowa 621, 112 N. W. 92, 11 L. R. A. (N. S.) 593.

28. Demurrer rather than a plea is the proper mode of reaching objections apparent on the face of the bill. *Davis v. Davis*, 57 N. J. Eq. 252, 41 Atl. 353.

An objection to the equity of plaintiff's claim, as stated in the bill, must be taken by demurrer rather than by plea. *Farley v. Kittson*, 120 U. S. 303, 7 Sup. Ct. 534, 30 L. ed. 684.

"The proper office of a plea is not, like an answer, to meet all the allegations of the bill; nor like a demurrer, admitting those allegations, to deny the equity of the bill; but is to present some distinct fact, which of itself creates a bar to the suit, or to the part to which the plea applies, and thus to avoid the necessity of making the discovery asked for, and the expense of going into the evidence at large. *Mitford Pl.* (4th ed.) 14, 219, 295; *Story Eq. Pl.*, §§649, 652." *Farley v. Kittson*, 120 U. S. 303, 7 Sup. Ct. 534, 30 L. ed. 684.

29. *Barrett v. Twin City Power Co.*, 111 Fed. 45.

30. *Andrews Steph. Pl.* (2nd ed.), §139, p. 266; *Christmas v. Russell*, 5 Wall. (U. S.) 290, 18 L. ed. 475; *Ky. Code Civ. Pr.*, §92.

Chancery rule 9, requiring that the causes of demurrer be, in all cases, plainly specified does not "in any manner change the classification of

demurrers as general and special." *Kerr v. Rupp*, 144 Mich. 269, 107 N. W. 1059. See also *Daschke v. Schellenberg*, 124 Mich. 16, 82 N. W. 665.

"Under our code it is hardly accurate to designate demurrers as 'general' or 'special,' as we have no other than the statutory demurrer, and it has no other office than to challenge the sufficiency of the pleadings upon one or more of the six specific grounds prescribed by the code." *Sparks v. Smeltzer*, 77 Kan. 44, 93 Pac. 338.

31. Special demurrers are not practically set aside by the statutory provision "that no process shall be abated, arrested or reversed for want of form only," and that amendments shall be liberally allowed. "The idea of the statute is not that bad pleadings shall stand as good, but that they may be corrected and made good by amendment." *Bean v. Ayers*, 67 Me. 482.

See VIII, *infra*.

32. See IX, *infra*.

33. May file a general and a special demurrer at the same time and in the same pleading. *McDowell v. Chesapeake & O. S. W. R. Co.*, 90 Ky. 346, 14 S. W. 338.

In *Bradbury v. Tarbox*, 95 Me. 519, 50 Atl. 710, it was held that though plaintiff was said to have "demurred specially," his demurrer was general as well as special and was available as such.

34. *Kemp v. Division No. 241, etc.*, 153 Ill. App. 344.

A demurrer which fails to definitely specify the point of which it com-

the special grounds assigned go to the substance rather than the form of the pleading, the demurrer amounts only to a general one.³⁵

Exceptions under the civil law are either dilatory or peremptory.³⁶

Dilatory exceptions are divided into declinatory and those simply called dilatory exceptions.³⁷ Dilatory exceptions are such as do not tend to defeat the action, but only to retard its progress.³⁸

Declinatory exceptions do not tend to defeat the demand, but only to decline the jurisdiction of the judge before whom it is brought.³⁹

Peremptory exceptions are those which tend to the dismissal of the action.⁴⁰

II. WHO MAY DEMUR.—As a general rule in actions at law either party may demur to the pleadings of his adversary.⁴¹ There

plaints will be regarded as a general demurrer, though styled a "special exception." *Western Union Tel. Co. v. Samuels* (Tex. Civ. App.), 141 S. W. 802; *Hough v. Fink* (Tex. Civ. App.), 141 S. W. 147; *Fritter v. Pendleton* (Tex. Civ. App.), 134 S. W. 1186; *Western Union Tel. Co. v. Harris* (Tex. Civ. App.), 132 S. W. 876; *Western Union Tel. Co. v. Cates* (Tex. Civ. App.), 132 S. W. 92.

The general expression that an allegation "is vague, uncertain, and the like, alone, shall be regarded as no more than a general exception." *Missouri, K. & T. R. Co. v. Harriman Bros.* (Tex. Civ. App.), 128 S. W. 932; *District Court Rule 18*, 94 Tex. 670; *Weatherford, M. W. & N. R. Co. v. Granger*, 85 Tex. 574.

Reasons assigned why a general demurrer should be sustained are not special exceptions though called such. *Nixon v. Malone* (Tex. Civ. App.), 95 S. W. 577.

That the grounds are grounds for special demurrer, while the conclusion is in the form used for general demurrer, does not make it general. *Kerr v. Rupp*, 144 Mich. 269, 107 N. W. 1059.

35. *Tyler v. Hand*, 7 How. (U. S.) 573, 12 L. ed. 824; *City of Spring Valley v. Spring Valley Coal Co.*, 71 Ill. App. 432.

Where they go to the equity of the bill. *Ideal Clothing Co. v. Hazle*, 126 Mich. 262, 85 N. W. 735.

So-called special exceptions, which attack the substance and not the manner and form of the pleading, are, in fact, only general demurrers. *Donnell v. Currie & Dahoney* (Tex. Civ. App.), 131 S. W. 88.

36. La. Code Pr., art. 331.

37. La. Code Pr., art. 331.

38. "Declinatory exceptions have this effect, as well as the exception of discussion opposed by a third possessor, or by a surety in an hypothecary action, or the exception taken in order to call in the warrantor." La. Code Pr., art. 332.

39. "In such cases the defendant contends that he is not bound to plead before the court in which the action has been brought." La. Code Pr., art. 334.

As where exception is taken to the competency of the judge, or because there is another suit "pending between the same parties, for the same object, and growing out of the same cause of action, before another court of concurrent jurisdiction." La. Code Pr., art. 335.

40. Some relate to forms and others arise from the law. La. Code Pr., art. 343.

Peremptory exceptions relating to forms are those which tend to have the cause dismissed because of some nullities in the proceedings. La. Code Pr., art. 344.

Peremptory exceptions founded on law are those which, without going into the merits of the cause, show that the plaintiff can not maintain his action, either because it is prescribed or because the cause of action has been destroyed or extinguished. La. Code Pr., §345; *Labarre v. Burton-Swartz Cypress Co.*, 126 La. 982, 53 So. 113.

They do not go into the merits. *Bijou Co. v. Lehmann*, 118 La. 956, 43 So. 632.

41. See II, and VII, *infra*.

seems to be some conflict of authority as to whether an intervenor may demur to pleadings previously filed.⁴²

Co-parties.—By statute in many states a co-defendant may demur to an answer which seeks affirmative relief against him.⁴³

Must Be Prejudiced.—Ordinarily the defects sought to be reached must be prejudicial to the demurrant.⁴⁴ Thus, for a misjoinder of parties defendant only those can demur who are improperly joined,⁴⁵ and to sustain a demurrer for nonjoinder of parties defendant it must appear that demurrant has an interest in having the omitted parties joined, or is prejudiced by their nonjoinder.⁴⁶

III. WHAT MAY BE DEMURRED TO.—A. GENERAL RULES. Generally speaking, in actions at law and under the codes, either party may demur to the pleadings of his adversary.⁴⁷ Thus, defend-

42. **Arkansas.**—In equity a person claiming an interest in pending litigation and who is permitted to become a party in order that he may bring such interest before the court, may only do so by way of cross-bill, and should not be permitted to demur. *Wright v. Walker*, 30 Ark. 44.

Maine.—One claiming property attached and who voluntarily appears and becomes a party to the action may demur to the declaration. *Copp v. Copp*, 103 Me. 51, 68 Atl. 458.

Texas.—May interpose a general demurrer or exceptions going to the merits of the action. *Hanchett v. Gray*, 7 Tex. 549. See also the title "**Intervention.**"

43. **Kan.**—Gen. St., 1909, §5699. **Ohio.**—Code 1910, §11,328. **Okl.**—Comp. Laws, 1909, §5644. **Wyo.**—Comp. Stat., 1910, §4400.

If such co-defendant answers instead, a demurrer may be filed to such answer as in other cases. *Ohio Code*, 1910, §11,328.

44. **In Equity.**—*Ellis v. Vandergrift* (Ala.), 55 So. 781.

A defendant who is liable for each of three amounts decreed in one suit cannot demur for multifariousness, since he is in no worse position by having only one suit against him than if there were three. *Buerk v. Imhaeuser*, 8 Fed. 457.

That the summons has not been served on one of the defendants affords no ground for demurrer by his co-defendant. *St. Paul Land Co. v. Dayton*, 37 Minn. 364, 34 N. W. 335.

45. **In Equity.**—Ala.—See *Toulmin v. Hamilton*, 7 Ala. 362. **Ark.**—Chris-

tian v. Crocker, 25 Ark. 327; *Gartland v. Dunn*, 11 Ark. 720. **Mich.** *Bigelow v. Sanford*, 98 Mich. 657, 57 N. W. 1037; *Torrent v. Hamilton*, 95 Mich. 159, 54 N. W. 634; *Sweet v. Converse*, 88 Mich. 1, 49 N. W. 899. **N. J.** *Heriman & Grace v. Board of Chosen Freeholders*, 71 N. J. Eq. 541, 64 Atl. 742, affirmed 73 N. J. Eq. 415, 75 Atl. 1101; *Simpson v. Bockius*, 77 N. J. Eq. 339, 78 Atl. 758; *Miller v. Jamison*, 24 N. J. Eq. 41. **Vt.**—*Hastings v. Belden*, 55 Vt. 273.

One of two defendants cannot demur for multifariousness on the ground of the joinder of the other. *Warthen v. Brantley*, 5 Ga. 571.

Under the Codes.—Mo.—*Alnutt v. Leper*, 48 Mo. 319. **Neb.**—*Roose v. Perkins*, 9 Neb. 304, 2 N. W. 715. **Wis.**—*Bronson v. Markey*, 53 Wis. 98, 10 N. W. 166.

A mere excess of parties defendant is no cause of demurrer for any of the parties properly sued. *Mitchell v. Bank of St. Paul*, 7 Minn. 252; *Lewis v. Williams*, 3 Minn. 151.

Should be overruled as to those against whom a cause of action is stated. *Brown v. Woods*, 48 Mo. 330.

46. *Thompson v. Richardson*, 74 App. Div. 62, 77 N. Y. Supp. 202; *Duffy v. Rodriguez*, 124 N. Y. Supp. 529; *Hillman v. Hillman*, 14 How. Pr. (N. Y.) 456; *Randall v. Johnstone*, 20 N. D. 493, 128 N. W. 687; *Dalrymple v. Security Loan & Trust Co.*, 9 N. D. 306, 83 N. W. 245.

47. *Me. Rev. Stat.*, 1903, c. 84, §35; *Mass. Rev. Laws*, 1902, c. 173, §13, p. 1552.

A demurrer to any pleading except

ant may demur to the declaration or complaint,⁴⁸ and to new matter set up in the replication or reply,⁴⁹ while plaintiff may demur to defendant's pleas,⁵⁰ or to new matter set up in his answer.⁵¹ So, too, a party against whom affirmative relief is demanded may demur to a cross-complaint,⁵² or to a complaint in intervention.⁵³

A demurrer may lie to a petition in a case in which the jury are required to determine both the law and the facts.⁵⁴

In some states a demurrer will lie to the pleadings on appeal.⁵⁵

There cannot, however, be a demurrer to a demurrer,⁵⁶ or to a motion,⁵⁷ or to a statutory notice or statement of special matter relied on as a defense under the general issue.⁵⁸

In Inferior Courts. — Whether demurrers are permissible in inferior courts depends on the statutes of the various states.⁵⁹

a demurrer is proper at any stage of the case. *Andrews Steph. Pl.* (2nd ed.), §95, p. 177.

Will lie to an oral complaint in the municipal court. *Weiner v. Yale Knitting Mills*, 123 N. Y. Supp. 327.

Does not lie to a claim against the county presented to the county court for allowance. *Wiegel v. Pulaski County*, 61 Ark. 74, 32 S. W. 116.

48. A general demurrer to the declaration may be filed. *Me. Rev. St.*, 1903, c. 84, §35.

Defendant may demur to the declaration in ejectment. *Mich. Comp. Laws*, 1897, §10,967. See VII, *infra*.

49. *Mo. Rev. St.*, 1909, §1809.

Defendant may demur to a replication in confession and avoidance. *Andrews Steph. Pl.* (2nd ed.), §106, p. 195. See VII, *infra*.

50. Plaintiff may demur to a dilatory plea or to a plea in bar "as being in substance or form, an insufficient answer, in point of law, to the declaration." *Andrews Steph. Pl.* (2nd ed.), §106, p. 195. See VII, *infra*.

51. Ga.—Pleas and answers may be demurrer to. *Code*, 1895, §5049. **N. Y.** To a counterclaim or defense consisting of new matter. *Code Civ. Proc.*, §494. **Ohio.**—To a counterclaim, set-off, or defense consisting of new matter. *Code*, 1910, §11,323. **Wyo.**—To a counterclaim, set-off, or defense consisting of new matter. *Comp. Stat.*, 1910, §4387. See also VII, *infra*.

52. Cal.—*Code Civ. Proc.*, §442. **Idaho.**—*Rev. Codes*, §4188. **Wis.**—*St.*, 1898, §2656a. See also VII, *infra*.

53. The adverse parties may demur to a complaint in intervention as

though it were an original complaint. *Idaho Rev. Codes*, §4111.

For failure to state a cause of action or ground for intervention. *Shepard v. County of Murray*, 33 Minn. 519, 24 N. W. 291. See also the title "Intervention."

54. A demurrer lies to a petition sounding in tort for libel, if certain conditions are present, though the constitution provides that the jury shall determine both the law and the facts. *Diener v. Star-Chronicle Pub. Co.*, 230 Mo. 613, 132 S. W. 1143.

In an action for insulting words, a demurrer shall not preclude the jury from passing thereon. *W. Va. Code*, §3485. *Sweeney v. Baker*, 13 W. Va. 158.

55. Lies to "reasons of appeal." *Eliot's Appeal*, 74 Conn. 586, 51 Atl. 558.

56. *Will's Gould Pl.* 584; *Andrews Steph. Pl.* (2nd ed.), §169, p. 339; *Haiton v. Jeffreys*, 10 Mod. 280, 88 Eng. Reprint 728.

57. *Graff v. Dougherty*, 139 Mo. App. 56, 120 S. W. 661.

58. *Piper v. Boston & M. R. Co.*, 75 N. H. 228, 75 Atl. 1041; *Powers v. Rutland R. Co.*, 83 Vt. 415, 76 Atl. 110; *Campbell v. Camp*, 69 Vt. 97, 37 Atl. 238; *Nott v. Stoddard*, 38 Vt. 25, 88 Am. Dec. 633.

59. See the statutes of the various states.

In Michigan demurrers are not permissible in the probate courts, they not being courts of general jurisdiction. *Turner v. Burr*, 141 Mich. 106, 104 N. W. 379.

In Equity.—A demurrer cannot be interposed to a plea,⁶⁰ or answer,⁶¹ but the contrary is generally true as to a cross-bill.⁶²

Special Proceedings.—As a general rule demurrers will lie to pleadings in habeas corpus,⁶³ certiorari,⁶⁴ and mandamus⁶⁵ proceedings, and proceedings for the disbarment of attorneys.⁶⁶

B. RIGHT TO DEMUR TO PART OF A PLEADING.—In equity defendant may demur to a separate and distinct part of the bill.⁶⁷

At Law and Under The Codes.—In states where the common law rules of pleading prevail, a party may demur to a separate count or plea.⁶⁸ The codes and practice acts of many states provide specifically that the defendant may demur to the whole complaint or any cause of action or count therein,⁶⁹ and to the whole or any part of the re-

60. *Winters v. Claitor*, 54 Miss. 341; *Kidd v. New Hampshire Traction Co.*, 72 N. H. 273, 56 Atl. 465, 66 L. R. A. 574; *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 249. See also *Wheeler v. Wadleigh*, 37 N. H. 55.

61. **U. S.**—*In re Sanford Fork & Tool Co.*, 160 U. S. 247, 16 Sup. Ct. 291, 40 L. ed. 414; *Banks v. Manchester*, 128 U. S. 244, 9 Sup. Ct. 36, 32 L. ed. 425; *Grether v. Wright*, 75 Fed. 742, 23 C. C. A. 498; *Pennsylvania Co. v. Bay*, 138 Fed. 203; *Barrett v. Twin City Power Co.*, 111 Fed. 45; *Crouch v. Kerr*, 38 Fed. 549. **N. J.**—*Travers v. Ross*, 14 N. J. Eq. 254. **Va.**—See *Kelly v. Hamblen*, 98 Va. 383, 36 S. E. 491.

A judgment sustaining such a demurrer will be reversed, though defendant made no objection to the filing of the demurrer and went to a hearing thereon without objection. *Edwards v. Drake*, 15 Fla. 666.

But see *Kelly v. Hamblen*, 98 Va. 383, 36 S. E. 491, where the court intimated that a demurrer will not lie to an answer or plea, but did not decide the question because no objection was made.

62. Ill. Rev. St., 1909, c. 22, §32, p. 253.

63. To the answer. Iowa Code, §449. See also the title "**Habeas Corpus.**"

64. A writ of review defective in form may be reached by demurrer. *Gans v. Steele*, 7 Idaho 143, 61 Pac. 286.

65. N. Y. Code Civ. Proc., §§2076, 2078.

To the petition. *State v. Jumbo Extension Min. Co.*, 30 Nev. 192, 94 Pac. 74.

To the return to the writ. Me. Rev. St., 1903, c. 104, §18.

To the return and pleas. W. Va. Code, §§3587, 3588.

Where a writ of injunction or mandamus is claimed "the defendant may demur to so much of the plaintiff's declaration as claims such writ, and such demurrer shall raise the question whether the facts stated as the ground of such claim disclose any such legal duty as that so sought to be enforced, but shall be subject to all rules governing general demurrers at law, both as to the proceedings thereon and thereafter." Pub. Gen. Laws, art. 75, §126. *Chesapeake & P. Tel. Co. v. Mackenzie*, 74 Md. 36, 21 Atl. 690.

See also the title "**Mandamus.**"

66. To the charges. *In re Bickley*, 4 Ohio N. P. (N. S.) 129.

67. See V, A, 2, *infra*, and cases there cited.

68. *Andrews Steph. Pl.* (2nd ed.), §190, p. 371; *Freeman's Appeal*, 71 Conn. 708, 43 Atl. 185.

69. **Cal.**—Code Civ. Proc., §431. **Idaho.**—Rev. Codes, §4175. **Md.**—To the whole of a bill in equity or part of it. Pub. Gen. Laws, art. 16, §148, p. 424. **Mass.**—Rev. Laws, 1902, c. 173, §14, p. 1552. **Minn.**—Rev. Laws, 1905, §4129. **Mont.**—Rev. Codes, 1907, §6536. **Nev.**—Comp. Laws, §3137. **N. Y.** Code Civ. Proc., §492. **N. D.**—Rev. Codes, 1905, §6855. **Ore.**—L. O. L., §69. **S. C.**—*Miles v. Charleston Light & Water Co.*, 87 S. C. 254, 69 S. E. 292. **S. D.**—Code Civ. Proc., §122. **Utah.**—Comp. Laws, 1907, §2963. **Wash.** Rem. & Ball. Ann. Codes & St., §260. **Wis.**—St., 1898, §2650.

A distinct cause of action may be

ply;⁷⁰ and that plaintiff may demur to the whole answer, or one or more defenses or counterclaims therein.⁷¹ As a general rule, however, a demurrer may not be interposed to a fragmentary part of a pleading not purporting to state an entire cause of action or defense.⁷²

demurred to separately, though not separately stated. *Anderson v. Scandia Bank*, 53 Minn. 191, 54 N. W. 1062.

A defendant may demur to a portion of a complaint in intervention embraced in certain paragraphs which contain a statement of all the facts on which the intervenor's claim for relief against him is based. *Seibert v. Minneapolis & St. L. R. Co.*, 52 Minn. 148, 53 N. W. 1151, 20 L. R. A. 535.

70. Colo. Code §66; Neb. Comp. St., 1911, §6682.

To the Reply to Any Defense.—Rev. Codes, 1905, §6865.

To the Reply or Any Defense Therein.—Utah Comp. Laws, 1907, §2982; Wis. St., 1898, §2663.

To the reply or to a separate traverse to, or avoidance of, a defense or counterclaim contained in the reply. Mont. Rev. Codes, 1907, §6563. N. Y.—Code Civ. Proc., §493. Ohio.—Code 1910, §11,327. Wyo.—Comp. St., 1910, §4386.

71. Colo.—Code, 1910, §66; *People v. Lothrop*, 3 Colo. 428. Idaho.—Rev. Codes, §4193. Mo.—Rev. St., 1909, §1809. Mont.—Rev. Codes, 1907, §6554, 6556. Nev.—Comp. Laws, §3145. Utah.—Comp. Laws, 1907, §2978. Wis. St., 1898, §§2658, 2659; *McCall Co. v. Stone*, 124 Wis. 572, 102 N. W. 1053.

In Massachusetts he may demur to the answer, or so much thereof as applies to one or more counts in the declaration. Rev. Laws, 1902, c. 173, §15, p. 1553; *Montague v. Boston & Fairhaven Iron Works*, 97 Mass. 502.

72. Ala.—*Hester v. Ballard*, 96 Ala. 410, 11 So. 427; *Alabama Great So. R. Co. v. Tapia*, 94 Ala. 226, 10 So. 236. Colo.—*Cochrane v. Parker*, 5 Colo. App. 527, 39 Pac. 361. Ore.—*Multnomah County v. Failing*, 55 Ore. 45, 104 Pac. 964; *Oregon v. Portland Gen. Elec. Co.*, 52 Ore. 502, 96 Pac. 722, 98 Pac. 160. Wis.—*State v. Chittenden*, 107 Wis. 354, 83 N. W. 635.

A demurrer can be properly interposed only where the party controverts the legal sufficiency of the matter stated in the entire count or petition. *District Township v. District Township*,

44 Iowa 512; *Hayden v. Anderson*, 17 Iowa 158.

It is not competent to assail a clause, or a sentence, or several clauses or sentences in a count or petition by demurrer. A so-called demurrer "to all that part," or "to so much as sets up," etc., in a certain count is bad. *Gordon v. Chicago, R. I. & P. R. Co.*, 129 Iowa 747, 106 N. W. 177; *Hayden v. Anderson*, 17 Iowa 158.

Does not lie to a single paragraph unless it purports to present a complete cause of action. *Lowman v. West*, 8 Wash. 355, 36 Pac. 258.

It cannot properly attack merely a part of the recovery sought on the ground that the prayer asks too much. *State v. Portland Gen. Elec. Co.*, 52 Ore. 502, 95 Pac. 722, 98 Pac. 160.

The words "part of a pleading," as used in Code Civ. Pr., §109, permitting a party to demur to a part of a pleading and present an issue of fact as to another part, means "a separate paragraph attempting to set up a separate cause of action or defense, and not to isolated sentences." The proper method "of procedure in such case is by motion to strike out, or by compelling the other party to paragraph, and then filing a demurrer to the defective paragraph." *Sun Mut. Ins. Co. v. Crist*, 19 Ky. L. Rep. 305, 39 S. W. 837.

Sustaining demurrers to isolated sentences was held to be harmless error, where the proper allegations so eliminated were sufficiently pleaded elsewhere. *Sun Mut. Ins. Co. v. Crist*, 19 Ky. L. Rep. 305, 39 S. W. 837.

If the complaint contains but one cause of action, the demurrer must be to it as a unity, or it will be disregarded. *Conant v. Barnard*, 103 N. C. 315, 9 S. E. 575; *Cowand v. Meyers*, 99 N. C. 198, 6 S. E. 82; *State v. Young*, 65 N. C. 579.

Cannot demur to a portion of the return in mandamus not constituting a separate ground for not obeying the writ. *State v. Chittenden*, 107 Wis. 354, 83 N. W. 635.

Thus, a demurrer will not lie to a part of a count,⁷³ or cause of action,⁷⁴ or paragraph,⁷⁵ or plea,⁷⁶ or defense,⁷⁷ or counterclaim.⁷⁸ In some states an exception to the rule is recognized in suits on bonds assigning special breaches,⁷⁹ and suits to enjoin the collection of taxes setting up several objections to the validity of the tax.⁸⁰

It has also been held that the plaintiff may demur to one only of several defenses set up in a single plea,⁸¹ or in a separate count,⁸²

A demurrer going only to the right to recover a part of the damages claimed will be overruled. *Alabama Great Southern R. Co. v. Tapia*, 94 Ala. 226, 10 So. 236.

A Demurrer Will Not Lie to a Paragraph of the Reply.—*Sullivan v. Murphy*, 120 N. Y. Supp. 55.

73. *Louisville & N. R. Co. v. McCool*, 167 Ala. 644, 52 So. 656; *Atlanta & B. A. L. R. v. Wood*, 160 Ala. 657, 49 So. 426.

It is not competent to assail paragraphs of a single count by demurrer. *Delaware County Bank v. Duncombe*, 48 Iowa 488.

74. **Minn.**—*Steenerson v. Great Northern R. Co.*, 64 Minn. 216, 66 N. W. 723; *Knoblauch v. Foglesong*, 38 Minn. 459, 38 N. W. 366; *Daniels v. Bradley*, 4 Minn. 158. **Mont.**—*Plymouth Gold Min. Co. v. United States Fidelity & Guar. Co.*, 35 Mont. 23, 88 Pac. 565. **S. C.**—*Miles v. Charleston Light & Water Co.*, 87 S. C. 254, 69 S. E. 292; *Sloan v. Seaboard R. R. Co.*, 64 S. C. 389, 42 S. E. 197.

75. Of the complaint. *Farris v. Jones*, 112 Ind. 498, 14 N. E. 484; *Vorhees v. Hushaw*, 30 Ind. 488.

Of the answer. *Beals v. Beals*, 27 Ind. 77.

A motion rather than a demurrer is the appropriate method of having stricken from the complaint a portion of the allegations of one paragraph claimed to set out improper elements of damage in connection with others admittedly proper. *Seidler v. Burns*, 84 Conn. 111, 79 Atl. 53.

76. *Louisville & N. R. Co. v. McCool*, 167 Ala. 644, 52 So. 656; *Corpening & Co. v. Worthington & Co.*, 99 Ala. 541, 12 So. 426.

77. **U. S.**—*Cheatham v. Edgefield Mfg. Co.*, 131 Fed. 118. **Ia.**—*Chicago, I. & D. R. Co. v. Cedar Rapids, I. F. & N. W. R. Co.*, 67 Iowa 324, 25 N. W. 264. **Minn.**—*Steenerson v. Great Northern Ry Co.*, 164 Minn. 216,

66 N. W. 723; *Dean v. Howard*, 49 Minn. 350, 51 N. W. 1102; *Knoblauch v. Foglesong*, 38 Minn. 459, 38 N. W. 366. **N. Y.**—*New Jersey Steel & Iron Co. v. Robinson*, 69 N. Y. Supp. 728. **S. C.**—*Lawson v. Gee*, 57 S. C. 502, 35 S. E. 759; *Buist v. Salvo*, 44 S. C. 143, 21 S. E. 615. **Wis.**—*Gooding v. Doyle*, 134 Wis. 623, 115 N. W. 114; *McCall Co. v. Stone*, 124 Wis. 572, 102 N. W. 1053.

Where certain matters in the answer which might have been set out in a separate division as constituting a separate defense are not so set out, but all the paragraphs of the answer are treated by defendant as constituting a single defense, he cannot complain that plaintiff treats them in like manner and assails them by motion instead of demurrer. *Reed v. Lane*, 96 Iowa 454, 65 N. W. 380.

78. *Dean v. Howard*, 49 Minn. 350, 51 N. W. 1102.

79. **Ala.**—*Louisville & N. R. Co. v. McCool*, 167 Ala. 644, 52 So. 656; *Atlanta & B. A. L. R. Co. v. Wood*, 160 Ala. 657, 49 So. 426; *Hester v. Ballard*, 96 Ala. 410, 11 So. 427. **Ind.**—*Farris v. Jones*, 112 Ind. 498, 14 N. E. 484; *Sheetz v. Longlois*, 69 Ind. 491. **Va.**—*Henderson v. Stringer*, 6 Gratt. 130.

Breaches improperly assigned may be demurred to specifically without demurring to the declaration as a whole. *Saco Brick Co. v. Eustis Mfg. Co.*, 207 Mass. 312, 93 N. E. 629.

80. In the same paragraph. *Mustard v. Hoppess*, 69 Ind. 324.

81. Duplicity is allowed under the statute. *Western Union Tel. Co. v. Saunders*, 164 Ala. 234, 51 So. 176.

82. Where, through bad pleading, two distinct and independent defenses are contained in one division of an answer, which is called a count, a demurrer may be directed at one of them. *Wright v. Connor*, 34 Iowa 240.

Where a petition not divided seeks

or separate paragraph.⁸³ of the defendant's answer.

A supplemental pleading is regarded as a part of the original pleading within this rule, and cannot be demurred to separately.⁸⁴

IV. TIME WITHIN WHICH DEMURRERS MUST BE INTERPOSED.—The time within which demurrers may be interposed is regulated by the statutes and rules of court of the various states, and such provisions must be complied with.⁸⁵ The time may or

relief on account of several alleged causes of action, defendant may demur to a single one of them. Plaintiff cannot, in such case, urge the defects in his petition to defeat the demurrer. *Burhaus v. Squires*, 75 Iowa 59, 39 N. W. 181.

83. *Williams v. Langford*, 15 B. Mon. (Ky.) 566; N. C. Rev., 1905, §475.

84. *Farris v. Jones*, 112 Ind. 498, 14 N. E. 484; *Derry v. Derry*, 98 Ind. 319; *Morey v. Ball*, 90 Ind. 450.

85. **California.**—To the complaint. Code Civ. Proc., §430; *Davis v. Honey Lake Water Co.*, 98 Cal. 415, 33 Pac. 270.

To the answer. Code Civ. Proc., §443.

Colorado.—To the complaint. Code, §56.

To the answer. Code, §66.

To the replication. Code, §66.

Florida.—To the declaration. Gen. St., 1906, §1418.

In equity. Gen. St., 1906, §§1870, 1896.

Idaho.—To the complaint. Rev. Codes, §4174.

To the answer. Rev. Codes, §4193.

In justice court. Rev. Codes, §§4669, 4672.

Illinois.—In chancery. Rev. St., 1909, c. 22, §16, p. 252.

Iowa.—To the complaint. Code, §3550.

To subsequent pleadings. Code, §3552.

Kansas.—Gen. St., 1900, §5700.

Maine.—In equity. Rev. St., 1903, c. 79, §17.

Maryland.—In equity. Pub. Gen. Laws, art. 16, §148, p. 424.

Michigan.—In equity. Comp. Laws, 1897, §457.

Minnesota.—To the complaint. Rev. Laws, 1905, §4128.

To the answer. Rev. Laws, 1905, §4134.

Mississippi.—In equity. Code, 1906, §600.

Missouri.—Rev. St., 1909, §1799. To the reply. Id., §1809.

Montana.—To the complaint. Rev. Codes, 1907, §6534.

To the answer. Id., §6554.

In justice court. Id., §§7012, 7015.

Nebraska.—Comp. St., 1911, §6683.

Nevada.—To the complaint. Comp. Laws, §3135.

To the answer. Id., §3145.

New Jersey.—Comp. St., 1910, pp. 4079, 4080, §§94, 97.

In equity. Id., p. 417, §20.

New York.—Code Civ. Proc., §421.

North Dakota.—Rev. Codes, 1905, §6853.

Oklahoma.—Comp. Laws, 1909, §5645.

Oregon.—L. O. L., §81.

Rhode Island.—In equity. Gen. Laws, 1909, c. 289, §6.

South Carolina.—To the complaint. Code Civ. Proc., §164.

To the answer. Id., §174.

South Dakota.—Code Civ. Proc., §120.

Utah.—To the complaint. Comp. Laws, 1907, §2962.

To the answer. Id., §2976.

To the reply. Id., §2982.

Washington.—Rem. & Ball. Ann. Codes & St., §303.

Wisconsin.—To the complaint. St., 1898, §2648.

To the answer. Id., §2658.

To the reply. Id., §2663.

May be stricken if not served in time. *Stilwell v. Kellogg*, 14 Wis. 461.

Wyoming.—Comp. St., 1910, §4417.

In Kentucky "a party who files an answer or subsequent pleading in vacation may file a demurrer therewith." Code Civ. Proc., §109.

In Georgia a demurrer must be filed and determined at the first term, unless continued by the court, or by consent of parties. Code, 1895, §5047.

As to all defects curable by amend-

dinarily be extended by the court,⁸⁶ or a demurrer allowed to be filed out of time,⁸⁷ for good cause shown. In equity leave may be granted even after default.⁸⁸

A material amendment operates to extend the time.⁸⁹

ment a demurrer to the petition must be filed at the first term. *Smith v. Ice Delivery Co.*, 8 Ga. App. 785, 70 S. E. 195.

That there is an adequate remedy at law. *Epping v. Aiken*, 71 Ga. 600; *Powell v. Cheshire*, 70 Ga. 357; *Belle Greene Mining Co. v. Tuggle*, 65 Ga. 652.

Special demurrer must be filed at first term. *Calhoun v. Mosley*, 114 Ga. 641, 40 S. E. 714; *Fleming v. Roberts*, 114 Ga. 634, 40 S. E. 792; *Gate City Fire Ins. Co. v. Thornton*, 5 Ga. App. 585, 63 S. E. 638.

Special demurrers at the trial term are too late. *Neal v. Davis Foundry & Mach. Works*, 131 Ga. 701, 63 S. E. 221; *Richmond & Danville R. Co. v. Mitchell*, 95 Ga. 78, 22 S. E. 124; *Mayor, etc. of Cartersville v. Maguire*, 84 Ga. 174, 10 S. E. 603; *Mayor, etc. of Atlanta v. Central R. & B. Co.*, 53 Ga. 120.

Where a demurrer is filed too late, the proper practice is to refuse to hear it, and to order it stricken, but overruling it instead may be harmless error. *Neal v. Davis Foundry & Mach. Works*, 131 Ga. 701, 63 S. E. 221.

Where the petition does not state a cause of action, however, an oral motion in the nature of a general demurrer may be made at any time before judgment. Ga. Civ. Code, §5046; *Kelly v. Strous & Bros.*, 116 Ga. 872, 43 S. E. 280.

The court may refuse to consider demurrers not filed until after the parties have announced ready for trial and have begun the examination of jurors. *Missouri Valley Bridge & Iron Co. v. Ballard*, 53 Tex. Civ. App. 110, 116 S. W. 93.

86. Fla.—Gen. St., 1906, §§1418, 1896. Ida.—Rev. Codes, §4229. Iowa. Code, §3554. Kan.—Gen. St., 1909, §5701. Me.—In equity. Rev. St., 1903, c. 79, §17. Miss.—In equity. Code, 1906, §601. Mo.—Rev. St., 1909, §1799. N. J.—Comp. St., 1910, p. 417, §20. N. D.—Rev. Codes, §6884. Utah. Comp. Laws, 1907, §3004. Wash.—Rem. & Ball. Ann. Codes & St., §303.

In Georgia, upon the call of the appearance docket the judge may in his discretion allow counsel for the defendant a reasonable time thereafter, and during the term, to demur and answer. *Miller v. Jones*, 136 Ga. 428, 71 S. E. 910.

87. Kan.—Gen. St., 1909, §5701. Mo.—Peak v. Laughlin, 49 Mo. 162. N. D.—Rev. Codes, 1905, §6884. Wis. On proper terms. *Stillwell v. Kellogg*, 14 Wis. 461.

Granting or refusing leave is discretionary. *Davis & Shangle v. Boyer*, 122 Iowa 132, 97 N. W. 1002.

Defendant in bankruptcy proceedings will be protected where his demurrer is filed too late, and the time will be extended, if the demurrer was not simply for the purpose of delay. *In re Cooper Bros.*, 159 Fed. 956, 20 Am. Bk. Rep. 392.

88. Turpin v. Derickson, 105 Md. 620, 66 Atl. 276.

The statutes of Virginia and West Virginia provide that no demurrer shall be received after an attachment has issued against a defendant against whom a bill has been taken for confessed unless by order of court upon motion. Va. Code, §3289; W. Va. Code, §3868.

89. California.—“The court has the same right to exercise its discretion in determining the time within which an answer or demurrer shall be filed to the amended pleading which it allows, as it has in determining whether it will allow such amended pleading, and, unless it shall appear that it has abused its discretion, its action will not be reviewed.” *Schultz v. McLean*, 109 Cal. 437, 42 Pac. 557.

Georgia.—An amendment materially changing the cause of action or defense opens the pleading as amended to demurrer. Civ. Code, §5068; *Barnett v. People's Bank*, 65 Ga. 51.

The mere addition of a verification to the answer and cross-petition is not a material amendment within this statute. *Neal v. Davis Foundry & Mach. Works*, 131 Ga. 701, 63 S. E. 221.

Failure to allow sufficient time within which to demur is not ground for reversal where no prejudice results.⁹⁰

V. RIGHT TO DEMUR AS AFFECTED BY PLEAS, MOTIONS, AND OTHER DEMURRERS.—A. DEMURRERS AND PLEAS TO THE MERITS.—1. **At Law and Under the Codes.**—a. *Right to Demur After Pleading to the Merits.*—In the absence of a statutory provision to the contrary,⁹¹ it is generally held that a party cannot interpose a demurrer after he has pleaded to the merits of the action,⁹²

Massachusetts.—May demur to an amended answer though the time for filing a demurrer to the original has expired. *Isenburger v. Hotel Reynolds Co.*, 177 Mass. 455, 59 N. E. 120.

In Idaho in justice court, where a pleading is amended, the adverse party may demur to it within such time, not exceeding two days, as the court may allow. Rev. Codes, §4675.

In Michigan, under circuit court rule 10, subd. a, a demurrer to an amended declaration must be filed within ten days after the amendment is received. *Michigan United Rys. Co. v. Ingham Circuit Judge*, 155 Mich. 478, 119 N. W. 588.

In New York a party must demur to an amended pleading within twenty days after service thereof. Code Civ. Proc., §543.

In Wisconsin defendant must demur to the amended complaint within twenty days after it is served. St., 1893, §2652.

90. "Unless it is made to appear that an answer is subject to demurrer and that the plaintiff could have derived some advantage by demurring to it, he cannot claim to have been deprived of any right because he is not granted time to determine whether he will demur." *Schultz v. McLean*, 109 Cal. 437, 42 Pac. 557.

A judgment will not be reversed for refusal to give three days' time in which to demur to a mere general denial, since such a demurrer would be frivolous. *Pidgeon v. United Rys. Co.*, 154 Mo. App. 20, 133 S. W. 130.

In *Interstate Land & Town Co. v. Patton*, 21 Colo. 503, 42 Pac. 673, it was held that defendant could not complain on appeal that the trial was commenced within the ten days allowed for demurring to the replication where he in no manner raised the question below and applied for a continuance

on other grounds, especially where he suffered no prejudice.

91. Since the statute permits them both to be filed at the same time, a demurrer may be filed after a plea in bar without withdrawing the latter. In view of the intent of the statute, it is immaterial whether they are filed on the same or different days. *Wade v. Doyle*, 18 Fla. 630.

92. Ill.—*Wear v. Jacksonville & S. R. Co.*, 24 Ill. 593. Me.—*Tukey v. Gerry*, 63 Me. 151. Mich.—*Cicotte v. Wayne County*, 44 Mich. 173, 6 N. W. 236. Neb.—*Pine-Ule Medicine Co. v. Yoder & Eply*, 135 N. W. 383; *Kyner v. Whittemore*, 90 Neb. 188, 133 N. W. 197. N. Y.—*Crowley v. La Brake*, 132 N. Y. Supp. 155.

There can be no demurrer after an issue in fact joined. *Will's Gould Pl.* 584.

A demurrer must be filed before an answer or reply has been filed. Iowa Code, §3551.

A demurrer filed after an issue of fact has been made up is irregular and should not be noticed. *Brush v. Blanchard*, 19 Ill. 31.

Is too late where filed after an issue of fact has been made up and tried and found for the adverse party. *Brown v. Illinois Central Mut. L. Ins. Co.*, 42 Ill. 366.

It is not proper practice to demur to plaintiff's statement of claim after an affidavit of defense has been interposed and held good. *Heller v. Royal Ins. Co.*, 151 Pa. 101, 25 Atl. 83.

Striking a demurrer filed after answer and during the trial, and without leave, was held not to be an abuse of discretion, in *Fadley v. Smith*, 23 Mo. App. 87.

After the case has been once tried and is on the trial calendar, a demurrer cannot be filed without leave of court. *Cook v. Norwood*, 106 Ill. 558.

at least unless such pleading is first withdrawn.⁹³

Except as the rule is modified by statute,⁹⁴ a party cannot withdraw a plea or answer and file a demurrer as a matter of right,⁹⁵ though the court has discretionary power to permit him to do so.⁹⁶

Effect.—A demurrer is generally deemed to be waived or overruled by filing an answer to the merits at the same time,⁹⁷ or before it is disposed of,⁹⁸ though there is some authority to the contrary.⁹⁹

A special demurrer comes too late after issue joined on pleas. *Roane's Admr. v. Drummond's Admrs.*, 6 Rand. (Va.) 182.

An exception going to the action cannot be taken after answering to the merits. *Drake v. Brander*, 8 Tex. 351.

A peremptory exception cannot be received after answer. *Coles v. Kelsey*, 2 Tex. 542.

93. Ill.—*Wear v. Jacksonville & S. R. Co.*, 24 Ill. 593. **Ind.**—*Morrison v. Ross*, 113 Ind. 186, 14 N. E. 479. **Me.** *Tukey v. Gerry*, 63 Me. 151. **Mich.** *Cicotte v. Wayne County*, 44 Mich. 173, 6 N. W. 236.

94. See Mo. Rev. St., 1909, §1803.

95. *Southern Hardware & Supply Co. v. Block Bros.*, 163 Ala. 81, 50 So. 1036.

Must obtain leave of court. *Morrison v. Ross*, 113 Ind. 186, 14 N. E. 479.

96. Conn.—*Hotchkiss v. Hoy*, 41 Conn. 568. **Idaho.**—*Murphy v. Russell & Co.*, 8 Idaho 133, 67 Pac. 421. **Neb.** *Edney v. Baum*, 70 Neb. 159, 97 N. W. 252.

The refusal to permit the withdrawal of a plea of the general issue, which operated as an admission that defendants were liable jointly, if at all, and to file a demurrer questioning such joint liability, was held not to be an abuse of discretion. *Southern Hardware & Supply Co. v. Block Bros.*, 163 Ala. 81, 50 So. 1036.

It is discretionary with the court to entertain a demurrer after demurrant has answered. *Brown v. Case*, 9 Kan. App. 685, 79 Pac. 601.

After Demurrer Overruled.—*Herrington v. Stevens*, 26 Ill. 298; *Lowy v. Andreas*, 20 Ill. App. 521.

Leave will be allowed as of course after overruling a demurrer to a plea. *Chesapeake & O. R. Co. v. American Exchange Bank*, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449; *Camden Clay Co.*

v. Town of New Martinsville, 67 W. Va. 525, 68 S. E. 118. See also XVIII, *infra*.

97. Ia.—*Fisher v. Scholte*, 30 Iowa 221. **Mo.**—*Donahue v. Bragg*, 49 Mo. App. 273. **N. C.**—*Ransom v. McClees*, 64 N. C. 17. **Okla.**—*Ryndak v. Seawell*, 13 Okla. 737, 76 Pac. 170.

98. Colo.—Code, 1910, §58; *Plattner Imp. Co. v. Bradley, Alderson & Co.*, 40 Colo. 95, 90 Pac. 86. **Ind.**—*Earhart v. Farmers' Creamery*, 148 Ind. 79, 47 N. E. 226; *Moore v. Glover*, 115 Ind. 367, 16 N. E. 163; *Morrison v. Ross*, 113 Ind. 186, 14 N. E. 479; *Robertson v. Huffman*, 92 Ind. 247. **Mich.** *Cicotte v. Wayne County*, 44 Mich. 173, 6 N. W. 236. **Miss.**—*Home Ins. Co. v. Delta Bank*, 71 Miss. 608, 15 So. 932. **Mo.**—*State v. Bright*, 224 Mo. 514, 123 S. W. 1057; *Dunklin County v. Clark*, 51 Mo. 60; *Donahue v. Bragg*, 49 Mo. App. 273. **S. D.**—See, *Pierson v. Minnehaha County*, 26 S. D. 462, 128 N. W. 616.

By answering and proceeding to trial on the merits. *Vore v. Woodford*, 29 Ohio St. 245.

Answering and proceeding to trial on the merits, without bringing it on for a hearing. *Budlong v. Budlong*, 48 Wash. 645, 94 Pac. 478; *Watson v. Town of Kent*, 35 Wash. 21, 76 Pac. 297; *Mosher v. Bruhn*, 15 Wash. 332, 46 Pac. 397.

99. "The filing of the demurrer and answer at the same time does not preclude the defendant from waiving his right to a trial upon the merits, and standing by his demurrer." *Bridges v. Reed*, 9 Bush (Ky.) 329.

Where both are filed at the same time, the fact that the parties proceed to trial without objection, and without noticing the demurrer, authorizes the inference that the demurrer was waived or overruled. *Danville, L. & N. T. R. Co. v. Stewart*, 2 Met. (Ky.) 119.

In *Scully Steel & Iron Co. v. Hann*, 18 N. D. 528, 123 N. W. 275, it was

An exception to the rule is sometimes recognized in the case of demurrers on the ground of want of jurisdiction, or failure to state a cause of action,¹ and of course no waiver results where the statute permits both to be filed at the same time.²

In a few states a party who demurs after pleading to the merits thereby waives such pleading.³

b. *Right To Demur and Plead to the Merits at the Same Time.*
(I.) *To Different Parts of the Pleading.*—A party may plead to one count or plea and demur to another at the same time.⁴

The codes generally provide that defendant may demur to one or more of the causes of action alleged in the complaint, and answer as to the residue,⁵ and that plaintiff may demur to one or more of several defenses or counterclaims set up in the answer and reply to the residue.⁶

held that the fact that plaintiff embodied a demurrer in his reply to an amended counterclaim filed after the sustaining of a demurrer to the original was not a waiver of the demurrer, in the absence of any objection to that method of pleading.

1. Answering to the merits before a general demurrer is disposed of does not waive the demurrer in view of the provision of Civ. Code Prac., §93, that failure to make the objection that the pleading does not state a cause of action is not a waiver thereof. *Schooler v. Yancey*, 133 Ky. 695, 118 S. W. 940.

In view of S. C. Code Civ. Proc., §169, which provides that all of the objections specified as grounds of demurrer shall be deemed waived except the objections to the jurisdiction and failure to state a cause of action. *Sprunt v. Gordon* (S. C.), 71 S. E. 1033.

The court has discretionary power to require defendant to elect on which he will proceed. *Sprunt v. Gordon* (S. C.), 71 S. E. 1033; *Stahn v. Catawba Mills*, 53 S. C. 519, 31 S. E. 498.

2. *Ariz.*—Sess. Laws, 1907, c. 74, §1, p. 122. *Cal.*—Code Civ. Proc., §472; *Hurley v. Ryan*, 119 Cal. 71, 51 Pac. 20; *Curtiss v. Bachman*, 84 Cal. 216, 24 Pac. 379. *Ga.*—Code, 1895, §5047. *Idaho.*—Rev. Codes, §4228. *Utah.* Comp. Laws, 1907, §3004.

3. See XII, *infra*.

4. Both at common law and under the statute of Anne. *Andrews Steph. Pl.* (2nd ed.), §190, p. 371.

In *Freeman's Appeal*, 71 Conn. 708,

43 Atl. 185, it is said that at common law a demurrer lay only to the whole of a plea, but that the rule as stated in the text now obtains.

5. *Ark.*—Kirby's Dig., §6097. *Cal.* Code Civ. Proc., §441. *Colo.*—Code, §58. *Ida.*—Rev. Codes, §4187. *Ind.* Burns' Ann. St., 1908, §349. *Ia.*—Code, §3564; *Clark v. Ross*, 96 Iowa 402, 65 N. W. 340. *Kan.*—Gen. St., 1909, §5689. *Ky.*—Code Civ. Pr., §109; *Sun Mut. Ins. Co. v. Crist*, 19 Ky. L. Rep. 305, 39 S. W. 837. *Minn.*—Rev. Laws, 1905, §4132. *Mo.*—Rev. St., 1909, §1802. *Mont.*—Rev. Codes, 1907, §6536. *Neb.* Comp. St., 1911, §6672. *Nev.*—Comp. Laws, §3137. *N. Y.*—Code Civ. Proc., §492; *Crowley v. La Brake*, 132 N. Y. Supp. 155. *N. C.*—Rev., 1905, §471; *Conant v. Barnard*, 103 N. C. 315, 9 S. E. 575. *N. D.*—Rev. Codes, 1905, §6861. *Ohio.*—Code, 1910, §11,313. *Okla.*—Comp. Laws, 1909, §5633. *Ore.* L. O. L., §75. *S. C.*—Code Civ. Proc., §172. *S. D.*—Code Civ. Proc., §128. *Utah.*—Comp. Laws, 1907, §2972. *Wash.* Rem. & Ball. Ann. Codes & St., §274. *Wis.*—St., 1898, §2650; *Jones v. Foster*, 67 Wis. 296, 30 N. W. 697. *Wyo.* Comp. St., 1910, §4385.

6. *Kan.*—Gen. St., 1909, §5697. *Ky.* Code Civ. Pr., §109. *Minn.*—Rev. Laws, 1905, §4134. *Mont.*—Rev. Codes, 1907, §6556. *N. C.*—Rev., 1905, §485; *Mottu v. Davis*, 151 N. C. 237, 65 S. E. 969; *Ransom v. McClees*, 64 N. C. 17. *N. D.*—Rev. Codes, 1905, §6863. *Ohio.*—Code, 1910, §11325. *Okla.*—Comp. Laws, 1909, §5642. *Ore.*—L. O. L., §78. *S. C.*—Code Civ. Proc., §174. *S. D.*—Code Civ. Proc., §130. *Utah.* Comp. Laws, 1907, §2978. *Wash.*—Rem.

(II.) To the Same Matter. — Except where the statute so provides,⁷ a party may not both demur and plead to the same matter at the same time.⁸ An exception has sometimes been recognized in the case of demurrers going to the substance of the claim.⁹

By Co-parties. — It has been held that, as to a single cause of action, some of a number of defendants may answer and some may demur,¹⁰ but that the contrary is true where their liability is joint and their interest in the question involved is identical.¹¹

& Ball. Ann. Codes & St., §276. Wis. St., 1898, §2659.

May demur to one of two distinct defenses and reply to the other, though they are not separately stated. *J. W. Bass & Co. v. Upton*, 1 Minn. 408.

The statute refers only to a complaint containing several causes of action, or an answer taking two distinct grounds. Where there is but a single counterclaim, the statute does not permit plaintiff to reply to some of its allegations and demur to others at the same time. *Ransom v. McClees*, 64 N. C. 17.

7. Ark.—Kirby's Dig., §6117. Cal. Code Civ. Proc., §431. Fla.—Gen. St., 1906, §1442. Ga.—Code, 1895, §5047. Ida.—Rev. Codes, §4175. Nev.—Comp. Laws, §3137. Utah.—Comp. Laws, 1907, §§2963, 2972.

Defendant may at the same time demur and answer to the entire complaint and to each cause of action, if more than one is stated. *People v. McClellan*, 31 Cal. 101.

In Arizona, a demurrer is treated as a defense and is required to be incorporated in the answer, and, hence, may accompany defenses in bar. Laws, 1907, c. 74, §1, p. 122; *Perrin v. Mallory Com. Co.*, 8 Ariz. 404, 76 Pac. 476.

In West Virginia, defendant may both demur and plead to a declaration in ejectment. Code, §3348.

8. Andrews Steph. Pl. (2nd ed.), §190, p. 371, and the following: Ill. City of Peoria v. Simpson, 110 Ill. 294; *Culver v. Third Nat. Bank*, 64 Ill. 528; *Wilson v. Myrick*, 26 Ill. 35; *Wear v. Jacksonville & S. R. Co.*, 24 Ill. 593. Mich.—Cicotte v. Wayne County, 44 Mich. 173, 6 N. W. 236. Mo.—State v. Bright, 224 Mo. 514, 123 S. W. 1057; *Long v. Towl*, 41 Mo. 398; *Donahue v. Bragg*, 49 Mo. App. 273. N. Y. *Crowley v. La Brake*, 132 N. Y. Supp. 155; *Munn v. Barnum*, 12 How. Pr. 563. N. C.—*Ransom v. McClees*, 64 N.

C. 17. Ohio.—*Davis v. Hines*, 6 Ohio St. 473. Okla.—*Ryndak v. Seawell*, 13 Okla. 737, 76 Pac. 170; *Tecumseh State Bank v. Maddox*, 4 Okla. 583, 46 Pac. 563. S. C.—*Sprint v. Gordon*, 71 S. E. 1033. Va.—*Chesapeake & O. R. Co. v. American Exchange Bank*, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449. W. Va.—*Camden Clay Co. v. Town of New Martinsville*, 67 W. Va. 525, 68 S. E. 118.

Neither at common law nor under the statute of Anne can a party plead and demur to the same matter or thing. *Will's Gould Pl.* 340.

The statute of 4 Anne, authorizing defendant "to plead as many several matters" as he shall think necessary for his defense does not authorize him to file a plea and a demurrer to the declaration at the same time. *Haiton v. Jeffreys*, 10 Mod. 280, 88 Eng. Reprint 728.

Cannot reply to some of the allegations of a counterclaim and demur to others at the same time. *Ransom v. McClees*, 64 N. C. 17.

To the same part of the complaint. *Pierson v. Minnehaha County*, 26 S. D. 462, 128 N. W. 616.

To the same cause of action in the same pleading. *Barnard v. Morrison*, 29 Hun (N. Y.) 410.

To the same count of the complaint. *Auburn & Owaseo Canal Co. v. Leitch*, 4 Denio (N. Y.) 65; *Struver v. Ocean Ins. Co.*, 16 How. Pr. (N. Y.) 422.

9. May reply to a counterclaim and at the same time demur on the ground that it does not constitute a counterclaim (*Latimer v. Sullivan*, 30 S. C. 111, 8 S. E. 639), or on the ground that there is another action pending in reference thereto (*Lipscomb v. Lipscomb*, 32 S. C. 243, 11 S. E. 206).

10. *Conant v. Barnard*, 103 N. C. 315, 9 S. E. 575.

11. Not at the same time. *Von Glahn v. De Rossett*, 76 N. C. 292.

2. **In Equity.**—A defendant may demur to part, answer to part and plead to part of the bill at the same time, provided each relates to separate and distinct parts.¹² As a general rule, however, he may not at the same time both answer or plead and demur to the whole bill, or to the same part of it.¹³ Hence a defendant may not demur after he has answered,¹⁴ unless the pleading of the adverse party is subsequently amended so as to change the nature of the cause of action set up thereby.¹⁵

A demurrer is overruled by an answer or plea filed with it,¹⁶

12. **U. S.**—*Livingston v. Story*, 9 Pet. 632, 9 L. ed. 255; *Bryant Bros. Co. v. Robinson*, 149 Fed. 321, 79 C. C. A. 259; *Strang v. Richmond, P. & C. R. Co.*, 101 Fed. 511; *United States v. American Bell Tel. Co.*, 30 Fed. 523; *Hayes v. Dayton*, 5 Fed. 702. **Fla.** Gen. St., 1906, §1870. **Md.**—Pub. Gen. Laws, art. 16, §148, p. 424; *Morton v. Harrison*, 111 Md. 536, 75 Atl. 337; *Frederick County v. Frederick City*, 88 Md. 654, 42 Atl. 218. **Miss.**—*Sledge v. Dickson*, 81 Miss. 501, 33 So. 282. **N. J.**—*Bennett v. Bennett*, 63 N. J. Eq. 306, 49 Atl. 501; *Davis v. Davis*, 57 N. J. Eq. 252, 41 Atl. 353. **Pa.** Rule 31; *Stegmaier v. Keystone Coal Co.*, 232 Pa. 140; *Barbey's Appeal*, 119 Pa. 413, 13 Atl. 451. **Vt.**—*Holt v. Daniels*, 61 Vt. 89, 17 Atl. 786.

Provided the demurrer and answer apply to different and distinct parts and are not inconsistent with each other. *Edes v. Garey*, 46 Md. 24.

13. **U. S.**—*Bryant Bros. Co. v. Robinson*, 149 Fed. 321, 79 C. C. A. 259; *In re Koplin*, 179 Fed. 1013; *In re Cooper Bros.*, 159 Fed. 956, 20 Am. Bk. Rep. 392; *Strang v. Richmond, P. & C. R. Co.*, 101 Fed. 511; *United States v. American Bell Tel. Co.*, 30 Fed. 523. **Conn.**—*Scott v. Spiegel*, 67 Conn. 349, 35 Atl. 262; *Brainard v. Staub*, 61 Conn. 570, 24 Atl. 1040; *Hoadley v. Smith*, 36 Conn. 371. **Ill.**—*Harding v. American Glucose Co.*, 182 Ill. 551, 55 N. E. 577, 64 L. R. A. 738. **Md.**—*Frederick County v. Frederick City*, 88 Md. 654, 42 Atl. 218. **N. J.**—*Redrow v. Sparks*, 75 N. J. Eq. 396, 72 Atl. 442; *Veghte v. Raritan Water Power Co.*, 19 N. J. Eq. 143. **Pa.**—*Stegmaier v. Keystone Coal Co.*, 232 Pa. 140; *Appeal of Barbey*, 119 Pa. 413, 13 Atl. 451. **R. I.**—*Roberts v. White*, 32 R. I. 522, 80 Atl. 123. **Vt.**—*Holt v. Dan-*

iels, 61 Vt. 89, 17 Atl. 786; *Wage v. Pulsifer*, 51 Vt. 45.

Where the bill, in its nature, cannot be segregated into parts, but all the paragraphs are merely successive steps in the statement of a single claim, he cannot answer certain paragraphs and demur to others. *Sledge v. Dickson*, 81 Miss. 501.

A defendant who answers in full cannot include in the answer a demurrer to all or part of the bill. *Bird v. Magowan* (N. J. Eq.), 43 Atl. 278.

14. *Hires Co. v. Simpkins*, 179 Fed. 1012; *Sanche v. Electrolibration Co.*, 4 App. Cas. (D. C.) 453.

After defendant has answered, thereby admitting the jurisdiction, he cannot subsequently demur on the ground that there is an adequate remedy at law, and it is error to permit him to do so. *Roberts v. White*, 32 R. I. 522, 80 Atl. 123.

A demurrer filed without leave, and after answer and submission is too late. *Newman v. Moody*, 19 Fed. 858.

15. A defendant who has answered the original bill may demur to an amended one which changes the nature of the case. *Sanche v. Electrolibration Co.*, 4 App. Cas. (D. C.) 453.

16. **U. S.**—*Bryant Bros. Co. v. Robinson*, 149 Fed. 321, 79 C. C. A. 259; *Miller & Lux v. Riekey*, 123 Fed. 604; *Strang v. Richmond, P. & C. R. Co.*, 101 Fed. 511; *United States v. American Bell Tel. Co.*, 30 Fed. 523. **Md.**—*Morton v. Harrison*, 111 Md. 536, 75 Atl. 337; *Turpin v. Derickson*, 105 Md. 620, 66 Atl. 276; *Frederick County v. Frederick City*, 88 Md. 654, 42 Atl. 218; *Chase's Case*, 1 Bland 206, 217. **Miss.**—*Sledge v. Dickson*, 81 Miss. 501, 33 So. 282. **N. J.**—*Redrow v. Sparks*, 75 N. J. Eq. 396, 72 Atl. 442; *McDevitt v. Connell*, 71 N.

or before it has been disposed of.¹⁷ Formerly the whole demurrer was overruled if any part of the matter covered by it was also covered by a plea or answer.¹⁸ This rule, however, no longer obtains in the federal courts.¹⁹

The filing of a cross-bill seeking affirmative relief in case a previous demurrer is overruled has been held not to prevent the consideration of the issues raised by the demurrer.²⁰

In some jurisdictions defendant is permitted to demur and answer to the same matter at the same time,²¹ or the matter is held to be discretionary with the court.²²

Leave may be granted to withdraw an answer and to file a demurrer in its place.²³

J. Eq. 119, 63 Atl. 504; *Droste v. Hall* (N. J. Eq.), 29 Atl. 437; *Veghte v. Raritan Water Power Co.*, 19 N. J. Eq. 143. **Pa.**—*Barby's Appeal*, 119 Pa. 413, 13 Atl. 451. **Vt.**—*Holt v. Daniels*, 61 Vt. 89, 17 Atl. 786; *Wade v. Pulsifer*, 54 Vt. 45. **Eng.**—*Jones v. Earl of Strafford*, 3 P. Wms. 79, 24 Eng. Reprint 977.

The plea cannot have that effect where it is stricken out because not accompanied by an affidavit of merits. *Turpin v. Derickson*, 105 Md. 620, 66 Atl. 276. See the title "Affidavits of Merits and Defense."

In Bankruptcy.—*In re Koplin*, 179 Fed. 1013; *In re Cooper Bros.*, 159 Fed. 956, 20 Am. Bk. Rep. 392.

The remedy in such case is a motion to strike out either the answer or the demurrer or to compel defendant to elect between them. The objection is waived by going to argument on the demurrer. *Hayes v. Dayton*, 8 Fed. 702.

The demurrer may be stricken on motion. *Miller & Lux v. Rickey*, 123 Fed. 604.

See *Snyder v. De Forest Wireless Tel. Co.*, 154 Fed. 142, where a motion to strike the demurrer was denied as involving the making of a useless order in view of the fact that the court thought that the demurrer should be overruled and the questions of law reserved until final hearing.

17. *Alexander v. Alexander*, 13 App. Cas. (D. C.) 334; *Harding v. American Glucose Co.*, 182 Ill. 551, 55 N. E. 577, 64 L. R. A. 738.

18. *Jarvis v. Palmer*, 11 Paige Ch. (N. Y.) 650.

19. No demurrer shall be held bad and overruled upon argument only be-

cause the answer of the defendant may extend to some part of the same matter as may be covered by the demurrer. Equity rule 37.

This rule covers only cases where the demurrer and answer each go to only part of the bill and happen to overlap, and not to where both the answer and the demurrer are to the whole of the bill. *Bryant Bros. Co. v. Robinson*, 149 Fed. 321, 79 C. C. A. 259; *In re Koplin*, 179 Fed. 1013; *In re Cooper Bros.*, 159 Fed. 956, 20 Am. Bk. Rep. 392; *Miller & Lux v. Rickey*, 123 Fed. 604; *Strang v. Richmond, P. & C. R. Co.*, 101 Fed. 511; *Huntington v. Laidley*, 79 Fed. 865.

20. *Bennett v. Bennett*, 63 N. J. Eq. 306, 49 Atl. 501.

21. In Florida, by statute a demurrer going to the whole bill may be incorporated in the answer. *McRaine v. Jarrell*, 59 Fla. 587, 52 So. 304.

In view of the statute permitting the incorporating of a demurrer in an answer, filing a demurrer with an answer, but on a separate paper, does not have the effect of overruling the answer. *Head v. Lightfoot*, 61 Fla. 608, 54 So. 893.

In Maine, by rule of court defendant may demur and answer at the same time. *Smith v. Kelley*, 56 Me. 64; *Hartshorn v. Eames*, 31 Me. 93.

In such case plaintiff need not reply until the demurrer is disposed of. *Smith v. Kelley*, 56 Me. 64.

22. The court has discretionary power to permit defendant to demur and plead to the whole bill at the same time, and its action in so doing will not be reviewed. *Alexander v. Alexander*, 13 App. Cas. (D. C.) 334.

23. At any time before final de-

3. Exceptions in Louisiana and Texas.—*In Louisiana* all exceptions, except such as relate to the absolute incompetency of the judge before whom the suit is brought, must be pleaded specially *in limine litis*, before issue joined.²⁴ Declinatory exceptions may be pleaded in defendant's answer, however, previous to his answering to the merits,²⁵ and it has been held that an exception not dilatory in character is not waived by filing an answer expressly reserving all of defendant's rights as set forth in the exception.²⁶ Peremptory exceptions founded in law may be pleaded in every stage of the action previous to the definitive judgment.²⁷

In Texas exceptions going to the substance of the petition may be entertained after an answer to the merits.²⁸

B. DEMURRERS AND MOTIONS.—A demurrer and a motion to strike,²⁹ or to dismiss³⁰ should not be filed simultaneously to the same pleading.

C. SUCCESSIVE DEMURRERS TO THE SAME PLEADING.—As a rule but one demurrer can be interposed to a single pleading,³¹ though in

cree. *Saunders v. Savage* (Tenn.), 63 S. W. 218; *Merchant v. Preston*, 1 Lea (Tenn.) 280; *Lowe v. Morris*, 4 Sneed (Tenn.) 69.

That complainants were not in court when leave was granted is immaterial. *Saunders v. Savage* (Tenn.), 63 S. W. 218.

The court may permit an answer filed after the filing of a demurrer to be withdrawn, in which case the demurrer may be considered without refiling it. *Fogg v. Price*, 145 Mass. 513, 14 N. E. 741.

On reversal of a decree for complainant based on a bill of review on the ground that such a bill does not lie under the facts alleged, the trial court may permit the answer to be withdrawn and a demurrer to be filed instead. *Wieczorek v. Adamski*, 114 Ill. App. 161.

24. Otherwise they shall not be admitted. La. Code Pr., art. 333.

Peremptory exceptions relating to forms. La. Code Pr., art. 344; *Phillips v. Preston*, 5 How. (U. S.) 278, 12 L. ed. 152.

Dilatory exceptions must be pleaded *in limine litis*. La. Code Pr., art. 333.

25. La. Code Pr., art. 333.

26. *New England Mtg. & Security Co. v. Metcalfe*, 49 La. Ann. 347, 21 So. 549.

27. *Phillips v. Preston*, 5 How. (U. S.) 278, 12 L. ed. 152; *Bijou Co. v. Lehmann*, 118 La. 956, 43 So. 632.

They are admissible after the pleadings are read. *Phillips v. Preston*, 5 How. (U. S.) 278, 12 L. ed. 152.

28. *Oliver v. Chapman*, 15 Tex. 400.

29. *Euright v. Midland Sampling & Ore Co.*, 33 Colo. 341, 80 Pac. 1041.

The right to file a motion to strike is waived by demurring, but the rule does not apply where the pleadings are amended after the demurrer is submitted. *Wisconsin Lumb. Co. v. Greene & W. Tel. Co.*, 127 Iowa 350, 101 N. W. 742, 69 L. R. A. 968.

30. In equity, that a motion to dismiss and a demurrer are filed at the same time and tried together is harmless, where one ground of the motion is incorporated in the demurrer and the other may be so treated. *Saunders v. Savage* (Tenn.), 63 S. W. 218.

31. *Dunbar v. Board of Comrs.*, 5 Idaho 407, 49 Pac. 409; Iowa Code, §3551; *Lundbeck v. Pilmair*, 78 Iowa 434, 43 N. W. 271.

Except by permission of the court. *Murphy v. Russell & Co.*, 8 Idaho 133, 67 Pac. 421.

A second demurrer will not be permitted where it will unnecessarily delay the trial and no good reason is shown where the grounds thereof could not have been set up in the first demurrer. *Victor Talking Mach. Co. v. Hoschke*, 169 Fed. 894.

The codes contemplate but one demurrer in which may be taken any or all of the objections enumerated as

some jurisdictions the court has discretionary power to permit the filing of a second one after the first has been overruled.³²

Effect of Amendment. — Demurrant generally has a right to refile his demurrer,³³ or to file another one on the same or different grounds,³⁴ after amendment, provided the issues are thereby changed.

In some jurisdictions it is held that defects which might have been taken advantage of by the original demurrer cannot be raised by a second demurrer interposed after the pleading has been amended in other particulars only.³⁵ A defendant may, however, demur to an

grounds of demurrer. *People v. Central Pac. R. Co.*, 76 Cal. 29, 18 Pac. 90.

It is proper to refuse to entertain a second demurrer on different grounds. *Burrows v. McCalley*, 17 Wash. 269, 49 Pac. 508.

In Equity.—In some states it is provided by statute that where a demurrer is overruled no other may be received. *Fla.*—Gen. St., 1906, §1873; *Hull v. Burr*, 61 Fla. 625, 55 So. 852. *N. J.*—Comp. St., 1910, p. 419, §24. *Tenn.*—Shannon's Code, §6205. *Va.* Code, §3273. *W. Va.*—Code, §3850.

"A party is not allowed to demur by piecemeal. He may assign any number of grounds of demurrer, but there can be only one demurrer to a bill or other pleading. A party will not be allowed to assign one or more grounds of demurrer, and, upon the overruling of that demurrer, assign other grounds of demurrer, or demur again, and thus continue to prevent a submission and hearing on final decree." *Turner v. Durr (Ala.)*, 55 So. 230.

An overruled dilatory exception, general in its nature, will not be reopened in order to consider points dilatory in their nature which should have been raised originally. *Bonin v. Town of Jennings*, 106 La. 534, 31 So. 64.

A demurrer to a plea will be stricken out where the plea has previously been held to be sufficient on a demurrer to the replication thereto. *Strout Co. v. Howell (Del.)*, 82 Atl. 1081.

32. *Kelly v. Leachman*, 3 Idaho 629, 33 Pac. 44.

It is not an abuse of discretion to permit defendant to file a special demurrer setting up limitations after a general demurrer has been overruled and a defense of limitations stricken from the answer. *Roche v. Spokane County*, 22 Wash. 121, 60 Pac. 59.

Where a second demurrer is filed without permission, the court may permit it to remain. *Kelly v. Leachman*, 3 Idaho 629, 33 Pac. 44.

33. Where a pleading is amended so as to change the issues it is error to refuse to allow the adverse party to refile a demurrer previously interposed, but the contrary is true where the issues are not changed. *Stanton v. Kenrick*, 135 Ind. 382, 35 N. E. 19.

34. *Alabama.*—If the amendment changes in the least the material allegations of the pleading. *Turner v. Durr (Ala.)*, 55 So. 230.

Georgia.—"An amendment to a petition, or plea, or answer, which materially changes the cause of action or defense, opens the petition, plea or answer, as amended, to demurrer." Civ. Code, §5068.

To have that effect the amendment must materially change the cause of action or defense. *Southern Bell Tel. & Tel. Co. v. Parker*, 119 Ga. 721, 47 S. E. 194; *Kelly v. Strouse*, 116 Ga. 872, 43 S. E. 280; *Gibson v. Thornton*, 107 Ga. 545, 33 S. E. 895; *Central of Georgia R. Co. v. Waldo*, 6 Ga. App. 840, 65 S. E. 1098; *Missouri State Life Ins. Co. v. Lovelace*, 1 Ga. App. 446, 58 S. E. 93.

The mere amplification of the allegations, or the fact that certain allegations are stricken will not open the pleading to a second demurrer. *Central of Georgia R. Co. v. Waldo*, 6 Ga. App. 840, 65 S. E. 1098; *Iowa Code*, §3551.

35. Defects of form, which are not affected by the amendment. *Bean v. Ayers*, 69 Me. 122.

On demurrer the original and amended bills, when relating to the same subject-matter, are taken as a unit. An amendment after answer does not permit defendant "to demur to the amended bill upon any cause of de-

amended complaint for want of facts, though that ground was not assigned upon demurrer to the original complaint.³⁵

VI. FORMAL REQUISITES.—A. **GENERAL RULES.**—In the absence of a statutory provision to the contrary, no particular form of demurrer is required.³⁷ Statutory provisions requiring pleadings to be liberally construed have been held not to apply to demurrers.³⁸

B. **WHETHER ORAL OR WRITTEN.**—Ordinarily demurrers are required to be in writing,³⁹ except in inferior courts where the pleadings are oral.⁴⁰

Demurrers *ore tenus* are allowed in some states where the defect is one of substance.⁴¹

murrer to which the original bill was open." Where, however, the amended bill makes an entirely new case, defendant may demur thereto though he has answered the original bill, and the effect of sustaining such demurrer is simply to dismiss the amended bill, leaving the original still standing. *State v. Mitchell*, 104 Tenn. 336, 58 S. W. 365.

The objection that defects existing in the original bill and not raised by the demurrer sustained thereto cannot be taken advantage of on demurrer to the amended bill, is waived where complainant does not move to strike the demurrer but proceeds to a hearing thereon without objection, and admits that the defect cannot be remedied. *Daschke v. Schellenberg*, 131 Mich. 103, 90 N. W. 1028.

36. *Disbrow v. Creamery Package Mfg. Co.*, 110 Minn. 237, 125 N. W. 115.

37. In Rhode Island, it need not be more formally stated than that the party demurring demurs to such declaration or plea. R. I. Gen. Laws, 1909, c. 288, §19.

A demurrer to a plea of answer in abatement on the ground that it does not state facts sufficient to abate the action is good, there being no form prescribed by the statute. *State v. Roberts*, 166 Ind. 585, 77 N. E. 1093.

38. *Merrill v. Pepperdine*, 9 Ind. App. 416, 36 N. E. 921. See, generally, the title "Construction and Theory of Pleadings."

39. Ia.—Code, §3551. Mich.—*Jenks v. Brown*, 38 Mich. 651. Ore.—*English v. Savage*, 5 Ore. 518. Va.—Code, §3271. Wis.—*Smith v. Kibling*, 97 Wis. 205, 72 N. W. 869.

A demurrer on which an interlocu-

tory judgment can be based. *Crowley v. La Brake*, 132 N. Y. Supp. 155.

Permitting a general demurrer to be made without being reduced to writing and signed and filed as a pleading held harmless. *Miller v. Rice*, 9 Ky. L. Rep. 620.

40. In the municipal court a demurrer to an answer or to new matter set up as a defense therein need not be in writing though the answer is written. A written demurrer to a complaint or counterclaim is necessary where the latter is in writing. *United States Gas Fixture Co. v. Boehmer*, 69 Misc. 618, 126 N. Y. Supp. 73.

41. Failure to state a cause of action. Ga.—*McCook v. Crawford*, 114 Ga. 337, 40 S. E. 225; *Latham v. Kolb*, 76 Ga. 291. N. C.—*Garrison v. Williams*, 150 N. C. 674, 64 S. E. 783. S. C.—*Hull v. Young*, 29 S. C. 64, 6 S. E. 938.

Where the action is prematurely brought. *Blackmore v. Winders*, 144 N. C. 212, 56 S. E. 874.

That the contract on which a counterclaim is based is void under the statute of frauds. *Mendelsohn v. Banov*, 57 S. C. 147, 35 S. E. 499.

Defect of parties cannot be raised by oral demurrer at the trial after answer. *Shull v. Caughman*, 54 S. C. 203, 32 S. E. 301.

Want of capacity to sue cannot be taken advantage of by an oral demurrer at the trial. *Dawkins v. Mathis*, 47 S. C. 64, 24 S. E. 990. After a general denial. *Mickle v. Congaree Const. Co.*, 41 S. C. 394, 19 S. E. 725.

"It is now familiar practice to raise the question of the sufficiency of the complaint at the trial by an objection to the reception of evidence under the complaint. This objection is some-

C. RIGHT TO INCORPORATE DEMURRER IN OTHER PLEADINGS.—As a general rule in actions at law and under the codes a demurrer must be a distinct pleading,⁴² and cannot be incorporated in an answer,⁴³ or in the same paper with an answer,⁴⁴ or in a reply,⁴⁵ though in a few states a contrary doctrine prevails.⁴⁶

In equity a demurrer may generally be incorporated in the answer.⁴⁷

thing like the demurrer *ore tenus* of the ancient practice, and some of its consequences are the same; and because of this similarity it is, for convenience, called a demurrer *ore tenus*. But it is not a demurrer at all, within the contemplation of the statute." *Smith v. Kibling*, 97 Wis. 205, 72 N. W. 869.

42. Matters of law and of fact should not be mixed in the same pleading. *Brooks v. Douglass*, 32 Cal. 208.

43. *Fidelity & Deposit Co. v. Parkinson*, 68 Neb. 319, 94 N. W. 120; *Jones v. Foster*, 67 Wis. 296, 30 N. W. 697.

A demurrer cannot be incorporated in a brief statement annexed to the general issue. *Truesdale v. Straw*, 58 N. H. 207.

A pleading designated by defendant as an answer will not be treated as both an answer and demurrer, though some of the alleged defenses are grounds of demurrer only, but the objectionable allegations will be regarded as surplusage. *Gordon v. Moore*, 110 N. Y. Supp. 374.

That part of an answer which in form amounts to a demurrer will be treated as surplusage. *Pine-Ule Medicine Co. v. Yoder & Eply* (Neb.), 135 N. W. 383; *Kyner v. Whittemore*, 90 Neb. 188, 133 N. W. 197.

A clause in an answer "that the complaint does not state facts sufficient to constitute a cause of action," when appearing with denials and affirmative defenses, is not a demurrer. *Barnard v. Morrison*, 29 Hun (N. Y.) 410.

There is no such pleading authorized as "a demurrer by way of answer." *Smith v. Kibling*, 97 Wis. 205, 72 N. W. 869.

44. *Davis v. Hines*, 6 Ohio St. 473.

It is improper to join the substance of a demurrer with matter belonging to an answer in the same pleading. *Long v. Towl*, 41 Mo. 398.

Cannot both demur and answer by the same pleading. *Taber v. Wilson*, 34 Mo. App. 89.

Demurrer and answer cannot be incorporated in the same pleading. *Munn v. Barnum*, 12 How. Pr. (N. Y.) 563.

45. That plaintiff both replied and demurred in the same pleading is immaterial on the question whether the demurrer was properly sustained where no objection was made to that mode of procedure. *Scully Iron & Steel Co. v. Hann*, 18 N. D. 528, 123 N. W. 275.

46. In Arkansas, a demurrer may be embodied in the answer. *Greenfield v. Carlton*, 30 Ark. 547.

In Arizona, a demurrer is treated as a defense and is required to be pleaded in the answer. *Rev. St.*, 1901, par. 1350; *Perrin v. Mallory Commission Co.*, 8 Ariz. 404, 76 Pac. 476.

In Texas, exceptions may be incorporated in the answer. *Edgar v. Galveston City Co.*, 46 Tex. 421.

Though in a restricted sense a demurrer is not part of the answer, it is a part of it within the statute permitting defendant to plead in his answer as many separate matters, whether of law or fact, as he shall think necessary for his defense. *Hudson v. Wheeler*, 34 Tex. 356.

In Louisiana, declinatory exceptions may be pleaded in the defendant's answer, previous to his answering to the merits, but dilatory exceptions may not be. *Code Pr.*, art. 333.

47. *Ala.*—Code, 1907, §3128. *Me.*—*Ricker & Sons v. Portland & R. F. R. Co.*, 90 Me. 395, 38 Atl. 338. *Mass.*—*Fogg v. Price*, 145 Mass. 513, 14 N. E. 741. *N. H.*—*Spofford v. Smith*, 59 N. H. 366. *Vt.*—*Town of Westminster v. Willard*, 65 Vt. 266, 26 Atl. 952. See *Holt v. Daniels*, 61 Vt. 89, 17 Atl. 786; *Wade v. Pulsifer*, 54 Vt. 45. *Va.*—*Matthews v. Jenkins*, 80 Va. 463; *Dunn v. Dunn*, 26 Gratt. 291. *W. Va.*—*Cook v. Dorsey*, 38 W. Va. 196, 18 S. E. 468.

The defendant may in all cases, instead of filing a formal demurrer, insist on any special matter in his answer, and have the same benefit there-

D. MUST IDENTIFY THE PLEADING DEMURRED TO. — The demurrer must point out the particular pleading,⁴⁸ or part of a pleading,⁴⁹ to which it is directed. It has been held that if it is doubtful whether a demurrer in equity is intended to apply to the whole bill or only a part of it, it will be regarded as a demurrer to the whole.⁵⁰

E. SPECIFICATIONS OF GROUNDS OF DEMURRER. — 1. **General Rules.** All demurrers must set forth in some form the grounds on which they are based.⁵¹

General Demurrers. — Except as the rule is modified by statute, a gen-

eral demurrer is treated as if he had demurred to the bill. Fla.—Gen. St., 1906, §1871; *Head v. Lightfoot*, 61 Fla. 608, 54 So. 898; *McRainey v. Jarrell*, 59 Fla. 587, 52 So. 304.

Where defendant in his answer admits the substantial averments of the bill, but denies that complainant has shown any right to equitable relief, and claims the same benefit of such objection as though he had formally demurred to the bill, he in effect demurs to the bill. *Bennett v. Bennett*, 63 N. J. Eq. 306, 49 Atl. 501.

The answer cannot in all cases state the objection and pray the same advantage as if taken by demurrer. As a general rule objections on the ground of multifariousness and misjoinder of complainants cannot be taken advantage of. *Veghte v. Raritan Water Power Co.*, 19 N. J. Eq. 143.

Under special circumstances, instead of demurring, defendant may insert in the answer a paragraph praying for the benefit of a demurrer, as where an answer and final hearing are necessary to determine the question of jurisdiction. *Redrow v. Sparks*, 75 N. J. Eq. 396, 72 Atl. 442. See also, *Reed v. Cumberland Mut. F. Ins. Co.*, 36 N. J. Eq. 146.

"If the paragraph of the answer praying for the benefit of a demurrer . . . cannot be regarded as material to the case under any possible circumstance or contingency, it will be deemed impertinent and may be stricken out." *Redrow v. Sparks*, 75 N. J. Eq. 396, 72 Atl. 442.

48. A general exception. District Court Rule 17, 94 Tex. 670.

A demurrer to "the complaint" filed after an amended complaint has been filed will be regarded as a demurrer to the amended complaint. *Cincinnati, B. & C. R. R. v. Wall* (Ind.

App.), 96 N. E. 389; *Chicago, I. & L. R. Co. v. Stepp*, 44 Ind. App. 353, 88 N. E. 343; *Scott v. La Fayette Gas Co.*, 42 Ind. App. 614, 86 N. E. 495; *City of Vincennes v. Spees*, 35 Ind. App. 389, 74 N. E. 277.

The omission of the word "amended" from a demurrer to an amended answer does not render it defective. *Long v. Johnson*, 15 Ind. App. 498, 44 N. E. 552.

Where defendant pleads the general issue with a brief statement, a demurrer to the "plea" does not reach such statement. *Stevens v. Doherty*, 65 Me. 94.

A special demurrer to a plea of the general issue does not apply to the brief statement filed with it. *Moore v. Knowles*, 65 Me. 493.

That a demurrer to an answer denominates it a "defense" instead of a "counterclaim" is immaterial where both the court and counsel treat it as an attack upon the pleading as a counterclaim. *Power v. Sla*, 24 Mont. 243, 61 Pac. 463.

49. In equity a demurrer to a part of the bill must state the particular part or parts to which it is directed. Md. Pub. Gen. Laws, art. 16, §149, p. 424.

In equity, a demurrer should clearly show to what specific part of the bill it is directed, and whether it applies to the whole bill or only a part of it. *Miller & Lux v. Rickey*, 123 Fed. 604.

50. *Miller & Lux v. Rickey*, 123 Fed. 604.

51. *Kelly v. Strouse & Bros.*, 116 Ga. 872, 43 S. E. 280.

A demurrer "and now come the above named defendants and demur to the petition of the plaintiff herein," without stating any ground, presents no question. *Tootle v. Berkley*, 57 Kan. 111, 45 Pac. 77.

eral demurrer need not point out any specific defects,⁵² and the same is true of an exception of no cause of action under the civil law.⁵³

A special demurrer must specifically point out the particular defects complained of.⁵⁴ It reaches only such defects of form as are specially assigned as causes of demurrer,⁵⁵ but under it all defects of sub-

52. *Mutual Acc. Assn. v. Tuggle*, 138 Ill. 428, 28 N. E. 1066, reversing, 39 Ill. App. 509.

"A general demurrer enables the party to assail every substantial imperfection in the pleadings of the opposite side without particularizing any of them in his demurrer; but if he thinks proper to point out the faults, this does not vitiate it." *Martin v. Bartow Iron Works*, 35 Ga. 320.

53. Though an exception of no cause of action need not specifically set out the objections to the pleading, the court "should see that such exception should be made to perform the function properly appertaining to it, and not be allowed to have substituted for it another, and be lost, merged and confounded." *Davis v. Arkansas Southern R. Co.*, 117 La. 320, 41 So. 587.

54. A special demurrer must distinctly and particularly specify wherein the defect lies. *Casey & Hedges Mfg. Co. v. Dalton Ice Co.*, 94 Ga. 407, 20 S. E. 333; *Martin v. Bartow Iron Works*, 35 Ga. 320.

Grounds of demurrer must distinctly specify the question for decision. *Mathis v. Fordham*, 114 Ga. 364, 40 S. E. 324.

Special demurrers must be specific. *Brunswick & W. R. Co. v. Hart Lumb. Co.*, 6 Ga. App. 583, 65 S. E. 299.

A special demurrer must point out minutely wherein the pleading is defective. *Ryan v. Watson*, 2 Greenl. (Me.) 382.

A special demurrer must point out the objection and the grounds thereof. *Briggs v. Grand Trunk R. Co.*, 54 Me. 375; *Com. v. Cross Cut R. Co.*, 53 Pa. 62.

"It is not sufficient to object in general terms that the pleading is 'uncertain, defective, informal,' or the like, but it is necessary to show in what respect uncertain, defective or informal." *Andrews Steph. Pl.* (2nd ed.). §139, p. 267.

"Cause for special demurrer must be

so assigned as to show by precise indication the particular defect relied on. If the alleged defect be *duplicity*, the particulars in which it consists should be stated." *Buell v. Warner*, 33 Vt. 570.

Must point out wherein alleged duplicity or argumentativeness consists. *Webster v. State Mut. Fire Ins. Co.*, 81 Vt. 75, 69 Atl. 319; *Willey v. Carpenter*, 64 Vt. 212, 23 Atl. 630, 15 L. R. A. 853; *Walker v. Wooster's Admr.*, 61 Vt. 403, 17 Atl. 792; *Carpenter v. McClure*, 40 Vt. 108.

A ground that "said rejoinder is double" is insufficient. *Holmes v. Chicago & A. R. Co.*, 94 Ill. 439.

Special Exceptions.—*Western Union Tel. Co. v. Cates* (Tex. Civ. App.), 132 S. W. 92.

"A special exception shall not only point out the particular pleading excepted to, but it shall also point out intelligibly the obscurity, inconsistency, duplicity, generality, or other insufficiency in the allegations in the pleading objected. The general expression that it is vague, uncertain, and the like, alone, shall be regarded as no more than a general exception." *District Court Rule 18*, 94 Tex. 670; *Weatherford, M. W. & N. R. Co. v. Granger*, 85 Tex. 574, 22 S. W. 959; *Missouri, K. & T. R. Co. v. Harriman Bros.* (Tex. Civ. App.), 128 S. W. 932.

Must indicate the defect with such certainty as to enable the pleader to obviate it by amendment. *Boynton v. Tidwell*, 19 Tex. 118.

Special exceptions held too indefinite. *Erie Telegraph Co. v. Grimes*, 82 Tex. 89, 17 S. W. 831.

55. *Andrews Steph. Pl.* (2nd ed.), §139, p. 266.

Ill.—*Cover v. Armstrong*, 66 Ill. 267; *Barbee v. Sproul*, 78 Ill. App. 532; *Iron Clad Dryer Co. v. Chicago Trust & Sav. Bank*, 50 Ill. App. 461. **Pa.**—*Com. v. Cross-Cut R. Co.*, 53 Pa. 62. **Tex.**—*Missouri, K. & T. R. Co. v. Gilbert* (Tex. Civ. App.), 130 S. W. 1037. **Vt.** *Webster v. State Mut. Fire Ins. Co.*, 81 Vt. 75, 69 Atl. 319.

stance may be availed of, though not specified in the demurrer.⁵⁶

2. Under the Codes and Practice Acts.—The codes and practice acts of most of the states now require demurrers to distinctly specify the grounds on which they are based, the degree of particularity required varying in the different jurisdictions,⁵⁷ and in such case only

As to all others it is, in effect, a general demurrer, under which no advantage can be taken of merely formal defects. Will's Gould Pl. 580.

As to formal defects not specifically assigned it is to be regarded as a general one. *Mahan v. Sutherland*, 73 Me. 158.

56. *Andrews* Steph. Pl. (2nd ed.), §139, p. 266; *Tucker v. Randall*, 2 Mass. 283.

Every special demurrer includes a general one. **Ga.**—*Ellison v. Georgia R. Co.*, 87 Ga. 691, 13 S. E. 809. **Me.** *State v. Peck*, 60 Me. 498. **Md.**—*Brown v. Jones*, 10 Gil. & J. 334. **Tex.**—*Snow v. Gallup* (Tex. Civ. App.), 123 S. W. 222.

As to defects not assigned, it operates as a general demurrer. Will's Gould Pl. 580.

Where it does not specifically point out the alleged defects, it can have effect only as a general demurrer. *Walker v. Wooster's Admr.*, 61 Vt. 403, 17 Atl. 792.

57. See also the following notes:

Alabama.—No demurrer can be allowed but to matter of substance, which the party demurring specifies. Code, 1907, §5340. See, *Mobile Electric Co. v. Sanges*, 169 Ala. 341, 53 So. 176; *McGehee v. Western Union Tel. Co.*, 169 Ala. 109, 53 So. 205.

The statute abolishes general demurrers and substitutes special demurrers therefor. *Henley v. Bush*, 33 Ala. 636.

It is error to sustain a general demurrer. *St. Louis & S. F. R. Co. v. Phillips*, 165 Ala. 504, 51 So. 638.

General grounds will not be considered. *McGehee v. Western Union Tel. Co.*, 169 Ala. 109, 53 So. 205.

Demurrers that pleas are no answer to the complaint and present an immaterial issue are too general. *Ryall v. Allen*, 143 Ala. 222, 38 So. 851.

Arkansas.—A demurrer to the complaint must distinctly specify the grounds of objection. *Kirby's Dig.*, §6094.

California.—Must distinctly specify

the grounds upon which any of the objections to the complaint are taken, and unless it does so, it may be disregarded. Code Civ. Proc., §431.

Colorado.—Substantially the same as California. Code, 1910, §57; *Lacey v. Bentley*, 39 Colo. 449, 89 Pac. 789; *Page Woven Wire Fence Co. v. Joslin*, 38 Colo. 162, 88 Pac. 142; *Blakely v. Fort Lyon Canal Co.*, 31 Colo. 224, 73 Pac. 249; *Henderson v. Johns*, 13 Colo. 280, 22 Pac. 461.

A special demurrer must specifically point out the precise defects complained of. *City of Goldfield v. MacDonald* (Colo.), 119 Pac. 1069.

Connecticut.—All demurrers shall distinctly specify the reasons why the pleading demurred to is insufficient. Gen. St., 1902, §608; *Cook v. Morris*, 66 Conn. 196, 33 Atl. 994; *Town of Hamden v. Merwin*, 54 Conn. 418, 8 Atl. 670; *Nash v. Smith*, 6 Conn. 421.

The statute cannot be evaded by treating an answer admitting each allegation of the complaint as a demurrer to formal defects. *Jacobs v. Holgenson*, 70 Conn. 68, 38 Atl. 914.

The contention that a demurrer is not sufficiently specific cannot be first made on appeal. *Parmelee v. Town of Bethlehem*, 57 Conn. 270, 18 Atl. 94.

Delaware.—"Upon a demurrer the court shall not consider any defect not specially alleged, if, upon the whole matter appearing, judgment can be given according to the merits of the case." Laws, c. 112, §1.

District of Columbia.—Supreme court common law rule 31 provides that in the margin of every demurrer there shall be stated some substantial matter of law intended to be argued and that a demurrer without such statement or with a frivolous statement may be set aside by a justice at chambers or by the court, and leave given to enter judgment as for want of a plea. *Miller v. Ambrose*, 35 App. Cas. (D. C.) 75.

Florida.—The substantial matters of law intended to be argued shall be stated, and if any demurrer shall be

delivered without such statement it may be set aside by the court. *Gen. St.*, 1906, §1444; *Benedict Pineapple Co. v. Atlantic Coast Line R. Co.*, 55 Fla. 514, 46 So. 732, 20 L. R. A. (N. S.) 92.

A ground of demurrer "and for other good and sufficient reasons apparent upon the face of the record in said cause" presents nothing for consideration. *Heathcote v. Fairbanks, Morse & Co.*, 60 Fla. 97, 53 So. 950.

The statute does not provide how the substantial matters of law intended to be argued shall be stated, but it is usual to state them as grounds of the demurrer. *Benedict Pineapple Co. v. Atlantic Coast Line R. Co.*, 55 Fla. 514, 46 So. 732, 20 L. R. A. (N. S.) 92.

Formerly, the causes of demurrer were required to be stated in the margin. *Benedict Pineapple Co. v. Atlantic Coast Line R. Co.*, *supra*; *Stephens v. Bradley*, 24 Fla. 201, 3 So. 415.

Idaho.—Identical with the California provision. *Rev. Codes*, §4175; *Valley Lumber & Mfg. Co. v. Driessel*, 13 Idaho 662, 93 Pac. 765.

A demurrer to the answer in justice court must state the grounds thereof. *Rev. Codes*, §4672.

Iowa.—A demurrer to the complaint must specify the causes on which it is founded (*Code*, §3551), and must specify and number the grounds of objection to the pleading (*Code*, §3562). See, *Harris-Emery Co. v. Piteairn*, 122 Iowa 595, 98 N. W. 476; *Traders' Bank v. Alsop*, 64 Iowa 97, 19 N. W. 863; *Jones v. Brunskill*, 18 Iowa 129.

In a special proceeding. *In re Estate of McMurray*, 107 Iowa 648, 78 N. W. 691.

Mandamus, it being an action at law. *District Twp. of Eden v. Independent Dist. of Templeton*, 72 Iowa 687, 34 N. W. 472.

The same certainty in statement of grounds is required in the case of a demurrer to the answer (*Code*, §3575; *Middleton Sav. Bank v. Dubuque*, 15 Iowa 394), or to the reply (*Code*, §3579).

Kansas.—Must distinctly specify the grounds of objection to the petition. *Gen. St.*, 1909, §5687. A demurrer "and now come the above named defendants and demur to the petition of the plaintiff herein," without stating any ground, presents no question.

Tootle v. Berkley, 57 Kan. 111, 45 Pac. 77.

The same rule applies in the case of a demurrer to the answer (*Gen. St.*, 1909, §5697), or reply (*Gen. St.*, 1909, §5698).

Massachusetts.—The causes of demurrer must be specifically assigned. *Rev. Laws*, 1902, c. 173, §§14, 15, pp. 1552, 1553.

The demurrer must point out specifically the particulars in which the alleged defect consists.

Mississippi.—*Rev. Laws*, 1902, c. 173, §16, p. 1553; *Dennehey v. Woodsum*, 100 Mass. 195; *Suffolk Bank v. Lowell Bank*, 8 Allen (Mass.) 355.

"Where mere defects of form or omissions in the form of statement are relied on, they must be specially pointed out." *Steffe v. Old Colony R. Co.*, 156 Mass. 262, 30 N. E. 1137; *Billings v. Mann*, 156 Mass. 203, 30 N. E. 1136; *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 11 N. E. 929; *Kellogg v. Kimball*, 138 Mass. 441; *Proctor v. Stone*, 1 Allen 193.

Michigan.—On issue joined on demurrer the court is required to give judgment according as the very right of the case and matter in law shall appear, without regard to any defect or imperfection not specially expressed in the demurrer, provided sufficient matter appears in the pleadings to enable him to do so, and to amend all defects not so pointed out. *Comp. Laws*, 1897, §§10068, 10069, *Circuit Ct. rule* 34.

The purpose of the statute and rule is to require every objection, either of form or substance to be specified, in the demurrer, and if this is not done the demurrer will be overruled if the declaration states a cause of action. *Adrian Waterworks v. City of Adrian*, 64 Mich. 584, 31 N. W. 529.

Minnesota.—Substantially the same as California. *Rev. Laws*, 1905, §4129. Must state the grounds of a demurrer to the reply. *Rev. Laws*, 1905, §4134.

Mississippi.—Can only consider defects which are assigned as causes of demurrer, unless something so essential to the action or defense be omitted that judgment according to law and the right of the cause cannot be given. *Code*, 1906, §754; *Shoults v. Kemp*, 57 Miss. 218.

Missouri.—Substantially the same as California. *Rev. St.*, 1909, §1801. See,

Hanson v. Neal, 215 Mo. 256, 114 S. W. 1073.

"May," as used in this section, means "should," and the court will only look to the objections specified. *McClurg v. Phillips*, 49 Mo. 315.

A demurrer to the answer must state the grounds thereof.

Missouri.—Rev. St., 1909, §1809.

Montana.—A demurrer to the complaint (Rev. Codes, 1907, §6535), or counterclaim (Rev. Codes, 1907, §6559) must distinctly specify the grounds thereof; otherwise it may be disregarded. The mode of specifying the objections to a counterclaim is the same as in case of a demurrer to the complaint (Id., §6559).

Under this section the objection of ambiguity must be taken by special demurrer. *Wahle v. Great Northern R. Co.*, 41 Mont. 326, 109 Pac. 713.

A demurrer in the language of the statute is insufficient in such case. *Jacobs Sultan Co. v. Union Mercantile Co.*, 17 Mont. 61, 42 Pac. 109.

Nebraska.—Comp. St., 1911, §§6669, 6682.

Nevada.—To the complaint. Comp. Laws, §3136. To the answer. Comp. Laws, §3145.

New York.—Must distinctly specify the objections to the complaint (Code Civ. Proc., §490) or counterclaim (Id., §496), or it may be disregarded.

North Carolina.—Substantially the same as California. Rev., 1905, §475.

A demurrer to the reply must state the grounds thereof. Rev., 1905, §486.

North Dakota.—Substantially the same as California. Rev. Codes, 1905, §6855.

To reply must state the grounds thereof. Rev. Codes, 1905, §6865.

A demurrer to an answer substantially in the language of the statute is sufficient. *Van Dyke v. Doherty*, 6 N. D. 263, 69 N. W. 200.

Ohio.—Shall specify the grounds of objection. Code, 1910, §11310.

Oklahoma.—A demurrer to the petition must distinctly specify the grounds thereof. Comp. Laws, 1909, §5630; *Helm & Son v. Briley*, 17 Okla. 314, 87 Pac. 595.

A demurrer to the answer or reply must state the grounds thereof. Comp. Laws, 1909, §§5642, 5643.

Oregon.—Substantially the same as California. L. O. L., §69; *Marx & Jor-*

genson v. Croisan, 17 Ore. 393, 21 Pac. 310.

Rhode Island.—Must be accompanied with a statement of the specific grounds of demurrer. Gen. Laws, 1909, c. 288, §19.

South Carolina.—Substantially the same as California. Code Civ. Proc., §166; *Carroll v. Still*, 13 S. C. 430.

A demurrer to the reply must state the grounds thereof. Code Civ. Proc., §176.

South Dakota.—Substantially the same as California. Code Civ. Proc., §122.

A demurrer to the reply must state the grounds thereof. Code Civ. Proc., §132. To the answer. *Hill v. Walsh*, 6 S. D. 421, 61 N. W. 440.

Tennessee.—Must state the objection relied on. Shannon's Code, §4655; *Brown v. Cumberland Tel. & Tel. Co.*, 181 Fed. 246; *Whittaker v. Whittaker*, 10 Lea 93; *Hobbs v. Memphis & C. R. Co.*, 12 Heisk. 526.

Utah.—Substantially the same as California. Comp. Laws, 1907, §2963.

A demurrer to the answer must distinctly specify the grounds thereof, and when to a counterclaim, in a similar manner to that required in a demurrer to the complaint; otherwise it may be stricken out. Comp. Laws, 1907, §2978.

Vermont.—Defects of form are to be disregarded and the court may amend them, "except those only in case of demurrer which the party demurring shall specially set down and express, together with his demurrer as the cause thereof." Pub. St., 1906, §§1497, 1498.

Virginia.—The court on motion of any party shall or of its own motion may require the grounds of demurrer relied on to be specifically stated in the demurrer. Code, §3271.

Wisconsin.—A demurrer to the complaint must distinctly specify the grounds thereof. St. 1898, §2651; *Cummings v. C. W. Noble Co.*, 143 Wis. 175, 126 N. W. 664.

A demurrer to the answer must distinctly specify the grounds of objection taken, and when to a counterclaim, in a similar manner to that required in a demurrer to the complaint. St., 1898, §2659. A demurrer to the reply must state the grounds thereof.

Wyoming.—Must specify the grounds of objection to the petition. Comp. St., 1910, §4382.

the grounds of objection to the pleading so set forth can be considered.⁵⁸

58. **U. S.**—United States *v.* Boyd, 15 Pet. 187, 10 L. ed. 706. **Ala.**—Code, 1907, §5340; Sloss-Sheffield Steel & Iron Co. *v.* Triplett, 58 So. 108; Sloss-Sheffield Steel & Iron Co. *v.* Long, 53 So. 910; Mobile Electric Co. *v.* Sangers, 169 Ala. 341, 53 So. 176; McGehee *v.* Western Union Tel. Co., 169 Ala. 109, 53 So. 205; Tallassee Falls Mfg. Co. *v.* Moore, 158 Ala. 356, 48 So. 593. **Cal.**—Mendocino Co. *v.* Morris, 32 Cal. 145. **Colo.**—Blakely *v.* Fort Lyon Canal Co., 31 Colo. 224, 73 Pac. 249; Heilman *v.* Ludington, 26 Colo. 326, 57 Pac. 1075. **Conn.**—Town of Bristol *v.* New England R. Co., 70 Conn. 305, 39 Atl. 235; Cook *v.* Morris, 66 Conn. 196, 33 Atl. 994; Nash *v.* Smith, 6 Conn. 421. **Del.**—Laws, c. 112, §1. **Fla.**—Heathcote *v.* Fairbanks, Morse & Co., 60 Fla. 97, 53 So. 950; Hartford Fire Ins. Co. *v.* Brown, 60 Fla. 83, 53 So. 838. **Ind.**—Toledo, W. & W. R. Co. *v.* Mulligan, 52 Ind. 505; Lake Erie & W. R. Co. *v.* Fishback, 5 Ind. App. 403, 32 N. E. 346. **Ia.**—Code, §3551; Harris-Emery Co. *v.* Pitcairn, 122 Iowa 595, 98 N. W. 476. **Md.**—On appeal. Williams *v.* Harlan, 88 Md. 1, 41 Atl. 51. **Mass.**—Saco Brick Co. *v.* Eustis Mfg. Co., 207 Mass. 312, 93 N. E. 629; Lascelles *v.* Clark, 204 Mass. 362, 90 N. E. 875; Billings *v.* Mann, 156 Mass. 205, 30 N. E. 1136; Train *v.* Boston Disinfecting Co., 144 Mass. 523, 11 N. E. 929; Kellogg *v.* Kimball, 138 Mass. 441; Kellogg *v.* Kimball, 122 Mass. 163; Suffolk Bank *v.* Lowell Bank, 8 Allen 355. **Minn.**—Disbrow *v.* Creamery Package Mfg. Co., 110 Minn. 237, 125 N. W. 115. **Miss.**—Code, 1906, §754. **Mo.**—McClurg *v.* Phillips, 49 Mo. 315. **Neb.**—Curran *v.* Hagerman, 92 N. W. 1003; Turner *v.* Althaus, 6 Neb. 54. **N. J.**—Comp. St., 1910, p. 46, §12; p. 4094, §131; Suyer *v.* New York & N. J. Telephone Co., 58 Atl. 90; Davey *v.* Erie R. Co., 69 N. J. L. 50, 54 Atl. 233; French *v.* Mayor, etc., of Millville, 66 N. J. L. 392, 49 Atl. 465, *affirmed*, 67 N. J. L. 349, 51 Atl. 1109; State *ex rel.* Yard *v.* Borough Comrs., 48 N. J. L. 375, 5 Atl. 142. **N. M.**—On appeal. Cleland *v.* Hostetter, 13 N. M. 43, 79 Pac. 801. **Vt.**—Pub. St., 1906, §§1497, 1498. **Va.**—Code, §3271. Where the court requires the grounds to be specifically stated.

"A party will not be allowed to

state one ground of objection, and argue and obtain judgment for another." Middleton Sav. Bank *v.* Dubuque, 15 Iowa 394.

Cannot demur upon one statutory ground and rely upon others. Helm & Son *v.* Briley, 17 Okla. 314, 87 Pac. 595.

Though the absence of an averment cannot be considered as an independent ground for overthrowing the declaration where it is not specified as a ground of demurrer it may "be given due effect in aid of the grounds of demurrer that are assigned." People's Bank & Trust Co. *v.* Weidinger, 73 N. J. L. 433, 64 Atl. 179.

The demurrer will be held to waive or abandon all objections not stated except those extending to such essential and vital defects as to show no cause of action or defense and such as are incapable of being cured by the statute of jeofails. Florida C. & P. R. Co. *v.* Ashmore, 43 Fla. 272, 32 So. 832.

Defects not pointed out in the memorandum required to accompany a demurrer for want of facts are deemed waived. Indiana Acts, 1911, p. 415, c. 157, §2.

Nonjoinder of parties is not reached by a demurrer for want of jurisdiction. Svanburg *v.* Fosseen, 75 Minn. 350, 78 N. W. 4, 43 L. R. A. 427.

A defendant demurring on the ground of misjoinder of parties is not entitled to have his demurrer sustained because there is a misjoinder of causes of action. Williams *v.* Casebeer, 126 Cal. 77, 58 Pac. 380.

On appeal demurrant will be confined to the assigned grounds of demurrer, when it does not appear that any other grounds were argued below. Williams Mfg. Co. *v.* Insurance Co. of N. A. (Vt.), 81 Atl. 916; Marshall *v.* Village of Hardwick, 83 Vt. 495, 76 Atl. 411.

On appeal only the grounds specified in the demurrer will be considered unless the plea is so faulty as to constitute no defense. Hartford Fire Ins. Co. *v.* Hollis, 58 Fla. 268, 50 So. 985; Royal Phosphate Co. *v.* Van Ness, 53 Fla. 135, 43 So. 916.

Where a pleading is not subject to any of the objections specified, a judgment sustaining a demurrer will not

In some states it is provided that if no grounds are specified the demurrer shall be regarded as objecting only that the complaint does not state facts sufficient to constitute a cause of action,⁵⁹ or that the court has no jurisdiction of the subject of the action,⁶⁰ or that the demurrer may be stricken out.⁶¹

In some states where a demurrer specifies the particular defects relied on the demurring party is confined to the defects so specified, even though no such specification is required,⁶² while a contrary rule prevails in others.⁶³

In some states no further specification than that used in the statute is necessary,⁶⁴ while in others a contrary rule prevails and the de-

be affirmed because of defects not specified. *Cheely's Admr. v. Wells*, 33 Mo. 106.

A judgment overruling a demurrer for want of facts will not be reversed on the ground of want of jurisdiction because of the absence of a showing of venue. *Marx & Jorgenson v. Croisan*, 17 Ore. 393, 21 Pac. 310.

Whether a complaint states a cause of action will not be considered on appeal from an order overruling a demurrer for misjoinder of causes of action. *Golden Valley Land & Cattle Co. v. Johnstone (N. D.)*, 128 N. W. 690.

59. *Ark.*—*Kirby's Dig.*, §6094; *Eagle v. Beard*, 33 Ark. 497. *Kan.* Gen. St., 1909, §5687. *Neb.*—Comp. St., 1911, §6669; *Turner v. Althaus*, 6 Neb. 54; *McClary v. Sioux City & P. R. Co.*, 3 Neb. 44. *Ohio.*—Code, 1910, §11310; *Rothweiler v. Ryan*, 4 Ohio C. C. 338. *Okla.*—Comp. Laws, 1909, §5630. *Wyo.* Comp. St., 1910, §4382.

A similar rule applied in the case of a demurrer to the answer, where defendant proceeded to a hearing without objection. *Colby v. Lyman*, 4 Neb. 429.

60. *Ohio Code*, 1910, §11310; *Rothweiler v. Ryan*, 4 Ohio C. C. 338; *Wyo.* Comp. St., 1910, §4382.

61. To the complaint. *Wis. Rev. St.*, 1898, §2651.

To the answer. *Wis. Rev. St.*, 1898, §2659.

62. *Lopez v. Central Arizona Mining Co.*, 1 Ariz. 464, 2 Pac. 748; *Allen v. Cerro Gordo County*, 34 Iowa 54.

Where a demurrer for want of facts omits the general statutory statement, the demurrer reaches only the defects specifically pointed out, though there are other defects which would have

been reached had the statutory language been employed. *Sluss v. Shrewsbury*, 18 Ind. 79; *State v. Leach*, 10 Ind. 308.

63. A party making certain specifications under the general ground of failure to state a cause of action or defense, is not confined to them on argument, but may urge any which are pertinent to the general objection. *Monette v. Cratt*, 7 Minn. 234.

64. In *North Dakota* a demurrer to the answer substantially in the language of the statute is sufficient. *Van Dyke v. Doherty*, 6 N. D. 263, 69 N. W. 200.

In *South Dakota* a demurrer in the language of the statute is sufficient except that a demurrer for want of jurisdiction must specify whether the want of jurisdiction is as to the person or the subject-matter, and a demurrer for defect of parties whether the defect is of parties plaintiff or defendant. *Hudson v. Archer*, 4 S. D. 128, 55 N. W. 1099.

In *Washington* the demurrer may specify the grounds in the language of the statute, or they may be distinctly specified. *Rem. & Ball. Anno. Codes & St.*, §260.

In *Wisconsin* the demurrer must distinctly specify the grounds of objection to the complaint in the language of the subdivision of the statute relied upon, adding, if based upon the ground that plaintiff has not legal capacity to sue, or that there is a defect of parties, a particular statement of the defect, and if based upon the ground that the action was not commenced within the time limited by law, a reference to the statute claimed to limit the right to sue. *St.*, 1898, §2651.

murrer must specifically point out wherein the alleged defect consists.⁶⁵

65. See also the preceding notes.

Colorado.—Except in the case of a demurrer for want of jurisdiction or failure to state a cause of action, it is not sufficient to use the language of the code without a reason being given. *Page Woven Wire Fence Co. v. Joslin*, 38 Colo. 162, 88 Pac. 142; *Henderson v. Johns*, 13 Colo. 280, 22 Pac. 461.

Florida.—A ground of demurrer that in effect merely states that a declaration or a count therein is bad in substance, or fails to state a cause or right of action, is not a compliance with the statute, and will be overruled unless from a bare inspection of the declaration or count it is clear that it fails to state the essentials of a cause of action or shows that plaintiff has no cause of action. *Heathcote v. Fairbanks, Morse & Co.*, 60 Fla. 97, 53 So. 950; *Benedict Pineapple Co. v. Atlantic Coast Line R. Co.*, 55 Fla. 514, 45 So. 732, 20 L. R. A. (N. S.) 92.

Indiana.—"When a demurrer to any complaint is filed on the ground that the complaint does not state facts sufficient to constitute a cause of action, a memorandum shall be filed therewith stating wherein such pleading is insufficient for want of facts, and the parties so demurring shall be deemed to have waived his right thereafter to question the same for any defect not so specified in such memorandum." Acts, 1911, p. 415, c. 157, §2.

"Said memorandum should contain only the reasons why the complaint is insufficient, stated in plain and concise language, without repetition, and no argument to sustain the same should be included therein. Any argument upon such demurrer, if in writing, must be upon a separate paper and is no part of the demurrer. Reasons stated in the memorandum should be numbered or otherwise designated so that in their consideration they can be referred to by number or such other designation. It is the better practice to set out said reasons immediately following the cause of demurrer on the same paper, and that the party filing the demurrer for want of facts or his counsel sign the same at the

close of the reasons set forth, so that the cause of demurrer and the reasons stated why the complaint is insufficient constitute one instrument or writing and may be signed and filed as one pleading." *State v. Bartholomew* (Ind.), 95 N. E. 417.

Iowa.—A demurrer must specify and number the grounds of objection to the pleading, and it is not sufficient to state the objection in the words of the statute, except in the case of a demurrer to an equitable petition on the ground that the facts stated do not entitle the plaintiff to the relief demanded. Code, §3562.

A demurrer on the ground that the allegations of the pleading are contradictory and inconsistent must point out wherein they are. *First Methodist Episcopal Church v. Donnell*, 95 Iowa 494, 64 N. W. 412.

It is not sufficient simply to say that the facts stated in the answer do not constitute a defense, or a particular defense. *Timken Carriage Co. v. Smith & Co.*, 123 Iowa 554, 99 N. W. 183.

In a law action a general statement that the petition does not allege facts constituting a cause of action is insufficient. *Robinson v. Grant & Sons*, 119 Iowa 573, 93 N. W. 586; *Childs v. Limback*, 30 Iowa 398; *Singer v. Cavers*, 26 Iowa 178.

"The manner of presenting the grounds of objection to a pleading must, of course, depend upon the matter or error to be pointed out. In some instances, as when there is a defect of parties, or where the plaintiff has no legal capacity to sue, the demurrer can generally in apt and concise language meet the requirements of the statute, and notify the adverse party of the very objection made. In other instances, and especially when the ground is that the petition or answer does not state facts constituting a cause of action or defense, there is frequently more difficulty in meeting the statutory requirements without doing more and making the demurrer an argument or statement of all the reasons why there is no cause of action or ground of defense. It is no part of the office of a demurrer under

In many states no particular specification is required in a demurrer for want of jurisdiction,⁶⁶ or for want of facts,⁶⁷ or in a demurrer

the Revision, any more than at common law, to contain an argument, brief of points, or anything else than just such matter as shall call the attention of the opposite party clearly to the specific points made by it. The statute condemns the use of such general language as leaves the party who is to defend his pleading ignorant of what the real objection is, until developed in the argument. But when words are employed which lead the mind to the fact or ground upon which it is claimed that the court has not jurisdiction or that there is no cause of action, the pleader may stop and is not required to give the reasons which have led his mind to this conclusion. These reasons he presents in his argument, and need not before." *Davenport Gas Light & Coke Co. v. City of Davenport*, 15 Iowa 6.

Montana.—Must particularly point out in what an alleged misjoinder of causes of action consists, a demurrer in the language of the statute being insufficient. *Collier v. Ervin*, 2 Mont. 335.

A demurrer in the language of the statute is insufficient in the case of a demurrer for ambiguity. *Jacobs Sultan Co. v. Union Mercantile Co.*, 17 Mont. 61, 42 Pac. 109.

South Carolina.—Demurrant must give five days' notice to the opposite party of the grounds of a demurrer for want of facts. Acts, 1903, No. 88; *Sprunt v. Gordon* (S. C.), 71 S. E. 1033.

Utah.—A demurrer in the language of the statute is insufficient, but it should show specifically wherein the alleged defects consist. *Owen v. Oviatt*, 4 Utah 95, 6 Pac. 527.

Washington.—Must point out wherein an alleged defect of parties and misjoinder of causes of action consists. *Lowman v. West*, 8 Wash. 355, 36 Pac. 258.

66. Ariz.—*Lopez v. Central Arizona Min. Co.*, 1 Ariz. 464, 2 Pac. 748. *Cal. Kent v. Snyder*, 30 Cal. 666. *Colo. Page Woven Wire Fence Co. v. Joslin*, 38 Colo. 162, 88 Pac. 142; *Henderson v. Johns*, 13 Colo. 280, 22 Pac. 461. **Mont.**—A demurrer in the lan-

guage of the statute is sufficient. *Rev. Codes, 1907, §6535; Collier v. Ervin*, 2 Mont. 335. **N. Y.**—A demurrer in the language of the statute is sufficient. *Code Civ. Proc.*, §490.

67. Ariz.—*Lopez v. Central Arizona Min. Co.*, 1 Ariz. 464, 2 Pac. 748. **Cal.**—*California Safe Deposit & T. Co. v. Sierra Valleys R. Co.*, 112 Pac. 274; *Kent v. Snyder*, 30 Cal. 666. **Colo.** *Page Woven Wire Fence Co. v. Joslin*, 38 Colo. 162, 88 Pac. 142; *Henderson v. Johns*, 13 Colo. 280, 22 Pac. 461.

A very general demurrer is sufficient where a plea is fatally defective, and might have been stricken on motion. *Ferdon v. Dickens*, 161 Ala. 181, 49 So. 888.

A general demurrer which merely states that the complaint or count to which it is addressed "does not state facts sufficient to constitute a cause of action against the defendant" is sufficient, and will search the entire complaint or count for any and every failure to state a material fact. *Burke v. Maguire*, 154 Cal. 456, 98 Pac. 21.

A general statement that no right of action appears is sufficient where the mere reading of the declaration discloses the omission of an essential allegation, and the demurrer will be sustained though such omission is not made a separate ground thereof. *United States Fidelity & Guaranty Co. v. District Grand Lodge, etc.*, 58 Fla. 373, 50 So. 952.

A plea which, on a bare inspection, is so faulty and defective as to constitute no defense to the action will be held bad even under a ground of demurrer that it does not state facts showing any defense to plaintiff's cause of action, as a plea which contradicts the terms of a written contract. *Rivers v. Brown* (Fla.), 56 So. 553.

In *Hall v. Northern & Southern Co.*, 55 Fla. 242, 46 So. 178, a demurrer on the ground "that it does not appear that the plaintiff has sustained any damage" was held sufficient, where the complaint stated no cause of action.

in an equitable action on the ground that the facts stated do not entitle plaintiff to equitable relief.⁶⁸ In some states a similar rule obtains in the case of a demurrer on the ground that there is another action pending.⁶⁹

An exception to the rule that no specification is necessary in a demurrer for want of facts is sometimes recognized where the defense sought to be taken advantage of by the demurrer is in the nature of a special privilege, which may be waived, and which is available only when specially pleaded.⁷⁰

Demurrers on the ground that the cause of action is barred by the statute of limitations are sometimes required to refer to the particular section of the statute claimed to apply.⁷¹

Where the declaration does not set forth any known cause of action, even imperfectly, a demurrer on the ground that it sets forth no legal cause of action is sufficiently specific. *Johnson v. Reed*, 136 Mass. 421.

A demurrer on the ground that the pleading does not contain facts sufficient to constitute a cause of action or defense is sufficient without further specifications. *Monette v. Cratt*, 7 Minn. 234.

The objection that a counterclaim does not state facts sufficient to constitute a cause of action. Rev. Codes, 1907, §§6559, 6535; *Power v. Sla*, 24 Mont. 243, 61 Pac. 468.

A demurrer in the language of the statute is sufficient. Mo.—*Wilson v. Polk County*, 112 Mo. 126, 20 S. W. 469; *Morgan v. Bouse*, 53 Mo. 219; *Hallock v. Brier*, 80 Mo. App. 331. Mont.—*Collier v. Ervin*, 2 Mont. 335. N. Y.—Code Civ. Proc., §490.

"In a demurrer which goes to the whole ground of action, or to the whole defense stated in the answer, it is sufficient to aver the cause in the general words of the statute." *Steeffe v. Old Colony R. Co.*, 156 Mass. 262, 30 N. E. 1137; *Chenery v. Inhabitants of Holden*, 16 Gray (Mass.) 125.

Where a point is unquestionably well taken on general demurrer, counsel should call the attention of the court to the same, so the court may have an opportunity to give it the proper consideration. *Allyn v. Schultz*, 5 Ariz. 152, 48 Pac. 960.

68. Code, §3562. *Stokes v. Sprague*, 110 Iowa 89, 81 N. W. 195.

Where the proceeding is treated as one in equity in the trial court, it

will be so regarded on appeal. *Hint-rager v. Sumbargo*, 54 Iowa 604.

69. A demurrer in the language of the statute is sufficient. Mont. Rev. Codes, 1907, §6535; N. Y. Code Civ. Proc., §490.

70. Limitations. *Burke v. Maguire*, 154 Cal. 456, 98 Pac. 21; *McFarland v. Holcomb*, 123 Cal. 84, 55 Pac. 761; *Brown v. Martin*, 25 Cal. 82; *Hunt v. Hayt*, 10 Colo. 278; *Hexter v. Clifford*, 5 Colo. 168.

"The bar of the statute of limitations is not specified in the code as a ground of demurrer, and that objection to a complaint, while required to be stated in the demurrer, must be deemed to be included within the ground of want of facts sufficient to constitute a cause of action." *Bell v. Bank of California*, 153 Cal. 234, 94 Pac. 889.

Where defendant desires to take advantage of the defense of limitations by demurrer, he is required to demur on the ground that the complaint "fails to state facts sufficient to constitute a cause of action, in this, that the alleged cause of action appears to be barred by the provisions of," specifying the particular statute applicable. *California Safe Deposit & T. Co. v. Sierra Valleys R. Co.*, 158 Cal. 690, 112 Pac. 274; *Kent v. Snyder*, 30 Cal. 666.

The failure to present a claim against the estate of a decedent for allowance before commencing suit thereon is not within this exception. *Burke v. Maguire*, 154 Cal. 456, 98 Pac. 21.

71. Cal.—*California Safe Deposit & T. Co. v. Sierra Val. R. Co.*, 158 Cal. 690, 112 Pac. 274. Utah.—*Nelden-Judson Drug Co. v. Commercial Nat.*

In some states a demurrer for defect of parties must indicate the persons who should have been joined.⁷²

Sustaining a general demurrer, though the statute requires the particular grounds to be specified, is harmless error where the pleading is incapable of amendment, without departure therefrom, so as to make it good.⁷³ So, too, where a demurrer is properly sustained, it is immaterial that the defect in the pleading was not particularly pointed out.⁷⁴

Under the conformity act the federal courts will follow the state practice as to the necessity of specifying the grounds of demurrer and the sufficiency of such specifications.⁷⁵

Manner of Stating Grounds.—In code states in stating the grounds of demurrer, the statutory form must be substantially followed.⁷⁶

Bank, 27 Utah 59, 74 Pac. 195; Fullerton v. Bailey, 17 Utah 85, 52 Pac. 1020; Thomas v. Glendinning, 13 Utah 47, 44 Pac. 652. Wis.—St., 1898, §2651.

72. State v. McClelland, 138 Ind. 395, 37 N. E. 799; Marks v. Indianapolis, B. & W. R. Co., 38 Ind. 440; Anderson v. W. J. Dyer & Bro., 94 Minn. 30, 101 N. W. 1061; Jaeger v. Sunde, 70 Minn. 356, 73 N. W. 171.

Either by name or in some definite way from the facts pleaded. State v. Metscham, 32 Ore. 372, 46 Pac. 791, 53 Pac. 1071, 41 L. R. A. 692.

“The rule is that a demurrer for defect of parties must specifically point out the defect complained of, and give the name or names of the parties who should be joined, stating whether as plaintiffs or defendants. . . . This is because the demurrer for such cause performs the same office as a plea in abatement performs when the defect of parties does not appear upon the face of the complaint.” Boseker v. Chamberlain, 160 Ind. 114, 66 N. E. 448.

A demurrer which names the missing parties and distinctly specifies that they are necessary parties is sufficient in form. Disbrow v. Creamery Package Mfg. Co., 104 Minn. 17, 115 N. W. 751.

The rule applies under the code, whether the action is legal or equitable. Baker v. Hawkins, 29 Wis. 576.

Contra.—A demurrer for defect of parties defendant should not name the persons who should have been joined, but were not, and if it does so, no conclusion can be drawn therefrom ad-

verse to plaintiff. Coe v. Beckwith, 31 Barb. (N. Y.) 339.

73. Deleon v. Walter (Ala.), 50 So. 934; McGehee v. Western Union Tel. Co., 169 Ala. 109, 53 So. 205; Ryall v. Allen, 143 Ala. 222, 38 So. 851.

74. Where the pleading is insufficient on its face, and a judgment sustaining a demurrer thereto is therefore right. Hoxie v. New York, N. H. & H. R. Co., 82 Conn. 352, 73 Atl. 754.

75. United States v. Boyd, 15 Pet. (U. S.) 187, 10 L. ed. 706; Brown v. Cumberland Tel. & Tel. Co., 181 Fed. 246.

76. Albaugh Bros., Drover & Co. v. Lynas (Ind. App.), 90 N. E. 908, 93 N. E. 678.

The reason or ground of insufficiency, as the same is required by the words of the statute, must be stated in the demurrer. Pritchett v. McGaughey, 151 Ind. 638, 52 N. E. 397.

To the complaint. Grounds of demurrer that the pleading “does not state facts sufficient to constitute a complaint” (State v. Katzman, 161 Ind. 504, 69 N. E. 157; Pine Civil Township v. Huber Mfg. Co., 83 Ind. 121), or “to constitute a good and sufficient petition” (Grubbs v. King, 117 Ind. 243, 20 N. E. 142), or “to constitute a ground of complaint” (Firestone v. Werner, 1 Ind. App. 293, 27 N. E. 623), or “to constitute a good paragraph of complaint” (Jones v. Peters, 28 Ind. App. 383, 62 N. E. 1019), or that certain paragraphs are not “good and sufficient in law” (Porter v. Wilson, 35 Ind. 348), have been held to be insufficient to present any question.

To the Answer.—Under Burns’ Ann.

If the language used is equivalent to that of the statute, it is sufficient.⁷⁷ The mere presence of surplusage will not vitiate it.⁷⁸

A demurrer to an answer,⁷⁹ or reply⁸⁰ on the ground that it does not state a cause of action is bad, as is a demurrer to a plea in abatement on the ground that it does not state facts sufficient to constitute a defense.⁸¹ Defendant should demur on the ground that several

St., 1908, §351, authorizing plaintiff to demur "where the facts stated in any paragraph of the answer are not sufficient to constitute a cause of defense," a demurrer to an answer or a paragraph thereof on the ground that it does not state facts sufficient to constitute an answer (*State v. Katzman*, 161 Ind. 504, 69 N. E. 157; *Wintrobe v. Renbarger*, 150 Ind. 556, 50 N. E. 570; *Thomas v. Goodwine*, 83 Ind. 458; *Malon v. Scholler* [Ind. App.], 96 N. E. 499; *City of Tell City v. Bielefeld*, 20 Ind. App. 1, 49 N. E. 1090; *Wade v. Huber*, 10 Ind. App. 417, 38 N. E. 351), or that a paragraph of answer, "as a defense to plaintiff's cause of action, is not sufficient in law" (*Gordon v. Swift*, 39 Ind. 212), is insufficient, and presents no question.

To the Reply.—Under the statute authorizing a demurrer to any paragraph of the reply on the ground that "the facts stated therein are not sufficient to avoid the paragraph of answer," demurrers on the ground that a paragraph does not state "facts sufficient to constitute a defense or reply to the defendant's answer" (*Sovereign Camp, etc. v. Haller*, 30 Ind. App. 450, 66 N. E. 186), or to constitute a reply (*State v. Katzman*, 161 Ind. 504, 69 N. E. 157; *Sovereign Camp, etc. v. Haller*, 30 Ind. App. 450, 66 N. E. 186), or "to constitute a cause of reply herein" (*Pritchett v. McGaughey*, 151 Ind. 638, 52 N. E. 397), or "to constitute a good reply to the defendant's answer to which it is directed" (*Peden v. Mall*, 118 Ind. 556, 20 N. E. 493), are not in proper form and may be overruled.

77. *Hay v. Bash*, 37 Ind. App. 167, 76 N. E. 644; *Durbin v. Northwestern Scraper Co.*, 36 Ind. App. 123, 73 N. E. 283; *City of Vincennes v. Spees*, 35 Ind. App. 389, 74 N. E. 277.

That a ground of demurrer is not stated in the precise language of the code is immaterial, where it is sub-

stantially the same, and the intention is unmistakable. *Hanna v. Hawes*, 45 Iowa 437.

Ground held sufficiently stated to raise the question of failure to state a cause of action. *Stewart v. Puck Soap Co. (Iowa)*, 135 N. W. 70.

A demurrer on the ground that the complaint does not "contain" facts sufficient, etc., instead of that it does not "state" facts, is sufficient. *Hay v. Bash*, 37 Ind. App. 167, 76 N. E. 644; *Leach v. Adams*, 21 Ind. App. 547, 52 N. E. 813.

A demurrer on the ground that the answer does not state facts sufficient to constitute a "ground of defense" instead of a "cause of defense" is sufficient. *Durbin v. Northwestern Scraper Co.*, 36 Ind. App. 123, 73 N. E. 297.

78. A demurrer to the reply for failure to state "facts sufficient to constitute a reply, or avoidance of the facts stated in the paragraphs of answer to which said paragraphs of reply are respectively pleaded," is good. *Miller v. White River School Township*, 101 Ind. 503.

A demurrer on the ground that "the complaint does not state facts sufficient to constitute a good cause of action" is sufficient. The word "good" will be treated as surplusage. *City of Vincennes v. Spees*, 35 Ind. App. 389, 74 N. E. 277.

79. *Hawley v. Zigerly*, 135 Ind. 248, 34 N. E. 219; *Ginther v. Rochester Improvement Co. (Ind. App.)*, 92 N. E. 698; *Hollis v. Roberts*, 25 Ind. App. 426, 58 N. E. 502.

80. *Snyder v. Wheeler*, 81 Kan. 508, 106 Pac. 462.

81. Since it is not required to allege facts sufficient to constitute a defense. *Kunkle v. Coleman (Ind. App.)*, 92 N. E. 61; *State v. Lannoy*, 30 Ind. App. 335, 65 N. E. 1052. See also *Combs v. Union Trust Co.*, 146 Ind. 688, 46 N. E. 16.

causes of action have been improperly united rather than on the ground that the complaint is multifarious.⁸²

A demurrer to a set-off or counterclaim is sometimes required to be in the same form as a demurrer to a complaint.⁸³

3. In Equity.—In equity a formal statement of the causes of demurrer, though usual, is not absolutely necessary, unless required by the statutes or rules of court,⁸⁴ but defendant may demur generally, and at the hearing may orally assign any defect in substance which is co-extensive with the demurrer upon the record.⁸⁵ It has been held, however, that the complainant may require them to be stated.⁸⁶

Statutes and rules of court in many states now require the grounds of demurrer to be more or less specifically stated,⁸⁷ and provide that

82. *Cohen v. Ottenheimer*, 13 Ore. 220, 10 Pac. 20. *Beacon Vacuum Pump & Elec. Co.*, 32 C. C. A. 151, 89 Fed. 1.

83. Though the statute makes no express provision for a demurrer to a set-off or counterclaim. *Duffy v. England* (Ind.), 96 N. E. 704.

A demurrer for want of facts must assign as a cause "want of sufficient facts to constitute a cause of action." *Albaugh Bros., Drover & Co. v. Lynas* (Ind. App.), 90 N. E. 908, 93 N. E. 678; *Storrs & Harrison Co. v. Fusselman*, 23 Ind. App. 293, 55 N. E. 245.

A demurrer to a counterclaim on the ground that it "does not state facts sufficient to constitute a good counterclaim against the plaintiff" (*Storrs & Harrison Co. v. Fusselman*, 23 Ind. App. 293, 55 N. E. 245), or does not state facts sufficient to constitute a cause of defense (*Bennett v. Root Furniture Co.* [Ind.], 96 N. E. 708; *Duffy v. England* [Ind.], 96 N. E. 704; *Albaugh Bros., Drover & Co. v. Lynas* [Ind. App.], 93 N. E. 678, 90 N. E. 908), is bad and should be overruled.

84. *Taylor v. Holmes*, 14 Fed. 498.

A demurrer in general language without assigning causes is sufficient. *Matthews v. Jenkins*, 80 Va. 463; *Dunn v. Dunn*, 26 Gratt. (Va.) 291.

In the absence of statute a demurrer must assign cause, but it is no longer necessary that it do so in view of the statute providing the form of a demurrer. *Cook v. Dorsey*, 38 W. Va. 196, 18 S. E. 468.

85. *Burk v. Muskegon Mach. & Foundry Co.*, 98 Mich. 614, 57 N. W. 804; *Hastings v. Belden*, 55 Vt. 273.

Equitable estoppel and laches may be considered when assigned *ore tenus* under a general demurrer. *Post v.*

Where a demurrer is put in to the whole bill for causes assigned on the record, if those causes are overruled the defendant will be allowed to assign other causes *ore tenus*, at the argument, but the demurrer *ore tenus* must be for some cause which covers the whole extent of the demurrer. *Van Orden v. Van Orden* (N. J. Eq.), 41 Atl. 671; *Barrett v. Doughty*, 25 N. J. Eq. 379.

When a new cause of demurrer is assigned *ore tenus*, it must be co-extensive with the demurrer. *Sweet v. Converse*, 88 Mich. 1, 49 N. W. 899.

If defendant assigns grounds *ore tenus* he will not generally be entitled to costs, since "if the objections had been formally stated, the plaintiff might have submitted to the demurrer and asked leave to amend." *Taylor v. Holmes*, 14 Fed. 498.

86. *Taylor v. Holmes*, 14 Fed. 498.

87. In Alabama the demurrer must set forth the grounds of demurrer, specially, except that defendant may test the equity of the bill by a general demurrer "that there is no equity in the bill." Code, 1907, §3121; *City of Huntsville v. County of Madison*, 166 Ala. 389, 52 So. 326.

In Maryland the demurrer must state the special grounds of the demurrer. Pub. Gen. Laws, art. 16, §149, p. 424; *Williams v. Harlan*, 88 Md. 1, 41 Atl. 51.

Michigan.—Chancery rule 9a. Both general and special. *Gillingham v. Ray*, 157 Mich. 488, 122 N. W. 111; *Kerr v. Rupp*, 144 Mich. 269, 107 N. W. 1059; *Schaub v. Welded Barrel Co.*, 130 Mich. 606, 90 N. W. 335; *Ideal*

only the grounds of demurrer so specified may be considered.⁸⁸ In equity it is generally held that notwithstanding such a provision a simple statement of want of equity in the complainant's bill is sufficient,⁸⁹ except where the defect sought to be reached is obscure,⁹⁰ or

Clothing Co. v. Hazel, 126 Mich. 262, 85 N. W. 735; *Daschke v. Schellenberg*, 124 Mich. 16, 82 N. W. 665.

A cause of demurrer must be so stated as to apprise the court of the real objection, and if it is not, the party demurring can claim nothing under it. *Kellogg v. Hamilton*, 43 Mich. 269, 5 N. W. 315.

New Jersey.—Chancery rule 209; *Bishop v. Waldron*, 56 N. J. Eq. 484, 4 Atl. 447, *affirmed* 58 N. J. Eq. 583, 43 Atl. 1098.

The specifications of grounds of demurrer prescribed by this rule is in effect a statement in advance of the points of law intended to be argued thereunder. Its purpose is to appraise the adverse party of the points at which his pleading will be attacked, and to aid the court in passing on the demurrer. *Board of Railroad Comrs. v. United N. J. R. & C. Co.* (N. J. Eq.), 74 Atl. 315, *reversing* 71 Atl. 291; *Swinley v. Force*, 78 N. J. Eq. 52, 78 Atl. 249; *Demarest v. Terhune*, 62 N. J. Eq. 663, 50 Atl. 664.

"The test of the sufficiency of these specifications is found in the question whether they exhibit the objections to the bill which were intended to be presented to the court for argument by the demurrer." *Swinley v. Force*, 78 N. J. Eq. 52, 78 Atl. 249.

Objections of form for want of certainty come within the rule. *Goldengay v. Smith* (N. J. Eq.), 52 Atl. 1116.

Rhode Island.—*Darcey v. Darcey*, 29 R. I. 384, 71 Atl. 595.

Tennessee.—The statute requiring the grounds to be stated applies in equity. *Whittaker v. Whittaker*, 10 Lea 93.

88. Michigan.—Chancery Rule 9a; *Gilligam v. Ray*, 157 Mich. 488, 122 N. W. 111; *Township of Merritt v. Harph*, 131 Mich. 174, 91 N. W. 156; *Flynn v. Third Nat. Bank*, 122 Mich. 642, 81 N. W. 572; *Kellogg v. Hamilton*, 43 Mich. 269, 5 N. W. 315.

This rule practically renders obsolete the practice of assigning causes of demurrer *ore tenus*. *Schaub v.*

Welded Barrel Co., 130 Mich. 606, 90 N. W. 335.

Tennessee.—*Whittaker v. Whittaker*, 10 Lea 93.

89. In Alabama the code provides that defendant may test the equity of the bill by a general demurrer "that there is no equity in the bill." Code, 1907, §3121; *City of Huntsville v. County of Madison*, 166 Ala. 389, 52 So. 326.

A ground of demurrer that "the bill contains no equity" is not a compliance with the statute, and raises no question as to defects in the bill curable by amendment. *Chambers v. Wright*, 52 Ala. 444.

A ground of demurrer that "the plaintiffs have not stated in the bill such a case as entitles them to any relief in equity" is a sufficient compliance with the rule requiring every demurrer to state the special grounds upon which it is based, and raises the question of want of equity in the bill. *Reeder v. Lanahan*, 111 Md. 372, 74 Atl. 575.

New Jersey.—Notwithstanding the rule, a simple statement of want of equity in the language of a general demurrer is sufficient, if on inspection of the bill, the right to relief is doubtful or uncertain, but a more explicit statement is necessary where the defect is so obscure or latent that it cannot be readily ascertained on inspection. *Safford v. Barber*, 74 N. J. Eq. 352, 70 Atl. 371; *Demarest v. Terhune*, 62 N. J. Eq. 663, 50 Atl. 664; *Parker v. Stevens*, 61 N. J. Eq. 163, 47 Atl. 573.

Is not necessary where the lack of equity is so manifest that it can be readily discerned upon a mere perusal. *Larter v. Canfield*, 59 N. J. Eq. 461, 45 Atl. 616; *Holmes v. Holmes*, 59 N. J. Eq. 449, 45 Atl. 703.

90. A specification is necessary where the defect is so obscure that it is not readily discernible on the face of the bill. *Holmes v. Holmes*, 59 N. J. Eq. 449, 45 Atl. 703.

A specification of want of equity is

where it is collateral to the main issue in the case.⁹¹

Defect of Parties.—In many jurisdictions it is held that a demurrer for want of parties should point out the persons omitted who should have been joined,⁹² but this rule has been held not to apply where it appears from the face of the bill that complainant has sufficient information in regard to them.⁹³

F. SIGNATURE AND PROTESTATION.—Demurrers must be signed by the party interposing them or his attorney.⁹⁴ As a rule a protestation is no longer required.⁹⁵

G. VERIFICATION AND AFFIDAVIT OR CERTIFICATE OF MERITS.—As a rule a demurrer need not be verified.⁹⁶ Whether it must be accompanied by an affidavit or certificate of merits depends on the statutes and rules of court of the various jurisdictions.⁹⁷ In some jurisdic-

too general to present the question that there is an adequate remedy at law where the case is one of the character over which the jurisdiction of equity extends. *Knikel v. Spitz*, 74 N. J. Eq. 581, 70 Atl. 992; *Safford v. Barber*, 74 N. J. Eq. 352, 70 Atl. 371.

91. The grounds of demurrer must be specified even where the defect in the bill is plain, if that defect be collateral to the main issue. *Safford v. Barber*, 74 N. J. Eq. 352, 70 Atl. 371; *Larter v. Canfield*, 59 N. J. Eq. 461, 45 Atl. 616; *Van Houten v. Van Winkle*, 46 N. J. Eq. 380, 20 Atl. 34.

92. In order to give plaintiff an opportunity to amend. *Hubbard v. Manhattan Trust Co.*, 30 C. C. A. 520, 87 Fed. 51; *Taylor v. Holmes*, 14 Fed. 498.

Should state the names of the parties omitted. *Nelson v. Wadsworth* (Ala.), 55 So. 120; *Chambers v. Wright*, 52 Ala. 444.

Where the objection is taken by special demurrer, it is proper for the demurrer to suggest the names of the parties omitted. *Strout v. Lord*, 103 Me. 410, 69 Atl. 694.

93. As to their names, interests, and residences. *Taylor v. Holmes*, 14 Fed. 498.

94. In Mississippi a demurrer in chancery must be subscribed by the solicitor interposing it. Code, 1906, §582.

95. In Massachusetts the statute expressly provides that a demurrer in equity need not contain a protestation or concluding prayer. Rev. Laws, 1902, c. 159, §13, p. 1390.

96. "A demurrer, and joinder in

demurrer, both usually add a verification, before praying judgment; but a verification appears to be unnecessary, as no proof is assumed by either of the parties." Will's Gould Pl. 585. See **Ia.**—Code, §3580. **Ky.**—Code Civ. Proc., §116. **Minn.**—Rev. Laws, 1905, §142. **N. Y.**—Code Civ. Proc., §523. **N. C.**—Rev., 1905, §488. **N. D.**—Rev. Codes, 1905, §6866. **Ore.**—L. O. L., §82. **S. C.**—Code Civ. Proc., §177. **S. D.**—Code Civ. Proc., §133. **Wash.**—Rem. & Ball. Ann. Codes & St., §281.

97. **United States.**—A demurrer in an equity case not accompanied by the affidavit of the defendant required by rule 31 is fatally defective and may be disregarded. *Sheffield Furnace Co. v. Witherow*, 149 U. S. 574, 13 Sup. Ct. 936, 37 L. ed. 853; *Bryant Bros. Co. v. Robinson*, 79 C. C. A. 259, 149 Fed. 321; *Stephens v. Gall*, 179 Fed. 938.

Florida.—Under the rules of practice in equity a demurrer must be accompanied by an affidavit of defendant, or in case of his absence from the state, of his agent or attorney, that it is not interposed for delay. If the rule is not complied with, the demurrer may be disregarded, and a decree *pro confesso* entered. *Taylor v. Brown*, 32 Fla. 334, 13 So. 957.

In Illinois no affidavit of merits need be filed. Rev. St., 1909, c. 110, §55, p. 1702.

Maryland.—In equity a demurrer to a bill or petition will not be allowed to be filed unless it is supported by affidavit that it is not intended for delay. Pub. Gen. Laws, art. 16, §149, p. 424.

tions a certificate of counsel is required to the effect that in his opinion the demurrer is well founded in law.⁹⁸

II. AMENDMENT OF DEMURRERS.—In many states a demurrer may be amended, either as a matter of right,⁹⁹ or by leave of court.¹ Where

In Massachusetts a demurrer in equity must be accompanied by a certificate that it is not intended for delay. Rev. Laws, 1902, c. 159, §13, p. 1390.

No such certificate is necessary where defendant relies on a statement in the nature of a demurrer contained in the answer. *Mill River Loan Fund Assn. v. Clafin*, 9 Allen (Mass.) 101.

The absence of the certificate cannot be taken advantage of for the first time after the case has been heard and reserved upon the demurrer for the consideration of the full court. *Nelson v. Ferdinand*, 111 Mass. 300.

In New Jersey a demurrer in equity must be accompanied by an affidavit of defendant or his agent, that the demurrer is not interposed for delay, but in good faith. Otherwise it may be treated as a nullity. Comp. St., 1910, p. 418, §22; *Redrow v. Sparks*, 75 N. J. Eq. 396, 72 Atl. 442; *Stanbery v. Baker*, 55 N. J. Eq. 270, 37 Atl. 351.

98. United States.—A demurrer in an equity case not accompanied by the certificate required by rule 31 is fatally defective and may be disregarded. *Sheffield Furnace Co. v. Witherow*, 149 U. S. 574, 13 Sup. Ct. 936, 37 L. ed. 853; *Bryant Bros. Co. v. Robinson*, 79 C. C. A. 259, 149 Fed. 321; *Stephens v. Gall*, 179 Fed. 938.

Florida.—In equity, under the rules of practice. *Taylor v. Brown*, 32 Fla. 334, 13 So. 957.

That a demurrer is not accompanied by the required certificate is not ground for overruling it. The proper remedy is by motion to strike off the demurrer, and the defect will be regarded as waived where objection is first made on appeal (*Keen v. Jordan*, 13 Fla. 327), or the demurrer may be disregarded and a decree *pro confesso* entered (*Taylor v. Brown*, 32 Fla. 334, 13 So. 957).

Massachusetts.—"The attorney, if any, shall certify upon the demurrer that he is of the opinion that there is such probable ground in law therefor as to make it a fit subject for ju-

dicial inquiry and trial and that it is not intended merely for delay." Rev. Laws, 1902, c. 173, §16, p. 1553.

Mississippi.—A demurrer in chancery must have attached thereto a certificate of the solicitor interposing it that he believes it ought to be sustained. Code, 1906, §582.

New Jersey.—In equity. Otherwise it may be treated as a nullity. Comp. St., 1910, p. 418, §22; *Redrow v. Sparks*, 75 N. J. Eq. 396, 72 Atl. 442; *Stanbery v. Baker*, 55 N. J. Eq. 270, 37 Atl. 351.

99. In Arizona a demurrer is treated as a defense and is required to be incorporated in the answer, and hence a general demurrer may be amended as of right at any time before trial so as to set up matters of defense in bar. *Perrin v. Mallory Commission Co.*, 8 Ariz. 404, 76 Pac. 476.

In California a demurrer may be once amended as of course at any time before the hearing on the original demurrer, it being a pleading within the statute relating to amendments. *Hedges v. Dam*, 72 Cal. 520, 14 Pac. 133.

In Iowa a demurrer is regarded as a pleading within the statute relating to amendments. *Morrison v. Miller*, 46 Iowa 84.

It may be amended after the pleading to which it is directed is amended. *Wisconsin Lumb. Co. v. Greene & W. Tel. Co.*, 127 Iowa 350, 101 N. W. 742, 69 L. R. A. 968.

A motion to strike an amended pleading was treated on appeal as an amendment to a demurrer to the original pleading, where it was so treated by all parties below, the misnomer not being reversible error. *Wisconsin Lumb. Co. v. Greene & W. Tel. Co.*, 127 Iowa 350, 101 N. W. 742, 69 L. R. A. 968.

In Virginia either party may amend his demurrer by stating additional grounds, or otherwise, at any time before the trial. Code, §3271.

1. *Murphy v. Russell & Co.*, 8 Idaho 133, 67 Pac. 421; *Dunbar v. Board of Comrs.*, 5 Idaho 407, 49 Pac. 409;

permission to amend is granted after the demurrer has been submitted, the submission should first be set aside.²

It has been held that an amended demurrer should show on its face that it is an amended demurrer.³

A demurrer presenting wholly new matter cannot be regarded as an amended one though so denominated.⁴

VII. GROUNDS OF DEMURRER.—A. LIES ONLY FOR MATTER APPARENT ON THE FACE OF THE PLEADING.—A demurrer reaches only matters apparent on the face of the pleading demurred to.⁵ It is not

Kelly v. Leachman, 3 Idaho 629, 33 Pac. 44.

The court has discretionary power to allow the amendment of a demurrer. *Hunter v. Philadelphia, B. & W. R. Co. (Del.)*, 75 Atl. 962.

The court may permit the withdrawal of a demurrer and the filing of another one setting up additional grounds. *McClaine v. Fairchild*, 23 Wash. 758, 63 Pac. 517.

Leave must be obtained, but, as to a first amendment prior to a hearing on demurrer, the leave should be granted as a matter of course. *Dunbar v. Board of Comrs.*, 5 Idaho 407, 49 Pac. 409.

In *New Jersey* the judge or court may at any time permit the grounds of demurrer to be amended on terms. *Comp. St.*, 1910, p. 4094, §132.

In equity allowing a demurrer to be amended is discretionary with the trial judge. *Phillips v. Jacobs*, 145 Mich. 108, 108 N. W. 899.

2. It is sufficient if it is practically, though not formally set aside. *Poweshiek County v. Cass County*, 63 Iowa 244, 18 N. W. 895.

3. *Dunbar v. Board of Comrs.*, 5 Idaho 407, 49 Pac. 409.

4. *Lundbeck v. Pilmair*, 78 Iowa 434, 43 N. W. 271.

5. *U. S.*—*Tyler v. Hand*, 7 How. 573, 12 L. ed. 824; *Lessee of Walden v. Craig's Heirs*, 14 Pet. 147, 10 L. ed. 393; *French v. Busch*, 189 Fed. 480; *Conroy v. Oregon Const. Co.*, 23 Fed. 71. *Ala.*—*Grand Lodge, K. of P. v. Grand Lodge, K. of P.*, 56 So. 963; *United States Fidelity & Guaranty Co. v. Town of Dothan*, 56 So. 953; *Minona Portland Cement Co. v. Reese*, 167 Ala. 485, 52 So. 523. *Ark.*—*Knott v. Clements*, 13 Ark. 335. *Cal.*—*Lange v. Geiser*, 138 Cal. 682, 72 Pac. 343; *McFarland v. Holcomb*, 123 Cal. 84, 55

Pac. 761; *Williams v. Bergin*, 116 Cal. 56, 47 Pac. 877; *Harvey v. Meigs (Cal. App.)*, 119 Pac. 941; *Donahue v. Stockton Gas & E. Co.*, 6 Cal. App. 276, 92 Pac. 196. *Colo.*—*Hunt v. Hayt*, 10 Colo. 278, 15 Pac. 410. *Conn.*—*Scanlon v. Parrish*, 82 Atl. 969; *Bristol v. New England R. Co.*, 70 Conn. 305, 39 Atl. 235; *Van Epps v. Redfield*, 68 Conn. 39, 35 Atl. 809, 34 L. R. A. 360. *Ga.*—*Williams v. Garbutt Lumber Co.*, 132 Ga. 221, 64 S. E. 65; *Constitution Pub. Co. v. Stegall*, 97 Ga. 405, 24 S. E. 33; *Brown v. Latham*, 92 Ga. 280, 18 S. E. 421; *McGehee v. Jones*, 10 Ga. 127. *Idaho.*—*Stevens v. Home Sav. & Loan Assn.*, 5 Idaho 741, 51 Pac. 779-986. *Ill.*—*Smith v. Alexander*, 128 Ill. App. 507; *American Exchange Nat. Bank v. Seaverns*, 121 Ill. App. 480; *Leathe v. Thomas*, 109 Ill. App. 434, affirmed 218 Ill. 246, 75 N. E. 810. *Ind.*—*Grand Trunk Western R. Co. v. Poole (Ind.)*, 93 N. E. 26; *Jennings v. Shertz*, 45 Ind. App. 120, 88 N. E. 729; *Indianapolis Street R. Co. v. Seerley*, 35 Ind. App. 467, 72 N. E. 169-1034; *Delaware Township v. Board of Comrs.*, 26 Ind. App. 97, 59 N. E. 189. *Ia.*—*Jeffries v. Fraternal Bankers' Reserve Society*, 112 N. W. 786; *Goring v. Fitzgerald*, 105 Iowa 507, 75 N. W. 358; *Johns v. Bailey*, 45 Iowa 241; *Mosher v. Independent School Dist.*, 42 Iowa 632; *Polk County v. Hierb*, 37 Iowa 361; *Childs v. Limback*, 30 Iowa 398. *Kan.*—*Walker v. Fleming*, 37 Kan. 171, 14 Pac. 470; *Continental Ins. Co. v. Pratt*, 8 Kan. App. 424, 55 Pac. 671. *Ky.*—*McDowell v. Chesapeake & O. S. W. R. Co.*, 90 Ky. 343, 14 S. W. 338; *McKensey v. Edwards*, 88 Ky. 272, 10 S. W. 815, 3 L. R. A. 397; *Currie Fertilizer Co. v. Krish*, 24 Ky. L. Rep. 2471, 74 S. W. 268; *Kentucky Cent. R. Co. v. Holliday*, 5 Ky. L. Rep. 695. *Me.*—*Strout v. Lord*, 103 Me. 410, 69 Atl. 694;

its office to set out new facts, and it cannot properly do so.^o If it

Delcourt v. Whitehouse, 92 Me. 254, 42 Atl. 394; Mitchell v. Sutherland, 74 Me. 100; Baker v. Atkins, 62 Me. 205. **Md.**—Sinclair v. Auxiliary Realty Co., 99 Md. 223, 57 Atl. 664; Baltimore & O. R. Co. v. Ritchie, 31 Md. 191. **Mass.** Peters v. Equitable Life Assurance Soc., 200 Mass. 579, 86 N. E. 885; Turners Falls Fire Dist. v. Millers Falls Water Supply Dist., 189 Mass. 263, 75 N. E. 630; Bliss v. Parks, 175 Mass. 539, 56 N. E. 566; Trull v. Moulton, 12 Allen 396; White v. Curtis, 2 Gray 467; Pearsall v. Dwight, 2 Mass. 84. **Minn.**—Krause v. Hoeffken, 135 N. W. 979; Lehigh Valley Coal Co. v. Gilmore, 93 Minn. 432, 101 N. W. 796; Everett v. O'Leary, 90 Minn. 154, 95 N. W. 901; Mendenhall v. Duluth Dry Goods Co., 72 Minn. 312, 75 N. W. 232; Bell v. Mendenhall, 71 Minn. 331, 73 N. W. 1086; Henkel v. Pioneer Sav. & Loan Co., 61 Minn. 35, 63 N. W. 243; Powers v. Ames, 9 Minn. 178. **Miss.**—State v. Woodruff, 81 Miss. 456, 33 So. 78. **Mo.**—Lackawanna Coal & Iron Co. v. Long, 231 Mo. 605, 133 S. W. 35; Hubbard v. Slavens, 218 Mo. 598, 117 S. W. 1104; Beattie Mfg. Co. v. Gerardi, 166 Mo. 142, 65 S. W. 1035; Hoyt v. Oliver, 59 Mo. 188; Arthur v. Rickards, 48 Mo. 298. **Mont.**—Knight v. Le Beau, 19 Mont. 223, 47 Pac. 952; Foster v. Wilson, 5 Mont. 53, 2 Pac. 310. **Neb.** Guthrie v. Treat, 66 Neb. 415, 92 N. W. 595; Bank of Bladen v. David, 53 Neb. 608, 74 N. W. 42; Hardy v. Miller, 11 Neb. 395, 9 N. W. 475; Mills v. Rice, 3 Neb. 76. **Nev.**—Levy v. Ryland, 32 Nev. 460, 109 Pac. 905. **N. H.** Tappan v. Evans, 11 N. H. 311. **N. J.** Riley v. Hodgkins, 57 N. J. Eq. 278, 41 Atl. 1099. **N. Y.**—Phoenix Bank v. Donnell, 40 N. Y. 410; Thompson v. Richardson, 74 App. Div. 62, 77 N. Y. Supp. 202; White & Co. v. Oakes, 117 N. Y. Supp. 938; Hubbard v. United Wireless Tel. Co., 115 N. Y. Supp. 1016; Getty v. Hudson River R. Co., 8 How. Pr. 177. **N. C.**—Dalrymple v. Cole, 156 N. C. 353, 72 S. E. 451; Wood v. Kincaid, 144 N. C. 393, 57 S. E. 4; Davison v. Gregory, 132 N. C. 389, 43 S. E. 916; Von Glahn v. De Rossett, 76 N. C. 292. **Okla.**—Faller v. Davis, 118 Pac. 382; Biard v. Laumann, 29 Okla. 138, 116 Pac. 780, citing 1 STAND. PROC. 1040. **Ore.**—Paulson v. City of

Portland, 16 Ore. 450, 19 Pac. 450, 1 L. R. A. 673; Weiss v. Bethel, 8 Ore. 523. **S. C.**—Cone & Co. v. Poole, 41 S. C. 70, 19 S. E. 203, 24 L. R. A. 289; Cheraw & C. R. Co. v. White, 14 S. C. 51. **S. D.**—Hudson v. Archer, 4 S. D. 128, 55 N. W. 1099. **Tenn.**—State v. Buchanan, 52 S. W. 480; Insurance Co. v. Thornton, 97 Tenn. 1, 40 S. W. 136. **Tex.**—Astin v. Mosteller (Tex. Civ. App.), 144 S. W. 701; Kruegel v. Porter (Tex. Civ. App.), 136 S. W. 801; Sievert v. Underwood (Tex. Civ. App.), 124 S. W. 721; Rucker v. Dailey, 66 Tex. 284. **Utah.**—Crane Bros. Mfg. Co. v. Reed, 3 Utah 506, 24 Pac. 1056. **Vt.**—Douglas & Varnum v. Village of Morrisville, 84 Vt. 302, 79 Atl. 391. **Va.**—Northwestern Bank v. Nelson, 1 Gratt. 108. **Wash.**—Peterson v. Pantheon Lumb. Co., 62 Wash. 189, 113 Pac. 562; Jackson v. McAuley, 13 Wash. 298, 43 Pac. 41; Lowman v. West, 8 Wash. 355, 36 Pac. 258. **Wis.** Gooding v. Doyle, 134 Wis. 623, 115 N. W. 114; Anderson v. Douglas County, 98 Wis. 393, 74 N. W. 109. **Wyo.**—Mau v. Stoner, 15 Wyo. 109, 87 Pac. 434, 89 Pac. 466; Columbia Sav. & Loan Assn. v. Clause, 13 Wyo. 166, 78 Pac. 708; Marks v. Board of Comrs., 11 Wyo. 488, 72 Pac. 894.

“Matter in the bill or the omission of matter that should be inserted.” Richardson v. Loree, 94 Fed. 375, 36 C. C. A. 301.

Never on matter collateral to the pleading. Wyoming County v. Bardwell, 84 Pa. 104.

Demurrer cannot raise the question of inconsistency of defense. Larimer v. Kelly, 10 Kan. 298.

6. U. S.—Stewart v. Masterson, 131 U. S. 151, 9 Sup. Ct. 682, 33 L. ed. 114; Star Ball Retainer Co. v. Klahn, 145 Fed. 854; Graham v. United States, 1 Ct. Cl. 183. **Ala.**—Sartain v. Shepherd, 55 So. 919. **Cal.**—Brennan v. Ford, 46 Cal. 7; Cook v. De La Guerra, 24 Cal. 237. **Fla.**—State v. County Comrs., 23 Fla. 632, 3 So. 164; Southern Life Ins. & Trust Co. v. Lanier, 5 Fla. 110. **Mass.**—Fay v. Boston & W. St. R. Co., 196 Mass. 329, 82 N. E. 7. **Ore.**—Rice v. Rice, 13 Ore. 337, 10 Pac. 495.

Any matter which cannot be determined without extraneous testimony is

relies on extrinsic facts, it is called a speaking demurrer, and is bad.⁷

B. GROUNDS IN GENERAL.—Except as otherwise provided by statute, a party may, as a rule, demur to any pleading of his adversary which is deficient either in substance or form.⁸ A demurrer goes to the sufficiency of the pleading itself, and not to the right of a party to file it.⁹

not ground for demurrer. *French v. Busch*, 189 Fed. 480.

“**Must stand or fall by the facts** as alleged in the opposing pleading, and it can raise only questions of law as to their sufficiency.” *Wood v. Kincaid*, 144 N. C. 393, 57 S. E. 4.

7. U. S.—*Richardson v. Loree*, 94 Fed. 375, 36 C. C. A. 301; *Star Ball Retainer Co. v. Klahn*, 145 Fed. 834.

Ala.—*United States Fidelity & Guaranty Co. v. Town of Dothan*, 56 So. 953. **Fla.**—*Southern Life Ins. & Trust Co. v. Lanier*, 5 Fla. 110. **Ga.**—

Williams v. Garbutt Lumber Co., 132 Ga. 221, 64 S. E. 65; *Reid v. Caldwell*, 120 Ga. 718, 48 S. E. 191; *Woods v. Colony Bank*, 114 Ga. 683, 40 S. E. 720; *Oliver v. Powell*, 114 Ga. 592,

40 S. E. 826; *Mathis v. Fordham*, 114 Ga. 364, 40 S. E. 324; *Gaines v. Bankers' Alliance*, 113 Ga. 1138, 39 S. E. 502; *Great Cosmopolitan Shows v. Petty*, 7 Ga. App. 236, 66 S. E. 624; *South-*

ern Express Co. v. Briggs, 1 Ga. App. 294, 57 S. E. 1066. **Ill.**—*Foss v. People's Gas Light & Coke Co.*, 241 Ill.

238, 89 N. E. 351. **Ia.**—*Jeffries v. Fraternal Bankers', etc. Soc.*, 135 Iowa 284, 112 N. W. 786. **Mo.**—*Coff-*

man v. Gates, 142 Mo. App. 648, 121 S. W. 1078. **N. H.**—*Bay State Iron Co. v. Goodall*, 39 N. H. 223. **N. J.**

Ivins v. Jacobs, 69 N. J. Eq. 643, 60 Atl. 1125; *Teeter v. Veitch*, 66 N. J. Eq. 162, 57 Atl. 160; *Riley v. Hodg-*

kins, 57 N. J. Eq. 278, 41 Atl. 1099. **N. C.**—*Dalrymple v. Cole*, 156 N. C. 353, 72 S. E. 451; *Wood v. Kincaid*, 144 N. C. 393, 57 S. E. 4; *Davison v.*

Gregory, 132 N. C. 389, 43 S. E. 916; *Von Glahn v. De Rossett*, 76 N. C. 292. **Tenn.**—*State v. Buchanan*, 52 S. W.

480; *Trust Co. v. Weaver*, 102 Tenn. 66, 50 S. W. 763; *Insurance Co. v. Thornton*, 97 Tenn. 1, 40 S. W. 136.

Wyo.—*Columbia Sav. & Loan Assn. v. Clause*, 13 Wyo. 166, 78 Pac. 708. **Eng.**—*Edsell v. Buchanan*, 2 Ves. Jr.

83, 30 Eng. Reprint 534.

Examples of speaking demurrers.
One seeking to plead *res adjudicata*,

where the former adjudication does not appear on the face of the pleading. *Buchanan v. Williamson*, 131 Ga. 501, 62 S. E. 815.

Where it is not necessary that the contract sued on be in writing, a demurrer on the ground that a copy of it is not attached to the petition. *Charleston & W. C. R. Co. v. Duck-*

worth, 7 Ga. App. 350, 66 S. E. 1018. A demurrer for want of parties, where the bill does not show that the persons named as omitted have any interest in the suit. *Alger v. Slaght*, 64 Mich. 589, 31 N. W. 531.

8. Tyler v. Hand, 7 How. (U. S.) 573, 12 L. ed. 824; *Trowbridge v. True*, 52 Conn. 190.

“A demurrer may be for insufficiency either in substance or in form; that is, it may be either on the ground that the case shown by the opposite party is essentially insufficient, or on the ground that it is stated in an inartificial manner.” *Andrews Steph. Pl.* (2nd ed.), §138, p. 265.

Any objection because of matter in the bill or because of defect in its frame. *Miller v. Baltimore County Marble Co.*, 52 Md. 642.

The omission in the complaint in an action by an assignee of the averment required by statute that the plaintiff was the actual and *bona fide* owner of the choses in action sued on can only be taken advantage of by demurrer. *Bennett v. Lathrop*, 71 Conn. 613, 42 Atl. 634.

“Special defects or omissions in the petition may always be taken advantage of by demurrer.” *Ga. Code*, 1895, §5048.

The defective statement of a good cause of action must be taken advantage of by demurrer, or it will be waived. *Mizzell v. Ruffin*, 118 N. C. 69, 23 S. E. 927.

Mistakes in the declaration must be taken advantage of by demurrer rather than by plea in abatement. *Hastrop v. Hastings*, 1 Salk. 212, 91 Eng. Reprint 189.

9. Ia.—*Williams v. Williams*, 115

Under the codes and practice acts, as a general rule, mere formal defects in pleading cannot be taken advantage of by demurrer, the remedy being by motion.¹⁰

Under the conformity act the federal courts are governed in civil actions at law by the state practice in determining what questions may be raised by demurrer.¹¹

The codes usually specify the grounds for demurrer,¹² and when such is the case, only those so specified are available.¹³

Iowa 520, 88 N. W. 1057. **Okla.**—Tecomseh State Bank *v.* Maddox, 4 Okla. 583, 46 Pac. 563. **Va.**—Bennett's Exrs. *v.* Loyd, 6 Leigh. 316.

It addresses itself to the sufficiency of a pleading which, however defective or insufficient it may be, is properly in court. Goodrich *v.* Alfred, 72 Conn. 257, 43 Atl. 1041.

The office of a demurrer is to put in issue the legal effect of a plea after it has been received, and it does not reach matters which can only be urged against receiving the plea, such as that it is not properly entitled in any term of court, or that it is not sufficiently verified. Commercial & Railroad Bank *v.* Slocomb, 14 Pet. (U. S.) 60, 10 L. ed. 354.

10. Ark.—Southern Anthracite Coal Co. *v.* Hodge, 139 S. W. 292; Jennings *v.* Bouldin, 134 S. W. 948; Dickerson *v.* Hamby, 96 Ark. 163, 131 S. W. 674; Roberts *v.* St. Louis, I. M. & S. R. Co., 95 Ark. 249, 130 S. W. 531. **Ariz.** Gill *v.* Manhattan Life Ins. Co., 11 Ariz. 232, 95 Pac. 89. **Ind.**—Mulky *v.* Karsell, 31 Ind. App. 595, 68 N. E. 689. **Ky.**—Mullins & Crigler *v.* Hume & Co., 15 Ky. L. Rep. 93. **Neb.**—Farmer & Wheeler *v.* Triplett, 7 Neb. 737. **N. J.**—Malberti *v.* United Electric Co., 69 N. J. L. 55, 54 Atl. 251. **N. Y.** McCarthy *v.* Heiselman, 140 App. Div. 240, 125 N. Y. Supp. 13. **N. C.**—New Bern Banking & Trust Co. *v.* Duffy, 72 S. E. 96; Blackmore *v.* Winders, 144 N. C. 212, 56 S. E. 874. **S. C.**—Latimer *v.* Sullivan, 30 S. C. 111, 8 S. C. 639. **Wash.**—Harris *v.* Halverson, 23 Wash. 779, 63 Pac. 549.

Matter that was only ground for special demurrer at common law cannot be assigned as cause of demurrer. Dougherty *v.* Edwards, 25 Ark. 84.

If a complaint states a cause of action, a demurrer because of incomplete, imperfect, and informal allegations will not lie, but the remedy is

by motion to make more definite and certain. City of Goldfield *v.* MacDonald (Colo.), 119 Pac. 1069; Downey *v.* Colorado Fuel & Iron Co., 48 Colo. 27, 108 Pac. 972.

Defects in matters of form or in the manner of stating a cause of action that do not make the declaration insufficient in substance are reached by motion rather than demurrer. Atlantic Coast Line R. Co. *v.* Wallace, 61 Fla. 93, 54 So. 893.

The sufficiency of a pleading as to matters of substance is reached by demurrer, but the remedy for non-compliance with the rules of pleading in stating the facts is by motion. Brownell *v.* Salem Flouring Mills Co., 48 Ore. 525, 87 Pac. 770. See also IX, *infra*.

11. Gray v. Grand Trunk Western R. Co., 156 Fed. 736, 84 C. C. A. 392; Chamberlain *v.* Mensing, 51 Fed. 669.

12. Mont.—Grounds in justices' court. Rev. Codes, 1907, §7007. **Neb.** In the county court. Comp. St., 1911, §2761. **N. Y.**—Grounds in mandamus. Code Civ. Proc., §§2076, 2078. In justice's court. Code Civ. Proc., §2939.

See *infra*, this section.

13. U. S.—Neis *v.* Yocum, 16 Fed. 168. **Ariz.**—Olney *v.* Bishop, 13 Ariz. 336, 114 Pac. 559. **Cal.**—Kyle *v.* Craig, 125 Cal. 107, 57 Pac. 791; Heutsch *v.* Porter, 10 Cal. 555. **Colo.**—Carpenter *v.* Smith, 20 Colo. 39, 36 Pac. 789. **Idaho.**—Fox *v.* Rogers, 6 Idaho, 710, 59 Pac. 538; Caldwell *v.* Ruddy, 2 Idaho 5, 1 Pac. 339. **Ind.**—Burns' Ann. St., 1908, §344, Acts, 1911, p. 415, c. 157; §2. **Ind.**—Frankel *v.* Garrard, 160 Ind. 209, 66 N. E. 687; Coddington *v.* Canaday, 157 Ind. 243, 61 N. E. 567; Armstrong *v.* Dunn, 143 Ind. 433, 41 N. E. 540; Cargar *v.* Fee, 140 Ind. 572, 39 N. E. 93; Campbell *v.* Campbell, 121 Ind. 178, 23 N. E. 81. **Ia.** District Township *v.* District Township, 44 Iowa 512; Orman *v.* Orman, 26 Iowa 361; Davis *v.* Bonar & Kearns,

A party may demur upon one or all of the statutory grounds,¹⁴ and if the pleading is bad on either ground the demurrer must be sustained.¹⁵ A demurrer on two or more grounds stated conjunctively will be overruled if any one of said grounds is untenable.¹⁶

C. WANT OF JURISDICTION.—Want of jurisdiction is ordinarily ground of demurrer both at law and in equity,¹⁷ as where the requisite citizenship does not exist,¹⁸ or the action or suit is brought in the wrong district.¹⁹

A bill in equity is demurrable where it shows on its face that complainant has an adequate remedy at law,²⁰ and the same is generally

15 Iowa 171. **Kan.**—*Mathes v. Shaw*, 85 Kan. 162, 116 Pac. 244. **Ky.**—*Hord v. Chandler*, 13 B. Mon. 403. **Minn.**—*Freeman v. Paulson*, 107 Minn. 64, 119 N. W. 651; *Leuthold v. Young*, 32 Minn. 122, 19 N. W. 652; *Campbell v. Jones*, 25 Minn. 155. **Mo.**—*Beattie Mfg. Co. v. Gerardi*, 166 Mo. 142, 65 S. W. 1035. **Neb.**—*Davey v. Dakota County*, 19 Neb. 721, 28 N. W. 276; *McClary v. Sioux City & P. R. Co.*, 3 Neb. 44. **Nev.**—*James v. Leport*, 19 Nev. 174, 8 Pac. 47. **N. M.**—*McVeigh v. Veig*, 117 Pac. 857. **N. Y.**—*Marie v. Garrison*, 83 N. Y. 14; *Bottom v. Chamberlain*, 21 Misc. 556, 47 N. Y. Supp. 733; *Bergstrom v. Commercial Advertiser Assn.*, 131 N. Y. Supp. 1025; *Mildeberger v. Franklin*, 115 N. Y. Supp. 903. **Okla.**—*Armstrong, Byrd & Co. v. Crump*, 25 Okla. 452, 106 Pac. 855. **S. D.**—*Hill v. Walsh*, 6 S. D. 421, 61 N. W. 440. **Wyo.**—*Regan v. Jones*, 1 Wyo. 210.

That the facts alleged do not entitle plaintiff to the relief demanded is not good ground for demurrer. *Kemp v. Mitchell*, 29 Ind. 163; *Cincinnati & C. R. Co. v. Washburn*, 25 Ind. 259.

A demurrer on the ground "that there is not any proper plaintiff in said cause" presents no question. *Campbell v. Campbell*, 121 Ind. 173, 23 N. E. 81.

14. **Cal.**—*People v. Central Pac. R. Co.*, 76 Cal. 29, 18 Pac. 90. **Ind.**—*Sherfey & Kidd Co. v. Board of Comrs.*, 26 Ind. App. 66, 59 N. E. 186. **Minn.**—*Disbrow v. Creamery Package Mfg. Co.*, 110 Minn. 237, 125 N. W. 115.

A pleading "may present as many demurrers as there may be grounds for in behalf of the pleader." *Ky. Code Civ. Proc.*, §113.

15. *Sherfey & Kidd Co. v. Board of Comrs.*, 26 Ind. App. 66, 59 N. E. 186.

16. A demurrer on the ground that the complaint "is ambiguous, unintelligible, and uncertain" will be overruled where the complaint is not ambiguous or unintelligible, though it is uncertain. *Greenebaum v. Taylor*, 102 Cal. 624, 36 Pac. 957; *Kraner v. Halsey*, 82 Cal. 209, 22 Pac. 1137.

A demurrer on the ground that the complaint is "ambiguous and uncertain," if it is either, but not both. *Wilhoit v. Cunningham*, 87 Cal. 453, 25 Pac. 675; *White v. Allatt*, 87 Cal. 245, 25 Pac. 420.

17. *Legum v. Blank*, 105 Md. 126, 65 Atl. 1071.

The objection must be taken by demurrer where it appears on the face of the declaration, and can be taken by plea only when want of jurisdiction depends on facts dehors the record. *Price v. Drew*, 18 Fla. 670.

That a state court should not take jurisdiction of a statutory action given by act of congress may be raised by demurrer. *Hoxie v. New York, N. H. & H. R. Co.*, 82 Conn. 352, 73 Atl. 754.

That a case as presented is not within the jurisdiction of equity. *Stephenson v. Davis*, 56 Me. 73.

18. *Coal Co. v. Blatchford*, 11 Wall. (U. S.) 172, 20 L. ed. 179.

19. In a district of which defendant is not a resident. *Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. ed. 943.

Where it affirmatively appears on the face of the bill that it was not filed in the proper district. *Puckett v. Puckett (Ala.)*, 56 So. 585.

20. **U. S.**—*Chapin v. Dougherty*, 183 Fed. 309, 105 C. C. A. 521; *Newman v. Westcott*, 29 Fed. 49. **Ill.**—*Law v. Ware*, 238 Ill. 360, 87 N. E. 308; *Gage v. Griffin*, 103 Ill. 41. **Vt.**—*Holt v. Daniels*, 61 Vt. 89, 17 Atl. 786.

true of the complaint or equivalent pleading in equitable actions under the codes.²¹

The codes generally provide that the defendant may demur to the complaint where it appears on its face that the court has no jurisdiction of the person of the defendant,²² or of the subject-matter of the action.²³ The codes of some of the states specifically provide that

W. Va.—*Van Dorn v. Lewis County Court*, 38 W. Va. 267, 18 S. E. 579.

A bill which does not exclude the existence of an adequate remedy at law is demurrable. *Bassett v. Brown*, 105 Mass. 551.

The objection should be raised by demurrer rather than by motion, at the hearing, to dismiss. *Patterson v. Turner*, 62 Ga. 674.

21. If the objection is not raised by demurrer it is waived. *Lloyd v. Simons*, 97 Minn. 315, 105 N. W. 902.

22. **Ark.**—*Kirby's Dig.*, §6093. **Cal.** Code Civ. Proc., §430. **Colo.**—Code, §56. **Ga.**—Code, 1895, §5048; *Kendrick v. Whitfield*, 20 Ga. 379. **Idaho.**—Rev. Codes, §4174. **Ind.**—*Burns' Ann. St.*, 1908, §344; *Acts* 1911, p. 415, c. 157, §2; *Stanford v. Stanford*, 42 Ind. 485. **Ia.**—Code, §3561. **Kan.**—Gen. St., 1909, §5686. **Ky.**—Code Civ. Proc., §92. **Minn.**—Rev. Laws, 1905, §4128. **Mo.**—Rev. St., 1909, §1800; *Kingman-St. Louis Implement Co. v. Bantley Bros. Hardware Co.*, 137 Mo. App. 308, 118 S. W. 500. **Mont.**—Rev. Codes, 1907, §6534. **Neb.**—Comp. St., 1911, §6668; *Roberts v. Lewis*, 144 U. S. 653, 12 Sup. Ct. 781, 36 L. ed. 579. **Nev.**—Comp. Laws, §3135. **N. Y.** Code Civ. Proc., §488. **N. C.**—Rev. 1905, §474. **N. D.**—Rev. Codes, 1905, §6854. **Ohio.**—Code, 1910, §11,309. **Okla.**—Comp. Laws, 1909, §5629. **Ore.** L. O. L., §68. **S. C.**—Code Civ. Proc., §165. **S. D.**—Code Civ. Proc., §121. **Utah.**—Comp. Laws, 1907, §2962. **Wash.** Rem. & Ball. Ann. Codes & St., §259. **Wis.**—St., 1898, §2649. **Wyo.**—Comp. St., 1910, §4381.

Because the action is brought in the wrong county. *Eel River R. Co. v. State*, 143 Ind. 231, 42 N. E. 617.

This ground of demurrer raises only the question whether the defendants are such persons as can be subjected to the process and jurisdiction of the court. *Belden v. Wilkinson*, 44 App. Div. 420, 60 N. Y. Supp. 1083; *Continental Life Ins. & Inv. Co. v. Jones*, 31 Utah 403, 88 Pac. 229; *Sanipoli v.*

Pleasant Valley Coal Co., 31 Utah 114, 86 Pac. 865.

It only embraces cases where the court cannot under any circumstances acquire the jurisdiction. It cannot reach objections to the service of process since nothing in reference to such service can be alleged in the complaint. *Reynolds v. La Crosse & Minn. Packet Co.*, 10 Minn. 178.

May be raised by demurrer only when it affirmatively appears on the face of the complaint. *Delaware Township v. Board of Comrs.*, 26 Ind. App. 97, 59 N. E. 189; *McDowell v. Chesapeake & O. S. W. R. Co.*, 90 Ky. 346, 14 S. W. 338.

Where the court is one of general jurisdiction, a demurrer only lies where the want of such jurisdiction appears affirmatively upon the face of the complaint. In the case of a court of limited and special jurisdiction the rule is otherwise, since then every fact essential to confer jurisdiction must be alleged. *Doll v. Feller*, 16 Cal. 432.

23. **Ark.**—*Kirby's Dig.*, §6093. **Cal.** Code Civ. Proc., §430. **Colo.**—Code, §56. **Ga.**—Code, 1895, §5048. **Idaho.** Rev. Codes, §4174. **Ind.**—*Burns' Ann. St.*, 1908, §344; *Acts*, 1911, p. 415, c. 157, §2. **Iowa.**—Code, §3561. **Kan.** Gen. St., 1909, §5686. **Ky.**—Code Civ. Proc., §92. **Minn.**—Rev. Laws, 1905, §4128. **Mo.**—Rev. St., 1909, §1800; *State v. Withrow*, 108 Mo. 1, 18 S. W. 41; *Glendale Lumber Co. v. Beekman Lumber Co.*, 152 Mo. App. 386, 133 S. W. 384; *Barnett, Haynes & Barnett v. Colonial Hotel Bldg. Co.*, 137 Mo. App. 636, 119 S. W. 471. **Mont.**—Rev. Codes, 1907, §6534. **Neb.**—Comp. St., 1911, §6668. **Nev.**—Comp. Laws, §3135. **N. Y.**—Code Civ. Proc., §488; *Howe v. New York, N. H. & H. R. Co.*, 126 N. Y. Supp. 1090; *Roberts v. Lewis*, 144 U. S. 653, 12 Sup. Ct. 781, 36 L. ed. 579. **N. C.**—Rev., 1905, §474. **Ohio.** Code, 1910, §11,309. **N. D.**—Rev. Codes, §6854. **Okla.**—Comp. Laws, 1909, §5629. **Ore.**—L. O. L., §68. **S. C.**—Code Civ. Proc., §165. **S. D.**—Code Civ. Proc.,

the plaintiff may demur to a counterclaim for want of jurisdiction.²⁴

D. WANT OF CAPACITY TO SUE.—That plaintiff has not legal capacity to sue is ground for demurrer in equity,²⁵ and under most of the codes,²⁶ where it appears on the face of the declaration or com-

§121. **Utah.**—Comp. Laws, 1907, §2962. **Wash.**—Rem. & Ball. Ann. Codes & St., §259; *Peterson v. Pantheon Lumb. Co.*, 62 Wash. 189, 113 Pac. 562. **Wis.** St., 1898, §2649. **Wyo.**—Comp. St., 1910, §4381.

Must affirmatively appear on the face of the complaint before demurrer will lie. **Ind.**—Indianapolis Street R. Co. v. Seerley, 35 Ind. App. 467, 72 N. E. 169-1034. **Ia.**—Childs v. Limback, 30 Iowa 398. **Minn.**—Powers v. Ames, 9 Minn. 178. **Mont.**—Knight v. La Beau, 19 Mont. 223, 47 Pac. 952.

Concurrent Jurisdiction.—Objection to the assumption of jurisdiction by the supreme court in a case in which it has concurrent jurisdiction with the surrogate cannot be taken by demurrer. *Childs v. Childs*, 68 Misc. 472, 124 N. Y. Supp. 550; *Mildeberger v. Franklin*, 115 N. Y. Supp. 903.

That jurisdiction is irregularly acquired is not ground for demurrer. *James v. Lepore*, 19 Nev. 174, 8 Pac. 47.

Wrong Remedy.—"That plaintiff brings an action at law, of which the court has jurisdiction, when it appears that he should have brought an action in equity, of which the court would not have jurisdiction, does not make the complaint demurrable for want of jurisdiction." *Benson v. Silvey*, 59 Minn. 73, 60 N. W. 847.

Demurrer is not the proper method of raising the question whether the proceeding should have been at law or in equity, the statute providing for a transfer to the proper docket on motion. *Trustees of Lebanon v. Forrest*, 15 B. Mon. (Ky.) 168.

24. **Mont.**—Rev. Codes, 1907, §6558. **N. Y.**—Code Civ. Proc., §495. **Ohio.** Code, 1910, §11324. **Wis.**—St., 1898, §2658.

Of the Subject-Matter.—*Utah* Comp. Laws, 1907, §2977; *Wyo.* Comp. St., 1910, §4388.

25. *Hoyt's Admr. v. Hoyt*, 58 Vt. 338, 3 Atl. 316.

26. **Ark.**—Kirby's Dig., §6093. **Cal.** Code Civ. Proc., §430. **Colo.**—Code, §56. **Idaho.**—Rev. Codes, §4174; *Carter v.*

Wann, 6 Idaho 556, 57 Pac. 314. **Ind.** Burns' Ann. St., 1908, §344; Acts, 1911, p. 415, c. 157, §2. **Ia.**—Code, §3561. **Kan.**—Gen. St., 1909, §5686; *Maelzer v. Swan*, 75 Kan. 496, 89 Pac. 1037; *Meyer v. Lane*, 40 Kan. 491, 20 Pac. 258; *Burton v. Cochran*, 5 Kan. App. 508, 47 Pac. 569. **Ky.**—Code Civ. Proc., §92. **Minn.**—Rev. Laws, 1905, §4128. **Mo.**—Rev. St., 1909, §1800; *Young Men's Christian Assn. v. Dubach*, 82 Mo. 475; *Wendleton v. Kingery*, 110 Mo. App. 67, 84 S. W. 102; *Alexander v. Wade*, 106 Mo. App. 141, 80 S. W. 19. **Mont.**—Rev. Codes, 1907, §6534; *Herbst Importing Co. v. Hogan*, 16 Mont. 384, 41 Pac. 135. **Neb.**—Comp. St., 1911, §6668; *Pine-Ule Medicine Co. v. Yoder & Eply*, 135 N. W. 383; *Gentry v. Bearss*, 82 Neb. 787, 118 N. W. 1077; *Meyer v. Omaha Furniture Co.*, 76 Neb. 405, 107 N. W. 767; *Church v. Callihan*, 49 Neb. 542, 68 N. W. 932; *Phoenix Ins. Co. v. Rad Bila Hora Lodge*, 41 Neb. 21, 59 N. W. 752; *Sanborn & Follett v. Hale*, 12 Neb. 318, 11 N. W. 302. **Nev.**—Comp. Laws, §3135. **N. Y.**—Code Civ. Proc., §488; *Nanz v. Oakley*, 122 N. Y. 331, 25 N. E. 263. **N. C.**—Rev., 1905, §474. **N. D.**—Rev. Codes, §6854. **Ohio.**—Code, 1910, §11309. **Okla.**—Comp. Laws, 1909, §5629. **Ore.**—L. O. L., §68. **S. C.**—Code Civ. Proc., §165; *People's Oil & Fertilizer Co. v. Charleston & W. C. Ry.*, 83 S. C. 530, 65 S. E. 733. **S. D.**—Code Civ. Proc., §121. **Utah.** Comp. Laws, 1907, §2962. **Wash.**—Rem. & Ball. Ann. Codes & St. **Wis.**—St., 1898, §2649. **Wyo.**—Comp. St., 1910, §4381.

Want of Right in the Petitioner. *Ga. Code*, 1895, §5048.

The capacity of the state to sue is properly tested by a demurrer on this ground. *State v. Ohio Oil Co.*, 150 Ind. 21, 49 N. E. 809, 47 L. R. A. 627.

That the representative capacity of one suing as guardian is insufficiently alleged must be raised by demurrer on this ground or it will be deemed waived. *Dalrymple v. Security Loan*

plaint. Statutes in some states also give plaintiff the right to demur to a counterclaim where it appears on its face that defendant has not legal capacity to maintain, or to recover upon, the same.²⁷

This ground of demurrer has reference only to some legal disability on the part of the party against whom it is directed, such as infancy, coverture, and the like,²⁸ rather than the nonexistence of a cause of

& Trust Co., 9 N. D. 306, 83 N. W. 245.

Error of the court in making a substitution of plaintiffs does not go to the legal capacity of plaintiffs to sue. *Gager v. Marsden*, 101 Wis. 598, 77 N. W. 922.

The Objection Must Affirmatively Appear on the Face of the Complaint. *Minn.*—*Lehigh Valley Coal Co. v. Gilmore*, 93 Minn. 432, 101 N. W. 796. *N. Y.*—*Phoenix Bank v. Donnell*, 40 N. Y. 410. *S. D.*—*Hudson v. Archer*, 4 S. D. 123, 55 N. W. 1099. *Utah.*—*Crane Bros. Mfg. Co. v. Reed*, 3 Utah 506, 24 Pac. 1056.

A mere failure to allege facts showing such capacity is not ground for demurrer. *Cone Export & Commission Co. v. Poole*, 41 S. C. 70, 19 S. E. 203, 24 L. R. A. 289; *Cheraw & C. R. Co. v. White*, 14 S. C. 51.

It is not good ground for demurrer that it does not appear in the complaint that plaintiff has the legal capacity to sue. A demurrer on that ground will only lie when it affirmatively appears on the face of the complaint that he has not such capacity. *Miller v. Lugo*, 80 Cal. 257, 22 Pac. 195; *Distriet No. 110 v. Feek*, 60 Cal. 403.

The fact that the complaint in a suit by assignees does not show the making of an affidavit necessary to a valid assignment does not render it demurrable on the ground of want of capacity to sue. *Wilhoit v. Cunningham*, 87 Cal. 453, 25 Pac. 675.

The Objection Is Not Reached by a Demurrer for Want of Facts.—*Idaho.* *Valley Lumb. & Mfg. Co. v. Nickerson*, 13 Idaho 682, 93 Pac. 24; *Valley Lumb. & Mfg. Co. v. Driessel*, 13 Idaho 662, 93 Pac. 765, 15 L. R. A. (N. S.) 299. *Ind.*—*Aetna Life Ins. Co. v. Sellers*, 154 Ind. 370, 56 N. E. 97. *Mo.*—*Baxter v. St. Louis Transit Co.*, 198 Mo. 1, 95 S. W. 856. *Mont.* *Knight v. Le Beau*, 19 Mont. 223, 47 Pac. 952. *N. Y.*—*Phoenix Bank v. Donnell*, 40 N. Y. 410. *Ore.*—*Owings v. Turner*, 48 Ore. 462, 87 Pac. 160.

S. C.—*Dawkins v. Mathis*, 47 S. C. 64, 24 S. E. 990. *S. D.*—*Evans v. Fall River County*, 9 S. D. 130, 68 N. W. 195. *Wash.*—*Birmingham v. Cheetham*, 19 Wash. 657, 54 Pac. 37.

That plaintiff's appointment as receiver is not sufficiently shown should be raised by demurrer for want of capacity to sue, and is not available under a demurrer for want of facts. *Walsh v. Byrnes*, 39 Minn. 527, 40 N. W. 831.

The objection is waived if not taken by demurrer where it appears on the face of the complaint. *N. Y.*—*Van Zandt v. Grant*, 67 App. Div. 70, 73 N. Y. Supp. 600. *Ohio.*—*Hoop v. Plummer*, 14 Ohio St. 448. *Ore.*—*Owings v. Turner*, 48 Ore. 462, 87 Pac. 160; *Wilson v. Wilson*, 26 Ore. 251, 38 Pac. 185. *S. C.*—*Mickle v. Congaree Const. Co.*, 41 S. C. 394, 19 S. E. 725. *Wash.* *Hale v. Crown Columbia Pulp Co.*, 56 Wash. 236, 105 Pac. 480.

27. *Mont.*—*Rev. Codes*, 1907, §6558. *N. Y.*—*Code Civ. Proc.*, §495. *Ohio.* *Code*, 1910, §11324. *Utah.*—*Comp. Laws*, 1907, §2977. *Wis.*—*St.*, 1898, §2658. *Wyo.*—*Comp. St.*, 1910, §4388.

28. *U. S.*—*Gaillard v. Cantini*, 76 Fed. 699, 22 C. C. A. 493. *Idaho.*—*Pratt v. Northern Pac. Express Co.*, 13 Idaho 373, 90 Pac. 341, 10 L. R. A. (N. S.) 499. *Ind.*—*Coddington v. Canaday*, 157 Ind. 243, 61 N. E. 567, and cases cited; *Campbell v. Campbell*, 121 Ind. 178, 23 N. E. 81; *Brown v. Critchell*, 110 Ind. 31, 7 N. E. 888, 11 N. E. 486; *Pittsburgh, C., C. & St. L. R. Co. v. Iddings*, 28 Ind. App. 504, 62 N. E. 112. *Kan.*—*Winfield Town Co. v. Maris*, 11 Kan. 128. *Ky.*—*Louisville & N. R. Co. v. Brantley's Admr.*, 96 Ky. 297, 28 S. W. 477, 49 Am. St. Rep. 291. *Neb.*—*State v. Moores*, 58 Neb. 285, 78 N. W. 529; *Farrell v. Cook*, 16 Neb. 483, 20 N. W. 720. *Wis.* *McKenney v. Minahan*, 119 Wis. 651, 97 N. W. 489; *Murray v. McGarigle*, 69 Wis. 483, 34 N. W. 522.

It "means a want of capacity to appear in court and maintain an ac-

action,²⁹ or the fact that plaintiff has no right to maintain a particular action,³⁰ or that an existing cause of action is not in plaintiff, but in another.³¹

E. ANOTHER ACTION PENDING.—The pendency of another action between the same parties for the same cause was not ground for demurrer at common law, but could only be taken advantage of by plea in abatement.³² It is generally ground for demurrer under the codes if apparent on the face of the complaint.³³ Statutes in some states

tion, regardless of in whom is vested the right of action." *Hunt v. Monroe*, 32 Utah 428, 91 Pac. 269, 11 L. R. A. (N. S.) 249.

29. *Pratt v. Northern Pac. Express Co.*, 13 Idaho 373, 90 Pac. 341, 10 L. R. A. (N. S.) 499; *Murray v. McGarrigle*, 69 Wis. 483, 34 N. W. 522.

When plaintiff is a natural person under no general disability to maintain actions, a failure to state a cause of action in his own favor goes to the sufficiency in substance of the petition, and not to his legal capacity. *State v. Moores*, 58 Neb. 285, 78 N. W. 529.

30. *Brown v. Critchell*, 110 Ind. 31, 7 N. E. 888, 11 N. E. 486.

It does not reach the objection that the complaint fails to show a right of action in the plaintiff. **U. S.**—*Gaillard v. Cantini*, 22 C. C. A. 493, 76 Fed. 699. **Ind.**—*Coddington v. Canaday*, 157 Ind. 243, 61 N. E. 567, and cases cited; *Campbell v. Campbell*, 121 Ind. 178, 23 N. E. 81; *Pittsburgh, C. & St. L. R. Co. v. Iddings*, 28 Ind. App. 504, 62 N. E. 112. **Ky.**—*Louisville & N. R. Co. v. Brantley's Admr.*, 69 Ky. 297, 28 S. W. 477, 49 Am. St. Rep. 291.

"A defect going to the cause of action itself as regards the plaintiff, one showing that in no event and under no circumstances and in no capacity does the plaintiff own or represent the cause of action sought to be enforced," does not come under this ground, but rather under the ground that the complaint fails to state a cause of action. *McKenney v. Minahan*, 119 Wis. 651, 97 N. W. 489.

It does not apply where plaintiff sues in his own right, and the facts alleged do not show any right of action in him, but only where he attempts to sue in the right of another, and does not allege such facts as are required by law to authorize him to

act in that capacity. *Roberts' Admr. v. Eales*, 10 Ky. L. Rep. 360.

A demurrer on this ground does not reach the objection that an action cannot be maintained by a partnership in the partnership name. *Mexican Mill v. Yellow Jacket S. Min. Co.*, 4 Nev. 40.

31. *Buckingham v. Buckingham*, 36 Ohio St. 68 (objection that cause of action was assigned), *approved* in *Zinn v. Baxter*, 65 Ohio St. 341, 62 N. E. 327.

Such defect may be taken advantage of by demurrer for want of facts. *Hunt v. Monroe*, 32 Utah 428, 91 Pac. 269, 11 L. R. A. (N. S.) 249.

"If the petition discloses a good cause of action against the defendant, but at the same time shows that the cause of action is not in favor of the plaintiff, the petition is demurrable on the ground that it does not state facts sufficient to constitute a cause of action," rather than on the ground of want of capacity to sue. *Central Ohio R. Co. v. City of Bellaire*, 67 Ohio St. 297, 65 N. E. 1007.

"That the plaintiff has not legal capacity to sue for damage for the alleged personal injury and suffering of his wife, nor for the alleged outrage and wounding of his feelings by reason thereof," does not go to want of capacity to sue, but to failure to state a cause of action. *Gaillard v. Cantini*, 22 C. C. A. 493, 76 Fed. 699.

32. *Hurst v. Everett*, 21 Fed. 218; *Harris v. Johnson*, 65 N. C. 478. See the title "Another Action Pending."

33. **U. S.**—*Hurst v. Everett*, 21 Fed. 218. **Ark.**—*Kirby's Dig.*, §6093. **Cal.**—*Code Civ. Proc.*, §430. **Colo.** *Code*, §56. **Idaho.**—*Rev. Codes*, §4174. **Ind.**—*Burns' Ann. St.*, 1908, §344; *Acts*, 1911, p. 415, c. 157, §2. **Ia.** *Code*, §3561. **Kan.**—*Gen. St.*, 1909, §5686. **Minn.**—*Rev. Laws*, 1905, §4128. **Mo.**—*Rev. St.*, 1909, §1800; *Rodney v.*

specifically provide that plaintiff may demur to a counterclaim on this ground,³⁴ and even in the absence of such a provision it has been held that he may do so, since he is really the defendant as to the cause of action stated therein.³⁵

F. DEFECT OF PARTIES.—The nonjoinder of necessary parties in actions *ex contractu* is ground for demurrer in states adhering to the common law rules of procedure,³⁶ but the contrary is true in actions *ex delicto*.³⁷

Gibbs, 184 Mo. 1, 82 S. W. 187. **Mont.**—Rev. Codes, 1907, §6534; Wetzstein v. Boston & M. C. C. & S. M. Co., 28 Mont. 451, 72 Pac. 865. **Neb.**—Comp. St., 1911, §6668. **Nev.**—Comp. Laws, §3135. **N. Y.**—Code Civ. Proc., §488. In the municipal court. Laws, 1902, p. 1540, c. 580, § 158. **N. C.**—Rev., 1905, §474; Harris v. Johnson, 65 N. C. 478. **N. D.**—Rev. Code, 1905, §6854. **Ohio.**—Code, 1910, §11309. **Okla.**—Comp. Laws, 1909, §5629. **Ore.**—L. O. L., §68. **S. C.**—Code Civ. Proc., §165. **S. D.**—Code Civ. Proc., §121. **Utah.**—Comp. Laws, 1907, §2962. **Wash.**—Rem. & Ball. Ann. Codes & St., §259. **Wis.**—St., 1898, §2649. **Wyo.**—Comp. St., 1910, §4381. See also the title "Another Action Pending."

In North Carolina the objection must be taken by demurrer if apparent on the face of the complaint. Hurst v. Everett, 21 Fed. 218.

Refers Only to Actions Pending in the Same State.—Sloan & Co. v. McDowell, 75 N. C. 29; Hill v. Hill, 51 S. C. 134, 28 S. E. 309.

That another action is pending in this state, between the same parties, for the same cause. Ky. Code Civ. Proc., §92.

The pendency of another "proceeding" is not within this provision. Queens County Water Co. v. O'Brien, 115 N. Y. Supp. 495.

The objection must affirmatively appear on the face of the complaint to be available as a ground of demurrer. **Idaho.**—Stevens v. Home Sav. & Loan Assn., 5 Idaho 741, 51 Pac. 779. **Ia.**—Mosher v. Independent School Dist., 42 Iowa 632. **Mo.**—Arthur v. Rickards, 43 Mo. 298. **N. Y.**—White & Co. v. Oakes, 117 N. Y. Supp. 938. **Okla.**—Biard v. Laumann, 29 Okla. 138, 116 Pac. 780, citing, 1 Standard Proc. 1034. **Wash.**—Jackson v. McAuley, 13 Wash. 298, 43 Pac. 41; Lowman v. West, 8 Wash. 355, 36 Pac. 258.

The Objection Is Not Reached by a Demurrer For Want of Facts.—Basye v. Basye, 152 Ind. 172, 52 N. E. 797; Williams v. Lewis, 124 Ind. 344, 24 N. E. 733; Somers v. Dawson, 86 Minn. 42, 90 N. W. 119.

See also the title "Another Action Pending."

34. Mont.—Rev. Codes, 1907, §6558. **N. Y.**—Code Civ. Proc., §495. **Ohio.**—Code, 1910, §11324. **Utah.**—Comp. Laws, 1907, §2977. **Wis.**—St., 1898, §2658. **Wyo.**—Comp. St., 1910, §4388.

35. Under the statute permitting defendant to demur to the complaint on the ground that there is another action pending. Caine v. Seattle & N. R. Co., 12 Wash. 596, 41 Pac. 904.

See also Lipscomb v. Lipscomb, 32 S. C. 243, 10 S. E. 929.

36. The nonjoinder of a joint contractor as defendant is ground for demurrer. Will's Gould Pl., 456.

Where the declaration discloses that there was a joint contractor at the time the contract in suit was made, and does not aver that he is dead, or a nonresident of the county, or account in any other way for his not being joined as a party, his nonjoinder may be taken advantage of by demurrer. The defect is one of substance and is reached by general demurrer. Kent v. Holliday, 17 Md. 387.

Nonjoinder of a joint obligor may be taken advantage of by demurrer. Inhabitants of Richmond v. Toothaker, 69 Me. 451.

37. Nonjoinder of persons jointly injured as plaintiffs in a tort action is not ground for demurrer. May v. Western Union Tel. Co., 112 Mass. 90.

Nonjoinder of a tenant in common as plaintiff in an action of trespass relating to possession may be taken advantage of by exception. May v. Slade, 24 Tex. 205.

In equity the nonjoinder of necessary or proper parties is ground for demurrer.³⁸ It is also ground for demurrer that plaintiff has no interest in the subject-matter of the suit.³⁹

Under the Codes.—The codes generally provide that the defendant may demur where it appears on the face of the complaint or equivalent pleading that there is a defect of parties plaintiff or defendant,⁴⁰

38. Fla.—Wood v. Wood, 56 Fla. 882, 47 So. 560. Tenn.—Shannon's Code, §§6196, 6198. W. Va.—Jones v. Crim, 66 W. Va. 301, 66 S. E. 367; Walbrecht v. Holbrook, 66 W. Va. 296, 66 S. E. 335; Pappenheimer v. Roberts, 24 W. Va. 702.

39. Crooker v. Rogers, 58 Me. 339; Haskell v. Hilton, 30 Me. 419.

A bill is demurrable where it does not show complainant's interest or right to sue. Sellman v. Sellman, 63 Md. 520.

40. Hatzel v. Moore, 120 Fed. 1015.

Ark.—Kirby's Dig., §6093. Cal.—Code Civ. Proc., §430. Colo.—Code, 1910, §56; Blakely v. Fort Lyon Canal Co., 31 Colo. 224, 73 Pac. 249. Ga. Code, 1895, §5048. Idaho.—Rev. Codes, §4174; Beane v. Givens, 5 Idaho 774, 51 Pac. 987. Ind.—Burns' Ann. St., 1908, §344; Acts, 1911, p. 415, c. 157, §2. Ia.—Code, §3561; Hornish v. Ringen Stove Co., 116 Iowa 1, 89 N. W. 95. Ky.—Code Civ. Proc., §92; Prichard's Extr. v. Peace, 98 Ky. 99, 32 S. W. 296; McCallister's Admr. v. Savings Bank, 80 Ky. 634. Minn.—Rev. Laws, 1905, §4128. Mo.—Rev. St., 1909, §1800; Lowenburg v. De Voigne, 145 Mo. App. 710, 123 S. W. 99; Van Stewart v. Miles, 105 Mo. App. 242, 79 S. W. 988. See, Akins v. Hicks, 109 Mo. App. 95, 83 S. W. 75. Mont.—Rev. Codes, 1907, §6534. Neb.—Comp. St., 1911, §6668. Nev.—Comp. Laws, §3135. N. Y. Code Civ. Proc., §488; Sullivan v. New York & Rosedale Cement Co., 119 N. Y. 348, 23 N. E. 820. N. C.—Rev. 1905, §474. N. D.—Rev. Codes, 1905, §6854. Ohio.—Code, 1910, §11309. Okla. Comp. Laws, 1909, §5629. Ore.—L. O. L., §68; Cohen v. Ottenheimer, 13 Ore. 220, 10 Pac. 20. S. C.—Code Civ. Proc., §165; Shull v. Caughman, 54 S. C. 203, 32 S. E. 301. S. D.—Code Civ. Proc., §121. Utah.—Comp. Laws, 1907, §2962. Wash.—Rem. & Ball. Ann. Codes & St., §259. Wis.—St., 1898, §2649; Cummings v. C. W. Noble Co., 143 Wis.

175, 126 N. W. 664; Jones v. Foster, 67 Wis. 296, 30 N. W. 697. Wyo.—Comp. St., 1910, §4381; Gillaind v. Union Pac. R. Co., 6 Wyo. 185, 43 Pac. 508.

That the action is not brought in the name of the real parties in interest can only be taken advantage of by demurrer, and not by objection to evidence. Carter v. Wann, 6 Idaho 556, 57 Pac. 314.

That one of two joint obligees cannot alone maintain an action on the joint obligation is properly raised by a demurrer for defect of parties. Weinfeld v. Fr. Bergner & Co., 114 N. Y. Supp. 284.

A demurrer for want of parties presents the issue of law that upon the facts stated in the complaint, no other facts appearing, another party named should be joined as plaintiff or defendant. Such a demurrer is not a mere substitute for a plea in abatement, and it is not necessary to its maintenance that the complaint show whether the omitted party is alive or dead. Disbrow v. Creamery Package Mfg. Co., 104 Minn. 17, 115 N. W. 751; Porter v. Fletcher, 25 Minn. 493.

The defect reached under this ground "has regard to the necessity for other parties than those already before the court to be also brought into the litigation; not to a defect in the right of the plaintiff, already in court, to enforce the cause of action as regards his own interests therein." McKenney v. Minahan, 119 Wis. 651, 97 N. W. 489.

The objection is waived unless taken advantage of by demurrer, where it is apparent on the face of the complaint. Ia.—Anderson v. Acheson, 132 Iowa 744, 110 N. W. 335, 9 L. R. A. (N. S.) 217. Minn.—Bell v. Mendenhall, 71 Minn. 331, 73 N. W. 1086; Benson v. Silvey, 59 Minn. 73, 60 N. W. 847. Neb.—Union Pac. R. Co. v. Vincent, 58 Neb. 171, 78 N. W. 457; Castile v. Ford, 53 Neb. 507, 73 N. W.

and in some states this is also ground for demurrer to a counterclaim.⁴¹

A defect of parties means an absence of necessary parties, and the objection that there are too many parties cannot be reached by a demurrer on this ground,⁴² nor will a demurrer for defect of parties reach the objection that a necessary party joined as defendant has not been served.⁴³

945. **N. D.**—*Ross v. Page*, 11 N. D. 458, 92 N. W. 822. **Ohio.**—*Hoop v. Plummer*, 14 Ohio St. 448. **S. C.**—*Shull v. Caughman*, 54 S. C. 203, 32 S. E. 301; *Allen v. Cooley*, 53 S. C. 77, 30 S. E. 721. **S. D.**—*Mather v. Dunn*, 11 S. D. 196, 76 N. W. 922. **Wash.**—*Buckles v. Reynolds*, 58 Wash. 485, 108 Pac. 1072; *Budlong v. Budlong*, 48 Wash. 645, 94 Pac. 478. **Wis.**—*Radant v. Werheim Mfg. Co.*, 106 Wis. 600, 82 N. W. 562. **Wyo.**—*Gilland v. Union Pac. R. Co.*, 6 Wyo. 185, 43 Pac. 508.

The objection must affirmatively appear from the pleading itself to be available on demurrer. **Minn.**—*Mendenhall v. Duluth Dry Goods Co.*, 72 Minn. 312, 75 N. W. 232. **Neb.**—*Hardy v. Miller*, 11 Neb. 395, 9 N. W. 475. **Ore.**—*Paulson v. City of Portland*, 16 Ore. 450, 19 Pac. 450, 1 L. R. A. 673.

The Objection Is Not Reached by a Demurrer For Want of Jurisdiction. *Svanburg v. Fosseen*, 75 Minn. 350, 78 N. W. 4.

The Objection Is Not Reached by a Demurrer For Want of Facts.—**Idaho.** *Bonham Nat. Bank v. Grimes Pass Placer Mining Co.*, 18 Idaho 629, 111 Pac. 1078. **Ind.**—*Leedy v. Nash*, 67 Ind. 311; *Cox v. Bird*, 65 Ind. 277; *Supreme Tribe of Ben Hur v. Hall*, 24 Ind. App. 316, 56 N. E. 780; *Loufer v. Stottlemeyer*, 16 Ind. App. 221, 44 N. E. 1008. **Minn.**—*Svanburg v. Fosseen*, 75 Minn. 350, 78 N. W. 4; *Bell v. Mendenhall*, 71 Minn. 331, 73 N. W. 1086. **Mo.**—*Tapana v. Shaffray*, 97 Mo. App. 337, 71 S. W. 119. **Neb.**—*Holway v. American Exch. Nat. Bank*, 64 Neb. 67, 89 N. W. 382. **N. D.**—*Ross v. Page*, 11 N. D. 458, 92 N. W. 822. **Okla.**—*Choctaw, O. & G. R. Co. v. Burgess*, 21 Okla. 653, 97 Pac. 271; *Helm & Son v. Briley*, 17 Okla. 314, 87 Pac. 595. **Utah.**—*Arnold v. Pope*, 37 Utah 204, 108 Pac. 351. **Wash.**—*Buckles v. Reynolds*, 58 Wash. 485, 108 Pac. 1072.

41. *Utah Comp. Laws*, 1907, §2977; *Wis. St.*, 1898, §2658.

The objection that the cause of action is such that it could not be main-

tained by defendant alone against plaintiff alone, and that for that reason there is a defect of parties, may be raised by demurrer, since in such case it is not the subject of a counterclaim. *Campbell v. Jones*, 25 Minn. 155.

42. **Ind.**—*Frankel v. Garrard*, 160 Ind. 209, 66 N. E. 687; *Hill v. Marsh*, 46 Ind. 218; *Bennett v. Preston*, 17 Ind. 291. **Minn.**—*Hoard v. Clum*, 31 Minn. 186, 17 N. W. 275. **Neb.**—*Boldt v. Budwig*, 19 Neb. 739, 28 N. W. 280. **N. Y.**—*Tew v. Wolfsohn*, 77 App. Div. 454, 79 N. Y. Supp. 286; *Peabody v. Washington County Mut. Ins. Co.*, 20 Barb. 339. **N. C.**—*Worth v. Knickerbocker Trust Co.*, 152 N. C. 242, 67 S. E. 590. **N. D.**—*Olson v. Shirley*, 12 N. D. 106, 96 N. W. 297. **Okla.**—*Choctaw, O. & G. R. Co. v. Burgess*, 21 Okla. 653, 97 Pac. 271; *Weber v. Dillon*, 7 Okla. 568, 54 Pac. 894. **Ore.** *Tieman v. Sachs*, 52 Ore. 560, 98 Pac. 163; *Paulson v. City of Portland*, 16 Ore. 450, 19 Pac. 450, 1 L. R. A. 673; *Cohen v. Ottenheimer*, 13 Ore. 220, 10 Pac. 20. **S. C.**—*Lowry v. Jackson*, 27 S. C. 318. **Wis.**—*Murray v. McGarigle*, 69 Wis. 483, 34 N. W. 522; *Jones v. Foster*, 67 Wis. 296, 30 N. W. 697; *Great Western Compound Co. v. Aetna Ins. Co.*, 40 Wis. 373.

"The defect of parties which will afford ground for a demurrer is the nonjoinder of those who should have been joined either as plaintiffs or defendants. A misjoinder or uniting of parties who should not be joined cannot be taken advantage of by demurrer." *Dolan v. Hubinger*, 109 Iowa 408, 80 N. W. 514.

"A defect of parties" refers to the absence of some person or persons who ought to be joined with the party on the record." A demurrer on this ground does not reach the objection that an action cannot be maintained by a partnership in the partnership name. *Mexican Mill v. Yellow Jacket S. Min. Co.*, 4 Nev. 40.

43. *Forbes v. Delashmutt*, 68 Iowa 164, 26 N. W. 56.

G. MISJOINDER OF PARTIES. — Misjoinder of plaintiffs is ground for demurrer in states where the common law system of pleading prevails.⁴⁴

In equity misjoinder of parties complainant or defendant is ground for demurrer.⁴⁵

In Texas misjoinder is ground for exception.⁴⁶

In many code states misjoinder of parties plaintiff,⁴⁷ or of parties plaintiff or defendant,⁴⁸ is ground for demurrer, and plaintiff is sometimes specifically given the right to demur to a counterclaim on this ground.⁴⁹ In other states misjoinder is not among the grounds of demurrer specified in the code, and hence cannot be taken advantage of in that manner.⁵⁰ In the latter case it is frequently held that the

44. *White v. Town of Portland*, 67 Conn. 272, 34 Atl. 1022.

45. *Hubbard v. Manhattan Trust Co.*, 87 Fed. 51, 30 C. C. A. 520; *Shannon's Code* (Tenn.), §§6196, 6198.

Of complainants. *Eaton v. Eaton*, 68 Mich. 158, 36 N. W. 50; *Eureka Marble Co. v. Windsor Mfg. Co.*, 47 Vt. 430.

That one is improperly made a defendant can only be raised by demurrer. *Toulmin v. Hamilton*, 7 Ala. 362.

46. *Hays v. Perkins*, 22 Tex. Civ. App. 198, 54 S. W. 1071.

47. **New York.**—Code Civ. Proc., §488. Misjoinder of parties defendant is not. *Adams v. Slingerland*, 87 App. Div. 312, 84 N. Y. Supp. 323; *Tew v. Wolfsohn*, 77 App. Div. 454, 79 N. Y. Supp. 286.

Wyoming.—Comp. St., 1910, §4381. Only when apparent on the face of the petition. *Mau v. Stoner*, 15 Wyo. 109, 87 Pac. 434, 89 Pac. 466.

48. **Cal.**—Code Civ. Proc., §430. **Colo.**—Code, §56. **Ga.**—Code, 1895, §5048. **Idaho.**—Rev. Codes, §4174. **Mont.**—Rev. Codes, 1907, §6534. **Nev.** Comp. Laws, §3135; *Fogg v. Nevada C. O. R. Co.*, 20 Nev. 429, 23 Pac. 840; *McBeth v. Bollen*, 6 Nev. 134. **Ohio.** Code, 1910, §11309; *Shamokin Bank v. Street*, 16 Ohio St. 1. **Utah.**—Comp. Laws, 1907, §2962.

In Missouri, it is ground for demurrer where it appears on the face of the petition that a party plaintiff or defendant is not a necessary party to a complete determination of the action. Rev. St., 1909, §1800. See, *Anable v. McDonald Land & Mining Co.*, 144 Mo. App. 303, 128 S. W. 38; *Breimeyer v. Star Bottling Co.*, 136 Mo. App. 84, 117 S. W. 119.

If apparent on the face of the complaint, it can only be taken advantage of by demurrer. *Sam's Automatic Car Coupler Co. v. League*, 25 Colo. 129, 54 Pac. 642.

Misjoinder is waived by failure to demur on that ground. *County of Lyon v. Lien*, 105 Minn. 55, 116 N. W. 1017; *Fulwider v. Trenton Gas Light & Power Co.*, 216 Mo. 582, 116 S. W. 508; *Boland v. Ross*, 120 Mo. 208, 25 S. W. 524.

49. *Utah Comp. Laws*, 1907, §2977.

50. **Ind.**—*Boonville Nat. Bank v. Blakey*, 166 Ind. 427, 76 N. E. 529; *Frankel v. Garrard*, 160 Ind. 209, 66 N. E. 687; *Coddington v. Canaday*, 157 Ind. 243, 61 N. E. 567; *Armstrong v. Dunn*, 143 Ind. 433, 41 N. E. 540; *Cargar v. Fee*, 140 Ind. 572, 39 N. E. 93. **Ia.**—*Citizens' State Bank v. Jess*, 127 Iowa 450, 103 N. W. 471; *Hornish v. Ringen Stove Co.*, 116 Iowa 1, 89 N. W. 95; *Dolan v. Hubinger*, 109 Iowa 408, 80 N. W. 514; *Wimer v. Allbaugh*, 78 Iowa 79, 42 N. W. 587; *Dubuque County v. Reynolds*, 41 Iowa 454. **Kan.** *Hurd v. Simpson*, 47 Kan. 372, 27 Pac. 961. **Ky.**—*Com. v. Gaubert's Admr.*, 134 Ky. 157, 119 S. W. 779; *Dean v. English*, 18 B. Mon. 132. **Neb.**—*County of Lancaster v. Rush*, 35 Neb. 119, 52 N. W. 837; *Boldt v. Budwig*, 19 Neb. 739, 28 N. W. 280. But see, *Goble v. Swobe*, 64 Neb. 838, 90 N. W. 919. **N. C.**—*Worth v. Knickerbocker Trust Co.*, 152 N. C. 242, 67 S. E. 590. **Okla.**—*Owen v. City of Tulsa*, 27 Okla. 264, 111 Pac. 320; *Choctaw, O. & G. R. Co. v. Burgess*, 21 Okla. 653, 97 Pac. 271; *Weber v. Dillon*, 7 Okla. 568, 54 Pac. 894; *Stiles v. City of Guthrie*, 3 Okla. 26, 41 Pac. 383. **Ore.**—*Paulson v. City of Port-*

remedy of one improperly joined as a defendant is by demurrer to the complaint on the ground that it does not state a cause of action against him.⁵¹

Misjoinder of parties is not a defect of parties, and is not reached by a demurrer on that ground.⁵²

Uniting causes of action against independent parties not subject to a joint action is reached by a demurrer for misjoinder of causes of action in states where that is ground for demurrer.⁵³

H. MISJOINDER OF CAUSES OF ACTION. — Misjoinder of counts or causes of action is ground for demurrer in states where the rules of common law pleading prevail,⁵⁴ and is ground for exception in Texas.⁵⁵

In many of the code states misjoinder of causes of action,⁵⁶ or that

land, 16 Ore. 450, 19 Pac. 450, 1 L. R. A. 673; *Cohen v. Ottenheimer*, 13 Ore. 220, 10 Pac. 20. **Wis.**—*Jones v. Foster*, 67 Wis. 296, 30 N. W. 697; *Marsh v. Board of Supervisors, etc.*, 38 Wis. 250; *Willard v. Reas*, 26 Wis. 540.

51. *Mitchell v. Bank of St. Paul*, 7 Minn. 252; *Lewis v. Williams*, 3 Minn. 151. See also, *Nichols v. Randall*, 5 Minn. 304; *Roose v. Perkins*, 9 Neb. 304, 2 N. W. 715.

If the complaint must state a cause of action in favor of all the plaintiffs against all the defendants, defendant may demur for want of facts. *Cohen v. Ottenheimer*, 13 Ore. 220, 10 Pac. 20. *Contra.*—*Cummings v. C. W. Noble Co.*, 143 Wis. 175, 126 N. W. 664, which apparently overrules *Jones v. Foster*, 67 Wis. 296, 30 N. W. 697.

52. See VII, F, *infra*.

53. *Stewart v. Templeton*, 55 Ore. 364, 104 Pac. 978, 106 Pac. 640. See, VII, H, *infra*.

54. **Ill.**—*Dalson v. Bradberry*, 50 Ill. 82. **Va.**—*Norfolk & W. R. Co. v. Wyssor*, 82 Va. 250. **Vt.**—*Smith v. Purmort's Admr.*, 63 Vt. 378, 20 Atl. 928.

"That a count in contract and a count in tort, or that a count in the plaintiff's own right and a count in some representative capacity, are improperly joined in the declaration; or that a declaration in contract or in tort is inserted in a writ of replevin." *Mass. Rev. Laws*, 1902, c. 173, §16, p. 1563.

Misjoinder of causes of action must be taken advantage of by demurrer. *Allwein v. Brown*, 29 Pa. Super. 331.

55. *Hays v. Perkins*, 22 Tex. Civ. App. 198, 54 S. W. 1071.

56. **Cal.**—Code Civ. Proc., §430. **Colo.**—Code, 1910, §56. Special demur-

rer. Hall v. Cudahy, 46 Colo. 324, 104 Pac. 415; Demurrer rather than motion is the proper remedy. *Merrill v. Suffa*, 42 Colo. 195, 93 Pac. 1099.

Ga.—Code, 1895, §5048. **Idaho.**—*Rev. Codes*, §4174. **Ind.**—*Burns' Ann. St.*, 1908, §344; *Acts*, 1911, p. 415, c. 157, §2; *Langsdale v. Woollen*, 120 Ind. 16, 21 N. E. 659; *Blanchard Hamilton Furniture Co. v. Colvin*, 32 Ind. App. 398, 69 N. E. 1032; *Thomas v. Dobblesmont*, 31 Ind. App. 146, 67 N. E. 463. **Minn.** *Rev. Laws*, 1905, §4128. **Mo.**—*Rev. St.*, 1909, §1800; *Fadley v. Smith*, 23 Mo. App. 95. **Mont.**—*Rev. Codes*, 1907, §6534; *Bandmann v. Davis*, 23 Mont. 382, 59 Pac. 856. **Neb.**—*Comp. St.*, 1911, §6668; *Reed v. Reed*, 70 Neb. 779, 98 N. W. 73. **Nev.**—*Comp. Laws*, §3135. *Fogg v. Nevada C. O. R. Co.*, 20 Nev. 429, 23 Pac. 840. **N. Y.**—Code Civ. Proc., §488; *O'Brien v. Fitzgerald*, 143 N. Y. 377, 38 N. E. 371; *Goetz v. Ries*, 123 N. Y. Supp. 433. **N. C.**—*Rev.*, 1905, §474. **N. D.**—*Rev. Codes*, 1905, §6854; *Mares v. Wormington*, 8 N. D. 329, 79 N. W. 441. **Ohio.**—Code, 1910, §11309. **Okla.**—*Comp. Laws*, 1909, §5629; *Choctaw, O. & G. R. Co. v. Burgess*, 21 Okla. 653, 97 Pac. 271. **Ore.**—*L. O. L.*, §68; *Stewart v. Templeton*, 55 Ore. 364, 104 Pac. 978, 106 Pac. 640; *Smith v. Day*, 39 Ore. 531, 64 Pac. 812, 65 Pac. 1055. **S. C.**—Code Civ. Proc., §165. **S. D.**—Code Civ. Proc., §121. **Utah.**—*Comp. Laws*, 1907, §2962. **Wash.**—*Rem. & Ball. Ann. Codes & St.*, §259; *Ames v. Kinnear*, 42 Wash. 80, 84 Pac. 629; *Dudley v. Duval*, 29 Wash. 528, 70 Pac. 68. **Wis.** *St.*, 1898, §2649; *Cummings v. C. W. Noble Co.*, 143 Wis. 175, 126 N. W. 664; *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909. **Wyo.**—*Comp. St.*, 1910, §4381.

separate causes of action against separate defendants are improperly joined,⁵⁷ is ground for demurrer. In others misjoinder is not specified among the statutory grounds, and hence cannot be availed of in that manner.⁵⁸

In a few states it is provided that plaintiff may demur where several causes of counterclaim are improperly joined,⁵⁹ but in the absence of such a provision demurrer will not lie.⁶⁰

A demurrer on this ground lies only where the pleader has set forth two or more causes of action which cannot properly be united in the same action,⁶¹ and will be overruled if the pleading contains but one

If apparent on the face of the complaint it can only be taken advantage of by demurrer. *Sam's Automatic Car Coupler Co. v. League*, 25 Colo. 129, 54 Pac. 642.

Cannot be taken advantage of by objection to evidence. *Carter v. Wann*, 6 Idaho 556, 57 Pac. 314.

Must affirmatively appear on the face of the complaint to be available on demurrer. *Hayden v. Pearce*, 33 Ore. 89, 52 Pac. 1049; *Mau v. Stoner*, 15 Wyo. 127, 87 Pac. 434, 89 Pac. 466.

Misjoinder is waived by failure to demur on that ground, where the defect is apparent on the face of the complaint. *Minn.*—County of Lyon v. Lien, 105 Minn. 55, 116 N. W. 1017; *Campbell v. Railway Transfer Co.*, 95 Minn. 375, 104 N. W. 547. *Mo.*—Stone v. Perkins, 217 Mo. 586, 117 S. W. 717. *Ore.*—Corbett v. Wrenn, 25 Ore. 305, 35 Pac. 658. *S. C.*—Ross v. Jones, 47 S. C. 211, 25 S. E. 59. *Wis.*—Stilwell v. Kellogg, 14 Wis. 461; *Cary v. Wheeler*, 14 Wis. 281.

The Objection Is Not Reached by a Demurrer For Want of Facts.—*Ind.* *Nesbit v. Miller*, 125 Ind. 106, 25 N. E. 148; *Board of Comrs. v. Redifer*, 32 Ind. App. 93, 69 N. E. 305. *Minn.* *Clark v. Lovering*, 37 Minn. 120, 33 N. W. 776; *Smith v. Jordan*, 13 Minn. 264. *Neb.*—Culbertson I. & W. P. Co. v. Wildman, 45 Neb. 663, 63 N. W. 947. *Nev.*—Ruhling v. Hackett, 1 Nev. 360. *Wash.*—Ames v. Kinnear, 42 Wash. 80, 84 Pac. 629; *Marvin v. Yates*, 26 Wash. 50, 66 Pac. 131. *Wis.*—Cummings v. C. W. Noble Co., 143 Wis. 175, 126 N. W. 664.

57. Ohio Code, 1910, §11309; Wyo. Comp. St., 1910, §4381.

Where there is but one defendant, the pleading is not obnoxious to this objection. A demurrer on this ground does not reach the objection that one

paragraph does not state a cause of action against defendant, but against a third person, the remedy in such case being by demurrer to such paragraph for want of facts. *Kearney Stone Works v. McPherson*, 5 Wyo. 178, 38 Pac. 920.

58. A motion to strike is the proper remedy. *Ark.*—Fordyce v. Nix, 58 Ark. 136, 23 S. W. 967, and cases cited. *Ia.*—Citizens' State Bank v. Jess, 127 Iowa 450, 103 N. W. 471; *District Township v. District Township*, 44 Iowa 512. *Kan.*—Mathes v. Shaw Oil Co., 85 Kan. 162, 116 Pac. 244. *Ky.*—Hord v. Chandler, 13 B. Mon. 402.

A motion to require an election is the proper remedy. *Lewis' Admr. v. Taylor Coal Co.*, 112 Ky. 845, 66 S. W. 1044, 57 L. R. A. 447.

59. *Cal.*—Code Civ. Proc., §444. *Idaho.*—Rev. Codes, §4194. *Mont.*—Rev. Codes, 1907, §6555. *Utah.*—Comp. Laws, 1907, §2976.

60. Not where the only statutory ground of demurrer to the answer is that it does not state a counterclaim or defense. *Campbell v. Jones*, 25 Minn. 155.

61. "A misjoinder of causes of action is a joinder of causes belonging to different classes, such as contract and tort, a money demand on contract and a claim to recover real property." *Coddington v. Canaday*, 157 Ind. 243, 61 N. E. 567.

"This provision applies in case a pleader sets forth several causes of action in his complaint which cannot be properly joined in the same action." *Kurtz v. Ogden Canyon Sanitarium Co.*, 37 Utah 313, 108 Pac. 14.

A demurrer on this ground will be overruled where a demurrer to one of the two causes of action for nonjoinder

cause of action, regardless of what else it may contain,⁶² and though it is pleaded as two,⁶³ or though the pleader has asked for more relief than can properly be granted.⁶⁴ In some states it is held that in passing on the demurrer it must be assumed that sufficient facts are stated to constitute two causes of action.⁶⁵ As a rule the fact that several causes of action which cannot properly be joined are not separately stated does not preclude a demurrer,⁶⁶ though there is author-

of parties has been sustained. *Hatzel v. Moore*, 120 Fed. 1015.

The statute refers to two or more good causes of action well pleaded. *Sullivan v. New York, N. H. & H. R. Co.*, 11 Fed. 848.

It is only where the complaint states two or more good causes of action that a demurrer for misjoinder will lie. *Boyd v. Mutual Fire Assn.*, 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171, 61 L. R. A. 918; *Koepke v. Winterfield*, 116 Wis. 44, 92 N. W. 437, and cases cited.

Where one of two causes of action attempted to be stated is insufficient on its face, and the other is well pleaded, the demurrer will be overruled and the insufficient allegations stricken out. *Crosby v. Lehigh Valley R. Co.*, 128 Fed. 193, *affirmed*, 137 Fed. 765, 70 C. C. A. 199.

On reviewing an order sustaining a demurrer on this ground it must first be determined whether the complaint states a cause of action. *Chicago, St. P., M. & O. R. Co. v. Douglas*, 134 Wis. 197, 114 N. W. 511.

62. *Gaillard v. Cantini*, 76 Fed. 669, 22 C. C. A. 493.

63. *Hillman v. Hillman*, 14 How. Pr. (N. Y.) 456.

64. Though the relief demanded may be inconsistent or applicable to different causes of action which could not properly be united. *Golden Valley Land & Cattle Co. v. Johnstone* (N. D.), 128 N. W. 690.

That the prayer asks for inconsistent relief should be taken advantage of by motion. *Colstrum v. Minneapolis & St. L. R. Co.*, 31 Minn. 367, 18 N. W. 94.

Though plaintiff asks for more relief than he is entitled to. *Randall v. Johnstone* (N. D.), 128 N. W. 687.

65. *Vaule v. Steenerson*, 63 Minn. 110, 65 N. W. 257.

To make a complaint demurrable for misjoinder of causes of action it is not necessary that such causes of ac-

tion shall be completely and sufficiently stated, but it is enough if the pleader has attempted to set them up and has partially succeeded in so doing. *Witherbee v. Bowles*, 201 N. Y. 427, 95 N. E. 27, *reversing*, 126 N. Y. Supp. 954.

That the attempt to set up two causes of action has failed as to one of them does not authorize the overruling of the demurrer, but the question must be determined as though the attempt had been successful. *Todaro v. Somerville Realty Co.*, 122 N. Y. Supp. 509.

66. *O'Connor v. Virginia Passenger & Power Co.*, 184 N. Y. 46, 76 N. E. 1082; *Goldberg v. Utley*, 60 N. Y. 427; *Green v. Dunlop*, 120 N. Y. Supp. 583; *Edison Electric Illuminating Co. v. Kalbfleisch Co.*, 111 N. Y. Supp. 462; *Kurtz v. Ogden Canyon Sanitarium Co.*, 37 Utah 313, 108 Pac. 14.

The form of the complaint does not control, and it may be searched to ascertain whether it, in fact, sets forth two. That they are intermingled and stated as if there were one does not prevent the sustaining of the demurrer. *Todaro v. Somerville Realty Co.*, 122 N. Y. Supp. 509.

"Where causes of action which may not be joined are pleaded in a single count of the complaint, the defendant may demur for misjoinder without first requiring that they be separately stated and numbered. *Goldberg v. Utley*, 60 N. Y. 427; *Crowell v. Truesdell*, 67 App. Div. 502, 73 N. Y. Supp. 1013." Quoted with approval in *Vock v. Auerbourn*, 66 Misc. 222, 122 N. Y. Supp. 1023.

Need not first move to correct the complaint in this respect. *O'Connor v. Virginia Passenger & Power Co.*, 184 N. Y. 46, 76 N. E. 1082; *Goldberg v. Utley*, 60 N. Y. 42; *Edison Electric Illuminating Co. v. Kalbfleisch Co.*, 111 N. Y. Supp. 462.

That a motion to compel plaintiff to separately state and number his causes of action has previously been denied

ity to the contrary.⁶⁷ A demurrer for misjoinder will not reach the objection that causes of action which may properly be joined are not separately stated.⁶⁸ Any of several defendants may demur on this ground, and it is not necessary for all of them to join.⁶⁹ The demurrer must, however, go to the pleading as a whole.⁷⁰

I. COMMINGLING CAUSES OF ACTION OR DEFENSES.—That several causes of action are commingled in a single count is ground for demurrer under the common law system of pleading.⁷¹

Under the codes as a rule, it is not ground for demurrer that several causes of action are not separately stated,⁷² or are united in a single count,⁷³ or that distinct defenses are not set out in separate paragraphs of the answer,⁷⁴ though the contrary is true in a few states.⁷⁵

J. MULTIFARIOUSNESS.—In equity multifariousness may be taken advantage of by demurrer if apparent on the face of the bill.⁷⁶

on the ground that there is only one does not preclude a demurrer for misjoinder. *O'Connor v. Virginia Passenger & Power Co.*, 184 N. Y. 46, 76 N. E. 1082.

67. A demurrer on this ground will not lie where several causes of action are jumbled together and the allegations are set forth, in form as a single cause of action. The remedy in such case is by motion. *Duncan v. E. Jones Co.*, 82 S. C. 562, 64 S. E. 749; *Marion v. City Council of Charleston*, 68 S. C. 257, 47 S. W. 140.

68. **Idaho.**—*Fox v. Rogers*, 6 Idaho 710, 59 Pac. 538. **Mo.**—*Zeideman v. Molasky*, 118 Mo. App. 106, 94 S. W. 754. **Utah.**—*Kurtz v. Ogden Canyon Sanitarium Co.*, 37 Utah 313, 108 Pac. 14. **Wash.**—*Harding v. Ostrander Ry. & Timber Co.*, 64 Wash. 224, 116 Pac. 635; *Peterson v. Pantheon Lumber Co.*, 62 Wash. 189, 113 Pac. 562. **Wis.**—*Sentinel Co. v. Thomason*, 38 Wis. 489; *Riemer v. Johnke*, 37 Wis. 258. **Wyo.**—*E. D. Metcalf Co. v. Gilbert*, 116 Pac. 1017; *Kearney Stone Works v. McPherson*, 5 Wyo. 178, 38 Pac. 920.

69. *Trowbridge v. Forepaugh*, 14 Minn. 133.

70. Hence, a demurrer to additional counts alone does not raise the question of misjoinder. *Lee v. Follensby*, 83 Vt. 35, 74 Atl. 327.

71. *Shattuck v. Marcus*, 182 Mass. 572, 66 N. E. 196; *Foster v. Leach*, 160 Mass. 418, 36 N. E. 69; *Downs v. Hawley*, 112 Mass. 237; *Commonwealth v. Dracont*, 8 Gray (Mass.) 455.

That both legal and equitable relief are sought in the same count. *Trowbridge v. True*, 52 Conn. 190.

72. **Colo.**—*Hall v. Cudahy*, 46 Colo. 324, 104 Pac. 415. **Kan.**—*City of Ellsworth v. Rossiter*, 46 Kan. 237, 26 Pac. 674. **Utah.**—*Kurtz v. Ogden Canyon Sanitarium Co.*, 37 Utah 313, 108 Pac. 14. **Wash.**—*Harding v. Ostrander Ry. & Timber Co.*, 64 Wash. 224, 116 Pac. 635; *Peterson v. Pantheon Lumber Co.*, 62 Wash. 189, 113 Pac. 562. **Wis.**—*Sentinel Co. v. Thomas*, 38 Wis. 489; *Riemer v. Johnke*, 37 Wis. 258.

The remedy is by motion rather than demurrer. *Chamberlain v. Mensing*, 51 Fed. 669.

73. **Colo.**—*Heilman v. Ludington*, 26 Colo. 326, 57 Pac. 1075, *affirming* 9 Colo. App. 548, 49 Pac. 377; *Brewer v. McCain*, 21 Colo. 382, 41 Pac. 822. **Idaho.**—*Fox v. Rogers*, 6 Idaho 710, 59 Pac. 538. **Ind.**—*McFadden v. Schroeder*, 4 Ind. App. 305, 29 N. E. 491, 30 N. E. 711. **Ia.**—*Hayden v. Anderson*, 17 Iowa 158.

74. *Mullikin v. Mullikin*, 15 Ky. L. Rep. 609, 23 S. W. 352, 25 S. W. 598; *Williams v. Langford*, 15 B. Mon. (Ky.) 566.

75. **Cal. Code Civ. Proc.**, §430; *Shelton v. Franklin*, 224 Mo. 342, 123 S. W. 1084; *State v. Tittman*, 103 Mo. 553, 15 S. W. 936.

Two inconsistent causes of action in one count. *Mitchner v. Holmes*, 117 Mo. 185, 22 S. W. 1070.

That Several Causes of Counterclaim Are Not Separately Stated.—**Cal. Code Civ. Proc.**, §444.

76. **U. S.**—*Hefner v. Northwestern Life Ins. Co.*, 123 U. S. 747, 8 Sup. Ct. 337, 31 L. ed. 309; *Walker v. Powers*, 104 U. S. 245, 26 L. ed. 729; *Oliver v. Piatt*, 3 How. 333, 11 L. ed. 622; *Em-*

Under the codes is it not, *eo nomine* ground for demurrer,⁷⁷ but may be reached by a demurrer for misjoinder of parties or causes of action in states where demurrers on those grounds are allowed.⁷⁸

K. INDEFINITENESS AND UNCERTAINTY. — In states adhering to the common law system of pleading, want of definiteness and certainty may be taken advantage of by demurrer,⁷⁹ and the same is true in equity.⁸⁰

Under the Codes. — As a general rule under the codes indefiniteness and uncertainty is not ground for demurrer, but the remedy is by motion.⁸¹ In a few states, however, it is specifically enumerated among

mons *v.* National Mut. Bldg. & Loan Assn., 135 Fed. 689, 68 C. C. A. 327; Foundation Co. *v.* O'Rourke Engineering Const. Co., 171 Fed. 425. **D. C.** Fields *v.* Gwynn, 19 App. Cas. 99, Fla.—Murrell *v.* Peterson, 57 Fla. 480, 49 So. 31. **Mass.**—Saltman *v.* Nesson, 201 Mass. 534, 88 N. E. 3. **Mich.** Kerr *v.* Rupp, 144 Mich. 269, 107 N. W. 1059. **Tenn.**—Shannon's Code, §§6196, 6198. **Vt.**—Wade *v.* Pulsifer, 54 Vt. 45. **Va.**—Dunn *v.* Dunn, 26 Gratt. 291.

Must be raised by demurrer. Kinkley *v.* Bishop, 152 Mich. 256, 114 N. W. 676; Miner *v.* Wilson, 107 Mich. 57, 64 N. W. 562.

Is not available unless raised by demurrer. Ala. Code, 1907, §3095.

"If a joint claim against two defendants is joined in the same bill with a separate claim against one of them only, either or both of the defendants may demur for multifariousness." Emans *v.* Wortman, 13 N. J. Eq. 205.

One of two defendants cannot demur for multifariousness on the ground of the joinder of the other. Worthen *v.* Brantley, 5 Ga. 571.

"To sustain a demurrer to a bill for multifariousness against several defendants, it is not necessary that the defendant demurring should so far answer the bill as to deny the ordinary general charge of combination." Emans *v.* Wortman, 13 N. J. Eq. 205.

77. Waldo *v.* Thweatt, 64 Ark. 126, 40 S. W. 782; Dyer *v.* Jacoway, 42 Ark. 186.

78. See Stalcup *v.* Garner, 26 Mo. 72.

Multifariousness must be raised by demurrer if apparent on the face of the petition or it is waived. Snowden *v.* Tyler, 21 Neb. 199, 31 N. W. 661. See *infra*, VII, G and H.

79. Ala.—Birmingham R., L. & P.

Co. *v.* Girod, 164 Ala. 10, 51 So. 242; City Delivery Co. *v.* Henry, 139 Ala. 161, 34 So. 389. **Conn.**—Boyle *v.* McWilliams, 69 Conn. 201, 37 Atl. 501. **Ill.**—Chenoweth *v.* Burr, 242 Ill. 312, 89 N. E. 1008. **Mich.**—Bettys *v.* Township of Denver, 115 Mich. 228, 73 N. W. 138; Snyder *v.* City of Albion, 113 Mich. 275, 71 N. W. 475.

Want of perspicuity and clearness. Chapin *v.* Cambria Iron Co., 145 Pa. 478, 22 Atl. 1041.

80. In West *v.* Reynolds, 35 Fla. 317, 17 So. 740, a demurrer to a bill was sustained because the allegations as to complainant's right to sue were vague and indefinite.

81. **U. S.**—Gulf, C. & S. F. R. Co. *v.* Washington, 49 Fed. 347, 1 C. C. A. 286; United Breweries Co. *v.* Colby, 170 Fed. 1008; Neis *v.* Yocum, 16 Fed. 168. **Ark.**—Southern Anthracite Coal Co. *v.* Hodge, 139 S. W. 292; Jennings *v.* Bouldin, 134 S. W. 948; Moore *v.* Rooks, 71 Ark. 562, 76 S. W. 548; Murrell *v.* Henry, 70 Ark. 161, 66 S. W. 647. **Colo.**—Clark Hardware Co. *v.* Centennial Tunnel Min. Co. (Colo. App.), 123 Pac. 322. **Ind.**—Gfroerer *v.* Gfroerer, 173 Ind. 424, 90 N. E. 757; Clow *v.* Brown, 150 Ind. 185, 48 N. E. 1034, 49 N. E. 1057; Louisville, N. A. & C. R. Co. *v.* Bates, 146 Ind. 564, 45 N. E. 108; Cleveland, C., C. & St. L. R. Co. *v.* Heineman, 46 Ind. App. 388, 90 N. E. 899. **Ia.**—Parkyn *v.* Travis, 50 Iowa 436; McCormick *v.* Basal, 46 Iowa 235; Hayden *v.* Anderson, 17 Iowa 158. **Kan.**—Sutter *v.* International Harvester Co., 81 Kan. 452, 106 Pac. 29; Lawrence *v.* Wheeler, 77 Kan. 209, 93 Pac. 602; Bowersox *v.* Hall, 73 Kan. 99, 84 Pac. 557; Burnette *v.* Elliott, 72 Kan. 624, 84 Pac. 374; McPherson *v.* Kingsbaker, 22 Kan. 646. **Ky.**—Riedel *v.* Com., 118 Ky. 926, 82 S. W. 635; Com. *v.* Ginn & Co., 111 Ky. 110, 63

the statutory grounds of demurrer to the complaint⁸² and answer.⁸³

L. AMBIGUITY AND INTELLIGIBILITY.—That allegations are ambiguous or unintelligible is ground for demurrer where the common law rules of pleading prevail,⁸⁴ except where special demurrers have been abolished.⁸⁵

Under the codes the remedy is by motion, and demurrer will not lie,⁸⁶ except in a few of the states, where this defect is specifically

S. W. 467; Posey v. Green, 78 Ky. 162; Mullins & Crigler v. Hume & Co., 15 Ky. L. Rep. 93; Lyons v. Hodgen & Miller, 10 Ky. L. Rep. 271. **Minn.** Ejelos v. Cleveland Cliffs Iron Co., 109 Minn. 320, 123 N. W. 1085; Blunt v. Egeland, 104 Minn. 351, 116 N. W. 653; Matteson v. United States & Canada Land Co., 103 Minn. 407, 115 N. W. 195. **Mo.**—MacAdam v. Seudder, 127 Mo. 345, 30 S. W. 168; Garnett & Allen Paper Co. v. Midland Pub. Co., 156 Mo. App. 187, 136 S. W. 736. **N. Y.**—Jacocks v. Morrison, 133 N. Y. Supp. 1002; Yarslowitz v. Bienstock, 125 N. Y. Supp. 649; Sullivan v. Murphy, 120 N. Y. Supp. 55. **N. C.** Jones v. Town of Henderson, 147 N. C. 120, 60 S. E. 894; Seaboard Air Line R. Co. v. Main, 132 N. C. 445, 43 S. E. 930; Allen v. Carolina Cent. R. Co., 120 N. C. 548, 27 S. E. 76. **Ohio.** Union Bank v. Bell, 14 Ohio St. 200. **Okla.**—Wey v. City Bank, 29 Okla. 313, 116 Pac. 943; Armstrong, Byrd & Co. v. Crump, 25 Okla. 452, 106 Pac. 855; City of Guthrie v. Shaffer, 7 Okla. 459, 54 Pac. 698. **Ore.**—Jackson v. Jackson, 17 Ore. 110, 19 Pac. 847. **S. C.** Scott v. Richland County, 83 S. C. 506, 65 S. E. 729; Mobley v. Cureton, 6 S. C. 49. **Wash.**—White Bros. & Crum Co. v. Watson, 64 Wash. 666, 117 Pac. 497; Schaad v. Robinson, 50 Wash. 283, 97 Pac. 104; Allen v. Baxter, 42 Wash. 434, 85 Pac. 26; Weiser v. Holzman, 33 Wash. 87, 73 Pac. 797; Howard v. Seattle Nat. Bank, 10 Wash. 280, 38 Pac. 1040, 39 Pac. 100. **Wis.** Darlington v. Gates Land Co., 142 Wis. 198, 125 N. W. 456; Wilbert v. Sheboygan, 121 Wis. 518, 99 N. W. 330; Olson v. Phoenix Mfg. Co., 103 Wis. 337, 79 N. W. 409. **Wyo.**—Butler v. Conwell, 14 Wyo. 166, 82 Pac. 950; Cone v. Iverson, 4 Wyo. 203, 33 Pac. 31, 35 Pac. 933.

Unless the pleading is so uncertain as not to state intelligibly a substantially good cause of action. City of Connersville v. Connersville Hydraulic

Co., 86 Ind. 235; Lewis v. Edwards, 44 Ind. 333; Blanchard Hamilton Furniture Co. v. Colvin, 32 Ind. App. 398, 69 N. E. 1032.

82. Cal.—Code Civ. Proc., §430; Palmer v. Lavigne, 104 Cal. 30, 37 Pac. 775; Watkins v. Glas, 5 Cal. App. 68, 89 Pac. 840. **Colo.**—Code, §56; Hall v. Cudahy, 46 Colo. 324, 104 Pac. 415. **Idaho.**—Rev. Codes, §4174; Craig v. Palo Alto Stock Farm, 16 Idaho 701, 102 Pac. 393; Dittmore v. Cable Milling Co., 16 Idaho 298, 101 Pac. 593; King v. Oregon Short Line Ry., 6 Idaho 306, 55 Pac. 665, 59 L. R. A. 209; Aulbach v. Dahler, 4 Idaho 654, 43 Pac. 322.

Cannot be reached by objection to evidence. Younie v. Blackfoot Light & Water Co., 15 Idaho 56, 96 Pac. 193; Carter v. Wann, 6 Idaho 556, 57 Pac. 314; Naylor v. Vermont Loan & Trust Co., 6 Idaho 251, 55 Pac. 297. **Mont.** Rev. Codes, 1907, §6534; Haupt v. Independent Telegraph Messenger Co., 25 Mont. 122, 63 Pac. 1033; Herbst Importing Co. v. Hogan, 16 Mont. 384, 41 Pac. 135. **Nev.**—Comp. Laws, §3135; Burgess v. Helm, 24 Nev. 242, 51 Pac. 1025. **Utah.**—Comp. Laws, 1907, §2962.

Demurrer rather than a motion to make more definite and certain. McFarland v. Holcomb, 123 Cal. 84, 55 Pac. 761.

83. Cal.—Code Civ. Proc., §444. **Idaho.**—Rev. Codes, §4194. **Mont.** Rev. Codes, §6555. **Utah.**—Comp. Laws, 1907, §2976.

Counterclaim.—Utah Comp. Laws, 1907, §2977.

84. In Florida, in the justice court, or in the county court in probate proceedings, either party may demur to the pleading of his adversary where it is not sufficiently plain or explicit to enable him to understand it. Gen. St., 1906, §§2079, 2052.

85. State v. German Sav. Bank, 103 Md. 196, 63 Atl. 481.

86. Ark.—Dickerson v. Hamby, 96 Ark. 163, 131 S. W. 674. **Minn.**—Larson v. Great Northern R. Co., 108

made ground for demurrer to the complaint,⁸⁷ or to the answer.⁸⁸

M. INCONSISTENCY AND REPUGNANCY.—Inconsistency or repugnancy is ground for demurrer where the common law rules prevail.⁸⁹ Inconsistency is ground for demurrer under some,⁹⁰ but not all,⁹¹ of the codes.

N. DEPARTURE.—Departure is generally ground for demurrer in states adhering to the common-law system of pleading,⁹² though there is authority to the contrary.⁹³

Under the codes, it is not ground for demurrer.⁹⁴

O. DUPLICITY.—Duplicity may be reached by demurrer where the common-law system of pleading prevails,⁹⁵ except in those states where special demurrers have been abolished by statute.⁹⁶ It is

Minn. 519, 121 N. W. 121. **Wyo.**—Cone v. Iverson, 4 Wyo. 203, 33 Pac. 31, 35 Pac. 933.

87. Cal.—Code Civ. Proc., §430; Palmer v. Lavigne, 104 Cal. 30, 37 Pac. 775; Tibbets v. Riverside Land & Irr. Co., 61 Cal. 160. **Colo.**—Code, §56; Hall v. Cudaby, 46 Colo. 324, 104 Pac. 415. **Idaho.**—Rev. Codes, §4174; Craig v. Palo Alto Stock Farm, 16 Idaho 701, 102 Pac. 393; Dittmore v. Cable Milling Co., 16 Idaho 298, 101 Pac. 593; Aulbach v. Dahler, 4 Idaho 654, 43 Pac. 322. Cannot be reached by objection to evidence. Younie v. Blackfoot Light & Water Co., 15 Idaho 56, 96 Pac. 193; Carter v. Wann, 6 Idaho 556, 57 Pac. 314. **Mont.**—Rev. Codes, 1907, §6534; Reed v. Poindexter, 16 Mont. 294, 40 Pac. 596. **Nev.**—Comp. Laws, §3135; Burgess v. Helm, 24 Nev. 242, 51 Pac. 1025. **Utah.**—Comp. Laws, 1907, §2962.

88. Cal.—Code Civ. Proc., §444. **Idaho.**—Rev. Codes, §4194. **Mont.**—Rev. Codes, §6555. **Utah.**—Comp. Laws, 1907, §2976.

Counterclaim.—Utah Comp. Laws, 1907, §2977.

89. Andrews Steph. Pl. (2nd ed.), §229, p. 431; Merrill v. Sheffield Co., 169 Ala. 242, 53 So. 219.

Inconsistency of defenses in the answer can only be taken advantage of by demurrer. Lyons v. Ward, 124 Mass. 364; Jewett v. Locke, 6 Gray (Mass.) 233. **Contra.**—State v. German Sav. Bank, 103 Md. 196, 63 Atl. 481.

90. That the petition in one count charges that the injury was caused by the negligence and by the wilful act of the defendant. Christy v. Butcher, 153 Mo. App. 397, 134 S. W. 1058.

91. Nicholson v. Nicholson, 83 Kan.

223, 109 Pac. 1086; Fetzer v. Williams, 80 Kan. 554, 103 Pac. 77; Bichel v. Oliver, 77 Kan. 696, 95 Pac. 396; Walters v. Chance, 73 Kan. 680, 85 Pac. 779; Walden v. Weber, 15 Ky. L. Rep. 846; Mullins & Crigler v. Hume & Co., 15 Ky. L. Rep. 93.

That an answer contains inconsistent defenses is not ground for demurrer. Caldwell v. Ruddy, 2 Idaho 5, 1 Pac. 339; McVeigh & Veig (N. M.), 117 Pac. 857.

92. Hanover Fire Ins. Co. v. Brown, 77 Md. 64, 25 Atl. 989, 27 Atl. 314.

That the replication is a departure from the declaration. Reid v. Wiessner Brewing Co., 88 Md. 234, 40 Atl. 877. See also *infra*, this section.

93. Motion to strike, rather than demurrer. Harden v. Birmingham Trust & Savings Bank (Ala.), 55 So. 943, and cases cited.

94. Walters v. Chance, 73 Kan. 680, 85 Pac. 779. See the title "Departure."

95. Ill.—Louisville, N. A. & C. R. Co. v. Carson, 169 Ill. 247, 48 N. E. 402. **Me.**—Briggs v. G. T. R. Co., 54 Me. 375. **Mass.**—Otis v. Blake, 6 Mass. 337. **R. I.**—Dawiski v. Natick Mills, 32 R. I. 1, 78 Atl. 263. **Vt.**—Willey v. Carpenter, 64 Vt. 212, 23 Atl. 630; Giffen v. Barr, 60 Vt. 599, 15 Atl. 190. See Central of Ga. R. v. Banks & Fortson, 128 Ga. 785, 58 S. E. 352.

96. Mass.—King v. Howard, 1 Cush. 137. **Va.**—Norfolk & W. R. Co. v. Ampey, 93 Va. 108, 25 S. E. 226; Grayson v. Buchanan, 88 Va. 251, 13 S. E. 457. **W. Va.**—Sweeney v. Baker, 13 W. Va. 158; Coyle v. Baltimore & O. R. Co., 11 W. Va. 94.

In New Jersey the remedy is by motion to strike out. Stratton v. Essex

not ground for demurrer under the code system of pleading.⁹⁷

P. IRRELEVANCY, REDUNDANCY AND SURPLUSAGE.—In states where the common-law rules prevail, irrelevant matter in a pleading may be taken advantage of by demurrer.⁹⁸

In equity it has been held that a demurrer will not lie.⁹⁹

Under the codes the remedy for irrelevancy,¹ or redundancy² is by motion, and demurrer will not lie.

Surplusage in a pleading otherwise sufficient is not ground for demurrer either under the common-law system of pleading,³ or under the codes.⁴

County Park Commission, 164 Fed. 901; *Karnuff v. Kelch*, 69 N. J. L. 499, 55 Atl. 163, *affirmed* 71 N. J. L. 558, 60 Atl. 364.

97. *Blakeney v. Ferguson*, 18 Ark. 347; *Smith v. Jordan*, 13 Minn. 264. Motion to strike is generally the remedy.

See the title "Duplicity."

98. *Chattanooga Southern R. Co. v. Thompson*, 133 Ga. 127, 65 S. E. 285; *Wilson v. Central of Georgia R. Co.*, 132 Ga. 215, 63 S. E. 1121.

Rather than by motion to expunge. *Freeman's Appeal*, 71 Conn. 708, 43 Atl. 185.

That separate paragraphs of a special defense and counterclaim contain irrelevant and evidentiary matter should be reached by motion rather than demurrer. *Board of Water Comrs. v. Robbins & Potter*, 82 Conn. 623, 74 Atl. 938.

99. *Jennings Bros. & Co. v. Beale*, 158 Pa. 283, 27 Atl. 948.

1. **Ia.**—*Frazer v. Andrews*, 134 Iowa 621, 112 N. W. 92, 11 L. R. A. (N. S.) 593; *Gordon v. Chicago, R. I. & P. R. Co.*, 129 Iowa 747, 106 N. W. 177; *In re Estate of McMurray*, 107 Iowa 648, 78 N. W. 691; *Hayden v. Anderson*, 17 Iowa 158. **Kan.**—*Sparks v. Smeltzer*, 77 Kan. 44, 93 Pac. 338. **Ky.**—*McMullen & Hazen Co. v. Slusher*, 145 Ky. 537, 140 S. W. 657; *Mullins & Crigler v. Hume & Co.*, 15 Ky. L. Rep. 93. **Minn.**—*Erickson v. Child*, 87 Minn. 487, 92 N. W. 1130; *Fish v. Berkeley*, 10 Minn. 199. **Mont.**—*Plymouth Gold Min. Co. v. U. S. Fidelity & Guaranty Co.*, 35 Mont. 23, 88 Pac. 565. **N. Y.**—*Coatsworth v. Lehigh Valley R. Co.*, 24 App. Div. 273, 48 N. Y. Supp. 511. **Wis.**—*Gooding v. Doyle*, 134 Wis. 623, 115 N. W. 114.

That allegations of particular dam-

age are foreign to the legal criterion in the action. *Bartram v. Ohio & B. S. R. Co.*, 141 Ky. 100, 132 S. W. 188.

2. **Ia.**—*Gordon v. Chicago, R. I. & P. R. Co.*, 129 Iowa 747, 106 N. W. 177; *Hayden v. Anderson*, 17 Iowa 158. **Kan.**—*Sparks v. Smeltzer*, 77 Kan. 44, 93 Pac. 338; *Bank of Le Roy v. Harding*, 1 Kan. App. 389, 41 Pac. 680. **Minn.**—*Fish v. Berkeley*, 10 Minn. 199. **Mont.**—*Plymouth Gold Min. Co. v. U. S. Fidelity & Guaranty Co.*, 35 Mont. 23, 88 Pac. 565. **Wis.**—*Gooding v. Doyle*, 134 Wis. 623, 115 N. W. 114.

3. **U. S.**—*Fletcher v. New York Life Ins. Co.*, 13 Fed. 526. **Ala.**—*Birmingham R., L. & P. Co. v. Hunnicutt*, 57 So. 262, and cases cited. **Conn.**—*Arnold v. Kutinsky*, 80 Conn. 549, 69 Atl. 350. **Me.**—*E. S. Martin & Son Co. v. Jesse S. Hedden Co.*, 106 Me. 498, 76 Atl. 935. **Md.**—*Deford v. Hewlett*, 49 Md. 51. **Miss.**—*Caston v. Turner*, 95 Miss. 303, 48 So. 721.

The defective allegation of matter that may be rejected as surplusage. *Curtis v. Watson*, 64 Vt. 536, 25 Atl. 478.

4. **Mont.**—*Plymouth, etc. Co. v. United States Fidelity, etc. Co.*, 35 Mont. 23, 88 Pac. 565. **Neb.**—*Andersen v. Andersen*, 69 Neb. 565, 96 N. W. 276. **N. Y.**—*Blaut v. Blaut*, 41 Misc. 572, 85 N. Y. Supp. 146. **Utah.**—*Campbell v. Taylor*, 3 Utah 325, 3 Pac. 445.

Where the pleading contains matter properly provable in defense or reduction of damages, it is not demurrable, though it also contains statements which are not provable and should not have been pleaded, but the remedy is by motion or objection to evidence. *Johnson v. Tantlinger*, 31 Iowa 500. See the title "Surplusage."

Q. FAILURE TO ATTACH OR FILE EXHIBITS.—Failure to attach or file an exhibit referred to in the pleading is ordinarily not ground for demurrer.⁵ In some states a failure to attach to the pleading a copy of an instrument sued on is ground for demurrer,⁶ while in others a contrary rule prevails.⁷

R. SPECIAL PLEA AMOUNTING TO THE GENERAL ISSUE.—That a special plea amounts to the general issue,⁸ or sets up matter available under the general issue,⁹ is ground for demurrer in some jurisdictions, but not in others.¹⁰

S. WANT OF VERIFICATION.—Failure to verify a pleading is generally not ground for demurrer,¹¹ but the contrary is true in some states as to pleadings which the statute requires to be sworn to.¹²

5. Allen's Exr. v. Allen, 15 Ky. L. Rep. 496.

Where it forms no part of the pleading and is not the foundation of the suit. *Stillwell v. Adams*, 29 Ark. 346; *Nordman v. Craighead*, 27 Ark. 369.

Provided the matters alleged constitute a cause of action or defense. *Home Fire Ins. Co. v. Arthur*, 48 Neb. 461, 67 N. W. 440.

The remedy is by motion rather than general demurrer. *Pringle v. Mulholland*, 116 N. Y. Supp. 572.

6. In Indiana, since the statute requires it to be filed. *Blackwell v. Pendergast*, 132 Ind. 550, 32 N. E. 319; *State v. Adams*, 15 Ind. App. 310, 44 N. E. 47; *Burt v. Little*, 12 Ind. App. 567, 40 N. E. 929. See also *Miller v. Bottenberg*, 144 Ind. 312, 41 N. E. 804.

In Iowa the code expressly provides that defendant may demur to the petition where the cause of action is founded on an account or writing as evidence of indebtedness; and neither such writing or account or a copy thereof is incorporated into or attached to the pleading, or a sufficient reason stated for not doing so. Code, §3561. *Winters v. Page County*, 70 Iowa 300, 30 N. W. 576; *Smith & Co. v. McLean*, 24 Iowa 322.

The petition is not demurrable on this ground where the cause of action does not necessarily embrace separate items of account. *O'Brien v. Chicago, M. & St. P. R. Co.*, 64 Iowa 411, 20 N. W. 738.

7. Such cause of action is not a part of the declaration though the statute requires it to be filed. *Martyn v. Arnold & Co.*, 36 Fla. 446, 18 So. 791.

Though the statute requires it to be filed. *Ryan v. State Bank*, 10 Neb. 524, 7 N. W. 276.

8. Spencer v. Patten, 84 Md. 414, 35 Atl. 963; *Miller v. Miller*, 41 Md. 623.

9. Moore Bros. v. Cowan (Ala.), 55 So. 903; *Taxicab Co. v. Grant (Ala. App.)*, 57 So. 141; *Finch & Co. v. Zenith Furnace Co.*, 245 Ill. 586, 92 N. E. 521.

Paragraphs of reply setting up matter provable under the general denial pleaded are demurrable. *Baltes v. Bass Foundry & Machine Works*, 129 Ind. 185, 28 N. E. 319.

10. Crandall v. Gallup, 12 Conn. 365.

In view of the statute abolishing special demurrers. *Merchants & Farmers Bank v. Calmes*, 82 Miss. 603, 35 So. 161; *Polkinghorne v. Hendricks*, 61 Miss. 366.

That a special plea tenders an issue covered by a plea of not guilty, is not ground for demurrer, but the remedy is by motion. *Atlantic C. L. R. Co. v. Crosby*, 53 Fla. 400, 43 So. 318.

11. Ark.—*Greenfield v. Carlton*, 30 Ark. 547. **Ky.**—*Harris v. Ray*, 15 B. Mon. 628. **Minn.**—*McMath v. Parsons*, 26 Minn. 246, 2 N. W. 703. **Wyo.** *Turner v. Hamilton*, 13 Wyo. 408, 80 Pac. 664.

Since the verification is no part of the plea. *Lewis v. Hicks*, 96 Va. 91, 30 S. E. 466.

The remedy is by motion to strike. *Turner v. Hamilton*, 13 Wyo. 408, 80 Pac. 664.

12. Pleas of Non Est Factum.—*Alexander v. Bryan*, 110 U. S. 414, 4 Sup. Ct. 107, 28 L. ed. 195; *Bell v. Mayor*,

Failure to verify a bill in equity is sometimes ground for demurrer.¹³

T. VARIANCE.—A variance between the process and the declaration is not ground for demurrer,¹⁴ nor is a variance between the instrument declared on and that offered in evidence,¹⁵ but the contrary is true as to a variance between the instrument declared upon and that produced and made a part of the declaration on oyer,¹⁶ or a variance between an instrument set out in the pleading and the allegations in relation thereto.¹⁷

U. MISTAKE IN THE REMEDY.—A mistake in the remedy is ground for demurrer in many jurisdictions,¹⁸ but not, as a rule, under the codes.¹⁹

V. FAILURE TO STATE A CAUSE OF ACTION.—Failure to state a cause of action is ground for demurrer at common-law and in the states where the common-law system of procedure prevails.²⁰

etc. of Vicksburg, 23 How. (U. S.) 443, 16 L. ed. 579.

Pleas in Abatement.—*Miller v. Citizens' Bldg. & Loan Assn.* (Ind. App.), 98 N. E. 70.

13. *Daschke v. Schellenberg*, 124 Mich. 16, 82 N. W. 665.

14. A variance between the praecipe, summons and declaration cannot be reached by demurrer to the declaration. *Wabash R. Co. v. Barrett*, 117 Ill. App. 315.

15. *Hooker v. Gallagher*, 6 Fla. 351.

16. *Cooke v. Graham's Admr.*, 3 Cranch (U. S.) 229, 2 L. ed. 420; *Bennett's Exr. v. Loyd*, 6 Leigh (Va.), 316.

17. Demurrer is the proper remedy rather than objection to the introduction of the instrument as evidence. *Savage v. Ross*, 59 Fla. 407, 52 So. 16.

18. That plaintiff sues at law when the proper remedy is in equity is ground for exception. *Lindsay v. First Nat. Bank*, 156 U. S. 485, 15 Sup. Ct. 472, 39 L. ed. 505.

An amended petition or bill filed in a law action which sets up matter not there cognizable over defendant's objection is demurrable. *Armstrong Cork Co. v. Merchants' Refrigerating Co.*, 171 Fed. 778.

19. That the proceeding is in equity instead of at law. *Thomas v. Farley Mfg. Co.*, 76 Iowa 735, 39 N. W. 974.

That the action is brought in equity instead of in ordinary. *Cumberland River Lumb. Co. v. Allen & Co.*, 6 Ky. L. Rep. 746.

"That plaintiff brings an action at

law, of which the court has jurisdiction, when it appears that he should have brought an action in equity, of which the court would not have jurisdiction, does not make the complaint demurrable for want of jurisdiction." *Benson v. Silvey*, 59 Minn. 73, 60 N. W. 847.

The remedy is by motion to transfer. *Trustees of Lebanon v. Forrest*, 15 B. Mon. (Ky.) 168; *Cumberland River Lumb. Co. v. Allen & Co.*, 6 Ky. L. Rep. 746.

By motion to change to the proper proceeding. *Thomas v. Farley Mfg. Co.*, 76 Iowa 735, 39 N. W. 874.

20. **Ala.**—*Northern v. Tatum*, 164 Ala. 368, 51 So. 17. **Me.**—*Smith v. Abbott*, 40 Me. 442. **Mass.**—*Thomson v. O'Sullivan*, 6 Allen 303.

"That the declaration or some count thereof does not state a legal cause of action substantially in accordance with the rules contained in this chapter." *Mass. Rev. Laws*, 1902, c. 173, §16, p. 1553.

That the demurrer omits the words "or some count thereof," and substitutes for the words "rules of this chapter" the words "rules contained in the revised laws of the commonwealth and acts in addition thereto and amendment thereof" does not render it bad. *Norton v. Lilley*, 210 Mass. 214, 96 N. E. 351.

The words "substantially in accordance with the rules contained in this chapter," need not be used where the party demurring relies on no defects of form. *Whiton v. Batchelder & Lin-*

Equity. — Want of equity apparent on the face of the bill is ground for demurrer.²¹

Under the Codes. — The codes provide that defendant may demur where the complaint or equivalent pleading does not state facts sufficient to constitute a cause of action,²² or to entitle the plaintiff to

coln Corp., 179 Mass. 169, 60 N. E. 483.

Failure to allege notice when a condition precedent. *Dickie v. Boston & A. R. Co.*, 131 Mass. 516.

In a negligence case failure to show affirmatively actionable negligence. *Hammond v. Michigan Cent. R. Co.*, 162 Mich. 431, 127 N. W. 318.

That the complaint does not state a cause of action under a particular subdivision of the employer's liability act is not a good ground of demurrer, since there is no duty resting on plaintiff to declare under any particular subdivision, and defendant has no right to dictate to him in the matter. *Sloss-Sheffield Steel & Iron Co. v. Smith*, 166 Ala. 437, 52 So. 38.

The absence of liability by the defendant to the petitioner. *Ga. Code*, 1895, §5048.

That a pleading is fatally defective may be taken advantage of either by a general demurrer or an oral motion to strike. *Smith v. Ice Delivery Co.*, 8 Ga. App. 767, 70 S. E. 195.

A declaration is sufficient on demurrer if it properly avers facts which, with the legal presumptions arising thereon, make a *prima facie* case. *People v. Lane*, 36 Ill. App. 649.

Demurrer Is the Only Proper Method. *Donovan v. Davis (Conn.)*, 82 Atl. 1025.

21. **Mass.**—*Saltman v. Nesson*, 201 Mass. 534, 88 N. E. 3. **N. H.**—*Coe v. Winnepisiogee Lake Cotton & Woolen Mfg. Co.*, 37 N. H. 254. **Tenn.**—*Shannon's Code*, §§6196, 6198.

Whether the affirmative defense of fraud is sufficiently alleged, and whether if properly alleged it is a sufficient defense, should be raised by demurrer and is not ground for exception. *Manhattan Trust Co. v. Chicago Elec. Tr. Co.*, 188 Fed. 1006.

22. **Ark.**—*Kirby's Dig.*, §6093; *Ashley v. Little Rock*, 56 Ark. 391, 19 S. W. 1058. **Cal.**—*Code Civ. Proc.*, §430. **Colo.**—*Code*, §56. **Fla.**—*Gen. St.*, 1906, §1441. In county court in probate proceedings. *Gen. St.*, 1906,

§2052. In justice court. *Gen. St.*, 1906, §2079. **Idaho.**—*Rev. Codes*, §4174; *County of Bingham v. Woodin*, 6 Idaho 284, 55 Pac. 662. **Ind.**—*Burns' Ann. St.*, 1908, §344, *Acts* 1911, p. 415, c. 157, §2. **Kan.**—*Gen. St.*, 1909, §5686. **Ky.**—*Code Civ. Proc.*, §93. **Minn.**—*Rev. Laws*, 1905, §4128. **Mo.**—*Rev. St.*, 1909, §1800. **Mont.**—*Rev. Codes*, 1907, §6534. **Neb.**—*Comp. St.*, 1911, §6668. **Nev.**—*Comp. Laws*, §3135. **N. Y.**—*Code Civ. Proc.*, §488. **N. C.**—*Rev. Laws*, 1905, §474. **N. D.**—*Rev. Codes*, 1905, §6854. **Ohio.**—*Code*, 1910, §11,309. **Okl.**—*Comp. Laws*, 1909, §5629. **Ore.**—*L. O. L.*, §68; *Hume v. Woodruff*, 26 Ore. 373, 38 Pac. 191. **S. C.**—*Code Civ. Proc.*, §165; *Lyles v. Kinard*, 82 S. C. 415, 64 S. E. 409. **S. D.**—*Code Civ. Proc.*, §121. **Tenn.**—Failure to show a substantial cause of action. *Shannon's Code*, §4606; *Evans v. Thompson*, 12 Heisk. 534. **Utah.**—*Comp. Laws*, 1907, §2962. **Wash.**—*Rem. & Ball. Ann. Code & St.*, §259; *Seattle Nat. Bank v. School Dist.*, 20 Wash. 368, 55 Pac. 317. **Wis.**—*St.*, 1898, §2649. **Wyo.**—*Comp. St.*, 1910, §4381.

Any defect apparent on the face of the complaint, which will defeat the present right to recover in whole or in part, is good ground of demurrer. *Hentsch v. Porter*, 10 Cal. 555.

The omission of allegations essential to the statement of a cause of action. *Cone & Co. v. Poole*, 41 S. C. 70, 19 S. E. 203, 24 L. R. A. 289.

A general demurrer only raises the question of the sufficiency of the allegations of the petition to state a cause of action, and does not challenge the right of the plaintiff to maintain an action for the cause of action, if any exists. *Westervelt v. Jones*, 5 Kan. App. 35, 47 Pac. 322.

When the complaint shows that the cause of action is based on a usurious contract, the principal of which has been fully paid. *Stevens v. Home Sav. & Loan Assn.*, 5 Idaho 741, 51 Pac. 779-986.

Demurrer is the only pleading by which the sufficiency of the complaint

the relief demanded.²³ A demurrer on this ground reaches only defects of substance, as distinguished from those of form.²⁴

W. PRAYER FOR RELIEF. — Ordinarily a demurrer will not lie to a mere prayer for relief.²⁵ As a rule the fact that the pleading demands relief to which the pleader is not entitled is not ground for demurrer,²⁶ and this is generally true in equity,²⁷ though it has been held that a

can be tested. *Multnomah County v. Faling*, 55 Ore. 45, 104 Pac. 964.

23. Iowa Code, §3561.

Demurrer rather than motion to strike is the proper remedy for failure to state a cause of action. *Irwin v. Yeager*, 74 Iowa 174, 37 N. W. 136.

Failure of a claimant of property levied on under an attachment (*Linden v. Green*, 81 Iowa 365, 46 N. W. 1108), or writ of execution (*Gray v. Carroll*, 144 Iowa 68, 120 N. W. 1035), against a third person to give notice of his ownership in the manner and form required by the statute may be raised by demurrer.

That the action was not brought within the time limited by the contract sued on is ground for demurrer, since it shows that plaintiff is not entitled to the relief claimed. *Albers v. Western Union Tel. Co.*, 98 Iowa 51, 66 N. W. 1040; *Moore v. State Ins. Co.*, 72 Iowa 414, 34 N. W. 183. Such was not the rule before the adoption of the code. *Carter v. Humboldt Fire Ins. Co.*, 12 Iowa 287.

24. See VIII, *infra*.

25. *Freeman v. Paulson*, 107 Minn. 64, 119 N. W. 651; *Disbrow v. Creamery Package Mfg. Co.*, 104 Minn. 17, 115 N. W. 751; *Missouri Valley Land Co. v. Bushnell*, 11 Neb. 192, 8 N. W. 389; *Pearce v. Knapp*, 71 Misc. 324, 127 N. Y. Supp. 1100.

26. *Ashley v. Little Rock*, 56 Ark. 391, 19 S. W. 1058.

That a complaint seeks to recover non-recoverable damages is not ground for demurrer, where it makes out a recoverable right. *Drehrer v. National Surety Co. (Ala.)*, 57 So. 34; *Hayes v. Miller*, 150 Ala. 621, 43 So. 818, 124 Am. St. Rep. 93, 11 L. R. A. (N. S.) 748; *Woodstock Iron Works v. Stockdale*, 143 Ala. 550, 39 So. 335.

A complaint setting forth a valid claim for general or nominal damages is not demurrable because it also seeks

to recover special damages which are not recoverable. *Walls v. Smith & Co.*, 167 Ala. 138, 52 So. 320.

That some of the grounds for claiming special damages set forth in a count are not valid grounds does not render it bad on demurrer, the illegal claims being regarded as surplusage. *Hiner v. Richter*, 51 Ill. 299.

That the damages claimed are remote and speculative. *Central of Georgia R. Co. v. Ashley*, 159 Ala. 145, 48 So. 981.

That all the damages claimed are not recoverable. *Colburn v. Phillips*, 13 Gray (Mass.) 64.

Where a declaration states a claim for actual damages, it is not subject to demurrer for some supposed defect in its claim for extra statutory damages. *Seaboard Air Line Ry. v. Nims*, 61 Fla. 420, 54 So. 779.

Elements of damages, amounts thereof, etc., cannot be raised by demurrer. *Cassells Mills v. Strater Bros. Grain Co.*, 166 Ala. 274, 51 So. 969.

That an improper measure of damages is relied on. *McMillen & Hazen Co. v. Slusher*, 145 Ky. 537, 140 S. W. 654; *Pulaski Stave Co. v. Miller's Creek Lumb. Co.*, 138 Ky. 372, 128 S. W. 96.

Setting up two grounds or measures of damages with respect to which the pleader might be required to elect. *McMillen & Hazen Co. v. Slusher*, 145 Ky. 537, 140 S. W. 657. See XIII, *infra*.

27. On demurrer complainant's rights are to be tested by the allegations in his bill rather than by his prayer for relief. *Laubengayer v. Rohde (Mich.)*, 133 N. W. 535.

A demurrer cannot be sustained merely because the bill contains a superfluous prayer. *Carter, Rice & Co. v. Samuel Hano Co.*, 72 N. H. 549, 58 Atl. 242.

bill is demurrable where it only asks for certain specific relief which cannot be granted.²⁸ In some states, however, a mistake in the relief sought is ground for demurrer.²⁹

That no damages are laid or claimed has been held to be ground for demurrer under the common-law system of pleading.³⁰

Formal defects in the prayer for relief cannot be taken advantage of by demurrer.³¹

X. FAILURE TO STATE A DEFENSE OR COUNTERCLAIM.—That the facts stated in a plea or answer are insufficient to constitute a valid defense to the action may be taken advantage of by demurrer,³² as when a plea does not answer the count of the complaint to which it is addressed,³³ or where it undertakes to answer the declaration or complaint as a whole and in fact answers only a part of it,³⁴ or where

28. *Loggie v. Chandler*, 95 Me. 220, 49 Atl. 1059.

29. **Connecticut.**—Pr., 1908, p. 252, §167; *Gorham v. City of New Haven*, 82 Conn. 153, 72 Atl. 1012; *Van Epps v. Redfield*, 68 Conn. 39, 35 Atl. 809, 34 L. R. A. 360.

In Georgia there may be a special demurrer to the relief prayed. *White v. Scofield*, 84 Ga. 56, 10 S. E. 591.

30. *Teusch v. Kamke*, 63 Md. 274; *McCormick v. Hogan*, 48 Md. 404.

31. That the prayer of a bill is vague, uncertain and prolix. *McPherson v. Davis* (Miss.), 48 So. 625.

The remedy is by motion to make more specific. *Bennett v. Preston*, 17 Ind. 291.

That the prayer asks for a money judgment, but does not state the amount, does not render the petition bad on general demurrer, the prayer not being a part of the cause of action. *Hiatt v. Parker*, 29 Kan. 765.

That allegations as to the measure of damages are irrelevant or insufficient. *State v. Portland Elec. Co.*, 52 Ore. 502, 95 Pac. 722, 98 Pac. 610; *Sunnyside L. Co. v. Willamette Bridge R. Co.*, 20 Ore. 544, 26 Pac. 835.

32. *Mobile Electric Co. v. Sanges*, 169 Ala. 341, 53 So. 176; *Carroll v. Bowen*, 113 Md. 150, 77 Atl. 128.

In Connecticut the statute provides that plaintiff may demur to the answer. Gen. St., 1902, §610.

In Massachusetts the statute provides that plaintiff may demur where "the answer does not state a legal defence to the declaration or to some count thereof substantially in accordance with the rules contained in this

chapter." Rev. Laws, 1902, c. 173, §16, p. 1553.

Florida.—That the plea does not set forth sufficient ground of defense. Gen. St., 1906, §1441.

Where the plea is deficient in substance, the remedy is by demurrer. *Southern Turpentine Co. v. Douglass*, 61 Fla. 424, 54 So. 385; *Heathcote v. Fairbanks, Morse & Co.*, 60 Fla. 97, 53 So. 950.

In justice court, when it contains no defence sufficient in law. Gen. St., 1906, §2079.

In the county court in probate proceedings, where it contains no defense, if true. Gen. St., 1906, §2052.

Demurrer Is the Only Proper Method. *Donovan v. Davis* (Conn.), 82 Atl. 1025.

Demurrer rather than motion to strike is the proper remedy. *St. Louis & S. F. R. Co. v. Phillips*, 165 Ala. 504, 51 So. 638; *Alabama Great So. R. Co. v. Clark*, 136 Ala. 450, 34 So. 917.

33. *United States Fidelity & Guaranty Co. v. Town of Dothan* (Ala.), 56 So. 953.

34. **Ala.**—*Smith v. Heineman*, 118 Ala. 195, 24 So. 364, 72 Am. St. Rep. 150. **Ill.**—*Illinois Cent. R. Co. v. Swift*, 213 Ill. 307, 72 N. E. 737. **Md.** *Lake v. Thomas*, 84 Md. 608; *Willing v. Bozman*, 52 Md. 44. **N. J.**—*Sprague Nat. Bank v. Erie R. Co.*, 62 N. J. L. 474, 41 Atl. 681.

A plea addressed to the complaint as a whole, which is bad as to some counts thereof. *Dixie v. Harrison*, 163 Ala. 304, 50 So. 284; *City Delivery Co. v. Henry*, 139 Ala. 161, 34 So. 389;

it sets up matters which the law would not permit to be proved.³⁵

The codes generally provide that plaintiff may demur to the answer on the ground that it does not state facts sufficient to constitute a defense,³⁶ or is insufficient in law.³⁷

City of Greenville v. Greenville Water Co., 125 Ala. 625, 27 So. 764.

Where it does not appear to which count of the complaint a plea is directed it is presumed that it is directed to each of them, and a demurrer thereto is properly sustained if it is not an answer to one of such counts. *Smiley, Son & Co. v. Keith (Ala.)*, 57 So. 127.

35. A plea seeking to contradict the terms of a written instrument is bad on demurrer. *Rivers v. Brown (Fla.)*, 56 So. 553; *Booske v. Gulf Ice Co.*, 24 Fla. 550, 5 So. 247.

Where the declaration sets out the written instrument relied on *in hæc verba*, a plea adding stipulations and conditions thereto is bad on demurrer. *Solary v. Stultz*, 22 Fla. 263.

36. **Ark.**—*Kirby's Dig.*, §6106. **Cal.** *Code Civ. Proc.*, §444. **Idaho.**—*Rev. Codes*, §4194. **Ia.**—*Code*, §3575. **Minn.** *Rev. Laws*, 1905, §4134; *Campbell v. Jones*, 25 Minn. 155. See *Gause v. Knapp*, 1 Fed. 292. **Mont.**—*Rev. Codes*, 1907, §6555. **Tenn.**—*Shannon's Code*, §4606. **Utah.**—*Comp. Laws*, 1907, §2976. **Wash.**—*Rem. & Ball. Ann. Codes & St.*, §276. **Wis.**—*St.*, 1898, §2658.

Indiana.—"Where the facts stated in any paragraph of the answer are not sufficient to constitute a cause of defense, the plaintiff may demur to it under the rules prescribed for demurring to a complaint." *Burns' Ann. St.*, 1908, §351.

Kentucky.—That it does not state facts sufficient to constitute a defense or to support a defense. *Code Civ. Pr.*, §93.

Nebraska.—May demur to one or more defenses set up in the answer. *Comp. St.*, 1911, §6682.

To an Answer Containing New Matter.—**N. C.**—*Rev.*, 1905, §485. **N. D.** *Rev. Codes*, 1905, §6863. **Ore.**—*L. O. L.*, §78. **S. C.**—*Code Civ. Proc.*, §174. **S. D.**—*Code Civ. Proc.*, §130.

An answer consisting entirely of denials, and containing no new matter, is not subject to demurrer. *Nelson Lumb. Co. v. Pelan*, 34 Minn. 243, 25 N. W. 406.

"Where a denial of a material allegation of the complaint is joined with new matter, and both are pleaded as a separate defense, such so called defense is not demurrable. The only sort of a defense which may be attacked by demurrer is a defense consisting of new matter. . . . The interpolation of a denial is the averment of matter which is not new, and renders the so called defense unassailable by demurrer. *Garrett v. Wood*, 27 App. Div. 312, 50 N. Y. Supp. 950. The new matter contemplated by the code provision admits and seeks to avoid the cause of action set out in the complaint. *Bellinger & Craigue*, 31 Barb. 534." *Onderdonk v. Peale, Peacock & Kerr*, 93 N. Y. Supp. 505.

Affirmative averments which in effect amount only to denials are within the rule, as an averment that a contract was executed and delivered in New York where the complaint alleges that it was executed and delivered in Pennsylvania. *Onderdonk v. Peale, Peacock & Kerr*, 93 N. Y. Supp. 505.

Is the Only Proper Method.—*Multnomah County v. Faling*, 55 Ore. 45, 104 Pac. 964.

Demurrer rather than motion to strike, is the proper remedy. *Goodwin v. Robinson*, 30 Ark. 535; *Wattels v. Minchen*, 93 Iowa 517, 61 N. W. 915.

The question is whether the facts alleged constitute any defense to the action. *Clement v. Riley*, 29 S. C. 286, 6 S. E. 932.

The objection is waived if not taken by demurrer. *Moreland v. Thorn*, 143 Ind. 211, 42 N. E. 639; *Purcell v. Hoesey*, 44 Ind. App. 448, 89 N. E. 520; *Code Civ. Proc. (S. C.)*, §169; *Marthinson v. McCutchen*, 84 S. C. 256, 66 S. E. 120.

37. **Kan.** *Gen. St.*, 1909, §5697; *Okla. Comp. Laws*, 1909, §5642; *Smith-Wogan Hardware & Implement Co. v. Moon Buggy Co.*, 26 Okla. 161, 108 Pac. 1103.

Where It Contains or Consists of New Matter.—**Colo.**—*Code*. 1910, §66. **Idaho.**

In some jurisdictions matter pleaded as a complete defense is demurrable if it is in fact only a partial defense,³⁸ and matter pleaded as a partial defense which, if anything, is a complete defense.³⁹

Counterclaim. — Under the codes plaintiff is generally given the right to demur to a counterclaim on the ground that the facts alleged are not sufficient to constitute a counterclaim,⁴⁰ or that the counterclaim is insufficient in law.⁴¹ In some states it is specifically provided that he may also demur to a counterclaim on the ground that it does not state facts sufficient to constitute a cause of action,⁴² or to entitle de-

In justice's court. Rev. Codes, §4672. **Mont.**—Rev. Codes, 1907, §6556. **N. Y.** Code Civ. Proc., §494; Stroock Plush Co. v. Talcott, 113 N. Y. Supp. 214. **Ohio.**—Code, 1910, §11,323. **Wyo.** Comp. St., 1910, §4387.

A demurrer to a defense consisting of new matter can be taken only on the ground that it is insufficient in law upon its face. Isbell-Porter Co. v. Heineman, 98 N. Y. Supp. 1018.

An objection to an entire defense for insufficiency must be taken by demurrer rather than motion to strike. Cochrane v. Parker, 5 Colo. App. 527, 39 Pac. 361.

A plea of the statute of limitations may be tested by demurrer. Devoe v. Lutz, 117 N. Y. Supp. 339.

38. French v. Busch, 189 Fed. 480.

39. Shattuck v. Guardian Trust Co., 109 N. Y. Supp. 862.

On demurrer to a partial defence, the question is whether it is sufficient for that purpose. N. Y. Code Civ. Proc., §508; Whalen v. Union Bag & Paper Co., 114 N. Y. Supp. 220.

40. **Ark.**—Counterclaim or set-off. Kirby's Dig., §6106. **Cal.**—Code Civ. Proc., §444. **Idaho.**—Rev. Codes, §4194. **Ia.**—Code, §3575. **Minn.**—Rev. Laws, 1905, §4134. **Mont.**—Rev. Codes, 1907, §6555. **N. C.**—Rev., 1905, §485. **N. D.** Rev. Codes, 1905, §6863. **Ohio.**—Code, 1910, §11,324. **Ore.**—L. O. L., §78. **S. C.**—Code Civ. Proc., §174. **S. D.** Code Civ. Proc., §130. **Wash.**—Rem. & Ball. Ann. Codes & St., §276. **Wis.** St., 1898, §2658.

That the counterclaim is insufficient, or that there is a defect of parties must be taken advantage of by demurrer if apparent on the face of the petition. Otherwise it is waived. Wyman v. Herard, 9 Okla. 35, 59 Pac. 1009.

The proper way to raise the question whether a cause of action is the subject of counterclaim is by demurrer,

and all objection on this ground is waived by failing to demur. Lacey v. Fixen, 39 Minn. 46, 38 N. W. 762; Walker v. Johnson, 28 Minn. 147, 9 N. W. 632.

That the matter is not a proper subject of counterclaim can only be taken advantage of by demurrer. First Nat. Bank v. Laughlin, 4 N. D. 391, 61 N. W. 473.

41. **Colo.**—For insufficiency. Code, 1910, §66. **Mont.**—Rev. Codes, 1907, §6556. **N. Y.**—Code Civ. Proc., §494. **Ohio.**—Code, 1910, §11,323. **Wyo.** Comp. St., 1910, §4387.

Demurrer is the proper remedy if the facts alleged do not constitute a counterclaim. Arnold v. Arnold, 119 N. Y. Supp. 451.

Where the counterclaim is in the nature of a complaint, it may be demurred to on any of the grounds specified in Code Civ. Proc., §495. Where it is set up for the purpose of defeating plaintiff's recovery, with no demand for affirmative judgment, it partakes of the nature of a special defense, and can be demurred to only on the ground that it is insufficient in law upon its face, as provided by Code Civ. Proc., §494. Isbell-Porter Co. v. Heineman, 98 N. Y. Supp. 1018.

A counterclaim which demands affirmative relief is not open to a demurrer on the ground that it is insufficient in law upon the face thereof. Sand v. Kenney Mfg. Co., 113 N. Y. Supp. 972.

Where special answers are denominated both as defenses and counterclaims and set-offs, the sufficiency of a demurrer thereto is to be tested by determining whether the facts pleaded allege any one of the three. Isbell-Porter Co. v. Heineman, 98 N. Y. Supp. 1018.

42. **Mont.**—Rev. Codes, 1907, §6558. **N. Y.**—Code Civ. Proc., §495; Isbell-Porter Co. v. Heineman, 98 N. Y.

defendant to the relief demanded,⁴³ or that the cause of action stated is not pleadable as a counterclaim to the action.⁴⁴

In some states the codes provide specifically that plaintiff may demur to a counterclaim for want of jurisdiction,⁴⁵ or want of legal capacity to maintain, or to recover upon the same,⁴⁶ or where it appears on the face thereof that there is another action pending between the same parties for the same cause,⁴⁷ or where there is a defect,⁴⁸ or misjoinder,⁴⁹ of parties, or where several causes of counterclaim are improperly joined,⁵⁰ or are not separately stated,⁵¹ or where the allegations are ambiguous,⁵² or indefinite or uncertain.⁵³

Y. INSUFFICIENCY OF REPLY.—In states where a reply is required, defendant is generally permitted to demur thereto on the ground that it does not state facts sufficient to constitute a defense to the new matter set up in the answer,⁵⁴ or is not a sufficient reply to such new matter,⁵⁵ or is insufficient in law on its face.⁵⁶

Z. SUBSTANTIVE DEFENSES.—Generally speaking, a demurrer will lie where a defense to the action is shown on the face of the plaintiff's pleadings, either in actions at law,⁵⁷ or suits in equity,⁵⁸ as, for ex-

Supp. 1018. **Utah.**—Comp. Laws, 1907, §2977. **Wis.**—St., 1898, §2658.

43. **Ohio** Code, 1910, §11,324. **Wyo.** Comp. St., 1910, §4388.

44. **Mont.**—Is not of the character specified in the statute. Rev. Codes, 1907, §6558. **N. Y.**—Code Civ. Proc., §495; *Isbell-Porter Co. v. Heineman*, 98 N. Y. Supp. 1018. **Utah.**—Comp. Laws, 1907, §2977. **Wis.**—St., 1898, §2658. **Wyo.**—Is not of the character specified in the statute. Comp. St., 1910, §4388.

If the facts alleged constitute a good set-off in favor of the party pleading them, his pleading is not demurrable for insufficiency though it pleads them as a counterclaim and demands an affirmative judgment. *West Allis Lumber Co. v. Wiesenthal*, 141 Wis. 460, 124 N. W. 498; *Schumacher v. Seeger*, 65 Wis. 394, 27 N. W. 30.

The objection is waived where it is apparent on the face of the complaint, if not taken by demurrer. *Heber v. Estate of Heber*, 139 Wis. 472, 121 N. W. 328.

45. See VII, C, *supra*.

46. See VII, D, *supra*.

47. See VII, E, *supra*.

48. See VII, E, *supra*.

49. See VII, F, *supra*.

50. See VII, G, *supra*.

51. See VII, H, *supra*.

52. See VII, K, *supra*.

53. See VII, J, *supra*.

54. **Ark.**—*Kirby's Dig.*, §6110. **Ia.** Code, §3579. **Minn.**—Rev. Laws, 1905,

§4134; *Bausman v. Woodman*, 33 Minn. 512, 24 N. W. 198. **Utah.**—Comp. Laws, 1907, §2982. **Wis.**—St., 1898, §2663.

Indiana.—"The defendant may demur to any paragraph in the reply, on the ground that the facts stated therein are not sufficient to avoid the paragraph of answer, or, if the answer be a set-off or counterclaim, any part thereof." *Burns' Ann. St.*, 1908, §363.

Defendant may demur to an answer to a counterclaim, and plaintiff to a reply to such answer. *Ind. Burn's Ann. St.*, 1908, §363.

55. **Fla.**—Gen. St., 1906, §1441. **Ore.** L. O. L., §80. **Wash.**—Rem. & Ball. Ann. Codes & St., §279.

56. **Mont.**—Rev. Codes, 1907, §6563. **N. Y.**—Code Civ. Proc., §493. **Ohio.** Code, 1910, §11,327. **Wyo.**—Comp. St., 1910, §4386.

If Insufficient.—**Colo.**—Code, §66. **Kan.**—Gen. St., 1909, §5698. **N. C.** Rev., 1905, §486. **N. D.**—Rev. Codes, 1905, §6865. **Okla.**—Comp. Laws, 1909, §5643. **S. C.**—Code Civ. Proc., §176. **S. D.**—Code Civ. Proc., §132.

57. All defenses, other than those to the jurisdiction or in abatement, shall be made by an answer or by a demurrer. *Conn. Gen. St.*, 1902, §607.

A complaint setting forth facts constituting a cause of action and facts constituting a defense thereto is bad on demurrer. *Hallock v. Dillon*, 132 N. Y. Supp. 796.

58. A defense in a suit in equity

ample, the defense of contributory negligence,⁵⁰ or estoppel.⁶⁰

There is a conflict of authority as to whether the defenses of fraud,⁶¹ or *bona fide* purchaser may be so raised.⁶²

That the contract sued on is void may be taken advantage of by demurrer;⁶³ but the contrary is true where it is merely voidable.⁶⁴

Former adjudication may generally be taken advantage of by demurrer if apparent on the face of the pleading,⁶⁵ though there is authority to the contrary.⁶⁶

Statute of Frauds.—In some states the defense of the statute of frauds may be taken advantage of by demurrer,⁶⁷ while in others it

may be taken by demurrer. Mass. Rev. Laws, 1902, c. 159, §13, p. 1390.

A demurrer is applicable to any defense which may be made out from the allegations in a bill. Taylor v. Holmes, 14 Fed. 498.

Matters detrimental to complainant's case alleged in the bill may be taken advantage of by demurrer unless explained. Post v. Beacon Vacuum Pump & Electrical Co., 89 Fed. 1, 32 C. C. A. 151.

"Matter in bar can be taken advantage of by demurrer when it is stated without sufficient avoidance in the bill itself." Prescription. Miles v. United Box Board Co. (Me.), 80 Atl. 706.

Matter in bar of the relief sought by the bill may form the subject of a demurrer if it is fully set forth and apparent on the face of the bill, and there is no further matter to control it. Tappan v. Evans, 11 N. H. 311.

In an action for libel the defense of privilege, being affirmative in its nature, can be raised by demurrer only when all the facts essential to its existence appear in the petition. Bibb v. Crawford, 6 Ga. App. 145, 64 S. E. 488.

59. Ga.—Paterson v. Central R. & B. Co., 85 Ga. 653, 11 S. E. 872. Ind. Roberts v. Indianapolis St. R. Co., 158 Ind. 634, 64 N. E. 217. Ky.—Favre v. Louisville & N. R. Co., 91 Ky. 541, 16 S. W. 370. Minn.—Clark v. Chicago, M. & St. P. R. Co., 28 Minn. 69, 9 N. W. 75.

60. Stone v. Cook, 179 Mo. 534, 64 S. W. 287, 78 S. W. 801.

61. In Michigan it may not be. People v. Detroit, G. H. & M. R. Co. (Mich.), 135 N. W. 87.

62. In Minnesota it may be. Newton v. Newton, 46 Minn. 33, 48 N. W. 450.

In Tennessee it may not be. Dunham v. Harvey, 111 Tenn. 620, 69 S. W. 772.

63. That the note sued on was executed on Sunday. Clough v. Goggins, 40 Iowa 325.

Not unless its invalidity appears on the face of the petition. Coons v. Green, 55 Tex. Civ. App. 612, 120 S. W. 1108.

64. Advantage of such fact can only be taken by answer. Western Union Tel. Co. v. Eskridge, 7 Ind. App. 208, 33 N. E. 238.

65. Ga.—Williams v. Cheatham, 99 Ga. 301, 25 S. E. 698. Ill.—Ferriman v. Gillespie, 250 Ill. 369, 95 N. E. 495. N. M.—Lockhart v. Leeds, 12 N. M. 156, 76 Pac. 312. Tex.—Fricke v. Wood, 31 Tex. Civ. App. 167, 71 S. W. 784.

In Equity.—Keen v. Brown, 46 Fla. 487, 35 So. 401; Holtheide v. Smith's Guardian, 27 Ky. L. Rep. 60, 84 S. W. 321.

Not Unless It Is Apparent on the Face of the Pleading.—Reid v. Caldwell, 120 Ga. 718, 48 S. E. 191; First Nat. Bank v. Williams, 126 Ind. 423, 26 N. E. 75.

66. Since it is not enumerated among the statutory grounds of demurrer, and this is particularly true where it does not appear on the face of the petition. Beattie Mfg. Co. v. Gerardi, 166 Mo. 142, 65 S. W. 1035.

67. Harper v. Goldschmidt, 156 Cal. 245, 104 Pac. 451; Wilson Sewing Machine Co. v. Schnell, 20 Minn. 40.

Where it affirmatively appears that the contract is verbal and within the statute, and there is no showing of part performance. Russell v. Wisconsin, M. & P. R. Co., 39 Minn. 145, 39 N. W. 302.

That the contract on which a counterclaim is based is void under the stat-

can only be set up by answer even though it is apparent on the face of the complaint.⁶⁸

Limitations.—In equity limitations may generally be taken advantage of by demurrer if apparent on the face of the bill,⁶⁹ though the courts of some states hold to the contrary.⁷⁰

At common law the defense of the statute of limitations could not be taken advantage of by demurrer in actions at law, even though it appeared from the face of the pleading that the action was barred, and this rule still obtains in some jurisdictions.⁷¹ In most states,

ute of frauds, where it affirmatively appears on the face of the complaint that it is not in writing. *Mendelsohn v. Banov*, 57 S. C. 147, 35 S. E. 499.

It Must Affirmatively Appear That the Cause of Action Is Barred.—A demurrer will not lie unless the complaint affirmatively shows that the contract is oral. *Levy v. Ryland*, 32 Nev. 460, 109 Pac. 905, and cases cited.

Not where the complaint is silent as to whether or not the contract is in writing. *Levy v. Ryland*, 32 Nev. 460, 109 Pac. 905.

Not where there is no allegation in the petition that the agreement was not in writing and it is not necessary to allege that it was. *Horn v. Shamblin*, 57 Tex. 243.

Where the petition does not show that a contract within the statute of frauds is in writing, it is demurrable. *Fiscal Court v. Board of Trustees (Ky.)*, 118 S. W. 298; *Smith v. Theobald*, 86 Ky. 141, 5 S. W. 394.

In Iowa the statute expressly provides that defendant may demur to the petition where it fails to show that the cause of action is in writing where it should be so evidenced. Code, §3561. *Babcock v. Meek*, 45 Iowa 137.

Where the defect is apparent on the face of the petition, the objection must be taken by demurrer rather than by answer, and if not so taken it will be deemed waived. *Wiseman v. Thompson*, 94 Iowa 607, 63 N. W. 346.

68. *Phillips v. Hardenburg*, 181 Mo. 463, 80 S. W. 891.

69. **U. S.**—*McDonald v. Thompson*, 184 U. S. 71, 22 Sup. Ct. 297, 46 L. ed. 437; *Coddington v. Pensacola & G. R. Co.*, 103 U. S. 409, 26 L. ed. 400; *National Bank v. Carpenter*, 101 U. S. 567, 25 L. ed. 815; *City of Memphis v. Postal Tel. Cable Co.*, 145 Fed. 602, 76 C. C. A. 292; *Taylor v. Holmes*, 14 Fed. 498. **Ala.**—*Tyson v. Austill*, 168 Ala. 525, 53 So. 263; *Fowler v. Ala-*

bama Iron & Steel Co., 164 Ala. 414, 51 So. 393; *Van Ingen v. Duffin*, 158 Ala. 318, 48 So. 507; *Allen v. Clarke*, 106 Ala. 600, 17 So. 713. **Ill.**—*Peterson v. Manhattan Life Ins. Co.*, 244 Ill. 329, 91 N. E. 466; *Porter v. Armour & Co.*, 241 Ill. 145, 89 N. E. 356; *Wieczorek v. Adamski*, 114 Ill. App. 161. **Me.**—*Mooers v. Kennebec & P. R. Co.*, 58 Me. 279. **Md.**—*Belt v. Bowie*, 65 Md. 350, 4 Atl. 295. **Vt.**—*Wilder's Exr. v. Wilder*, 82 Vt. 123, 72 Atl. 203; *Sherman v. Windsor Mfg. Co.*, 57 Vt. 57. **W. Va.**—*Crawford's Admr. v. Turner's Admr.*, 67 W. Va. 564, 68 S. E. 179. **Wis.**—*Howell v. Howell*, 15 Wis. 55.

Must clearly and distinctly appear from the bill. *Bacon v. Rives*, 106 U. S. 99, 1 Sup. Ct. 3, 27 L. ed. 69.

Not where the bill does not allege the giving of a statutory notice necessary to start the running of limitations. *Baker v. Atkins*, 62 Me. 205.

70. *People v. Detroit*, G. H. & M. R. Co. (Mich.), 135 N. W. 87.

71. **U. S.**—*Gray v. Grand Trunk Western R. Co.*, 156 Fed. 736, 84 C. C. A. 392. **Ala.**—*Norton v. Kumpke*, 121 Ala. 446, 25 So. 841; *Huss v. Central R. & B. Co.*, 66 Ala. 472. **Ill.**—*Heimberger v. Elliot Switch Co.*, 245 Ill. 448, 92 N. E. 297; *Peterson v. Manhattan Life Ins. Co.*, 244 Ill. 329, 91 N. E. 466; *Leshner v. United States Fidelity & Guaranty Co.*, 239 Ill. 502, 88 N. E. 208; *Langan v. Mik's Grove Special Drainage Dist.*, 239 Ill. 430, 88 N. E. 182; *Wall v. Chesapeake & O. R. Co.*, 200 Ill. 66, 65 N. E. 632. In mandamus. **Mass.**—*Miller v. Aldrich*, 202 Mass. 109, 88 N. E. 441; *Hodgdon v. Haverhill*, 193 Mass. 327, 79 N. E. 818. **N. J.**—*Oram v. Mayor*, etc., of New Brunswick, 64 N. J. L. 19, 44 Atl. 883. **N. Y.**—*Zebbley v. Farmers' Loan & Trust Co.*, 139 N. Y. 461, 34 N. E. 1067.

however, limitations may now be availed of by demurrer where it is apparent on the face of the pleading.⁷² It is specifically enum-

At Common Law.—Howell v. Howell, 15 Wis. 55.

Under the English practice it cannot be. *Chemung Canal Bank v. Lowery*, 93 U. S. 72, 23 L. ed. 806.

72. U. S.—Bauserman v. Blunt, 147 U. S. 647, 13 Sup. Ct. 466, 37 L. ed. 316; *Upton v. McLaughlin*, 105 U. S. 640, 26 L. ed. 1147; *Chemung Canal Bank v. Lowery*, 93 U. S. 72, 23 L. ed. 806; *Kendall v. United States*, 107 U. S. 123, 2 Sup. Ct. 277, 27 L. ed. 437 (action against the United States in the court of claims). **Ariz.**—Wagner v. Boyce, 6 Ariz. 71, 52 Pac. 1122. **Cal.**—McFarland v. Holcomb, 123 Cal. 84, 55 Pac. 761; *Cameron v. City & County of San Francisco*, 68 Cal. 390, 9 Pac. 430. **Colo.**—Brown v. Bell, 46 Colo. 163, 103 Pac. 380, 23 L. R. A. (N. S.) 1096. **Ga.**—McClaren v. Williams, 132 Ga. 352, 64 S. E. 65; *Thornton v. Jackson*, 129 Ga. 700, 59 S. E. 905; *Lang & Co. v. Camp Phosphate Co.*, 113 Ga. 1011, 39 S. E. 474; *Caldwell v. Montgomery*, 8 Ga. 106. **Idaho.**—*Chemung Mining Co. v. Hanley*, 9 Idaho 786, 77 Pac. 226. **Kan.**—Walker v. Fleming, 37 Kan. 171, 14 Pac. 470. **Md.**—Attrill v. Huntington, 70 Md. 191, 16 Atl. 651, 2 L. R. A. 779; *Biays v. Roberts*, 68 Md. 510, 13 Atl. 366. **Minn.**—*Thornton v. City*, 106 Minn. 233, 118 N. W. 834; *Board of County Comrs. v. Miller*, 101 Minn. 294, 112 N. W. 276; *Minneapolis Threshing Mach. Co. v. Jones*, 89 Minn. 184, 94 N. W. 551; *Trebby v. Simmons*, 38 Minn. 508, 38 N. W. 693; *Litchfield v. McDonald*, 35 Minn. 167, 28 N. W. 191. **Mo.**—Burrus v. Cook, 215 Mo. 496, 114 S. W. 1065, 117 Mo. App. 385, 93 S. W. 888; *State v. Bird*, 22 Mo. 470; *St. Louis Gas Light Co. v. City of St. Louis*, 84 Mo. 202, *affirming*, 11 Mo. App. 55. **Neb.**—*Bank of Miller v. Moore*, 81 Neb. 566, 116 N. W. 167; *Newman Grove State Bank v. Linderholm*, 68 Neb. 364, 94 N. W. 616; *Hower v. Aultman*, 27 Neb. 251, 42 N. W. 1039; *Hurley v. Cox*, 9 Neb. 230, 2 N. W. 705. **Nev.**—*State v. Yellow Jacket S. M. Co.*, 14 Nev. 220. **Tenn.**—*Thompson v. C. N. O. & T. P. R. Co.*, 109 Tenn. 268, 70 S. W. 612; *Whaley v. Catlett*, 103 Tenn. 347, 53 S. W. 131. **Tex.**—*Hudson v. Wheeler*, 34 Tex. 356; *Pryor v. Moore*, 8 Tex.

250; *Coles v. Kelsey*, 2 Tex. 541. **Utah.**—*Nelden-Judson Drug Co. v. Commercial Nat. Bank*, 27 Utah 59, 74 Pac. 195; *Fullerton v. Bailey*, 17 Utah 85, 53 Pac. 1020; *Thomas v. Glendinning*, 13 Utah 47, 44 Pac. 652. **Wyo.**—*Columbia Sav. & Loan Assn. v. Clause*, 13 Wyo. 166, 78 Pac. 708; *Marks v. Board of Comrs.*, 11 Wyo. 488, 72 Pac. 894; *Cowhick v. Shingle*, 5 Wyo. 87, 37 Pac. 689, 25 L. R. A. 608; *Bonni-field v. Price*, 1 Wyo. 172.

Where the petition shows that the action is barred and that plaintiff is not within any of the statutory exceptions which save his right to sue. *Stillwell v. Leavy*, 84 Ky. 379; *Chiles v. Drake*, 2 Met. (Ky.) 146.

The rule is otherwise where the petition does not show that plaintiff is not within any of the statutory exceptions. *Com. v. Gardner*, 17 Ky. L. Rep. 75.

The statute will not be applied on general demurrer to the whole petition unless it goes to defeat the whole case as presented by the petition, and hence will not be applied to defeat the claims of a part only of the plaintiffs where there is a possibility of saving exceptions in favor of the others, which are not excluded by the averments of the petition. *Spalding v. St. Joseph Industrial School*, 21 Ky. L. Rep. 1107. See also *Schneider v. Schleutker*, 23 Ky. L. Rep. 951; *Farmers Nat. Bank v. Stone*, 22 Ky. L. Rep. 831.

It must affirmatively appear on the face of the pleading that the cause of action is barred. **Cal.**—*Williams v. Bergin*, 116 Cal. 56, 47 Pac. 877; *Donahue v. Stockton Gas & E. Co.*, 6 Cal. App. 276, 92 Pac. 196. **Md.**—*Sinclair v. Auxiliary Realty Co.*, 99 Md. 223, 57 Atl. 664. **Neb.**—*Bank of Bladen v. David*, 53 Neb. 608, 74 N. W. 42; *Mills v. Rice*, 3 Neb. 76. **Tex.**—*Rucker v. Dailey*, 66 Tex. 284, 1 S. W. 316; *Sievert v. Underwood* (Tex. Civ. App.), 124 S. W. 721; *Newsom & Johnson v. Sharman* (Tex. Civ. App.), 119 S. W. 912. **Wyo.**—*Columbia Sav. & Loan Assn. v. Clause*, 13 Wyo. 166, 78 Pac. 708; *Marks v. Board of Comrs.*, 11 Wyo. 488, 72 Pac. 894.

Not when it does not appear on the

erated among the statutory grounds of demurrer in some of the states.⁷³

Laches may generally be availed of on demurrer,⁷⁴ especially where

face of the complaint when the cause of action accrued, as where the date is alleged under a *videlicet*. *Conroy v. Oregon Constr. Co.*, 23 Fed. 71.

The statute of limitations is a defense which plaintiff is not bound to negative. *French v. Busch*, 189 Fed. 480.

73. Ia.—Code, §3561. **Ohio.**—Code, 1910, §11,309; *Seymour v. Railway Co.*, 44 Ohio St. 12, 4 N. E. 236; *Combs v. Watson*, 32 Ohio St. 228; *Vore v. Woodford*, 29 Ohio St. 245. **Ore.**—L. O. L., §68; *Scott v. Christenson*, 46 Ore. 417, 80 Pac. 731. **Wash.**—Rem. & Ball. Ann. Codes & St., §§155, 259; *Joergenson v. Joergenson*, 28 Wash. 477, 68 Pac. 913; *Board, etc. v. First Presbyterian Church*, 19 Wash. 455, 53 Pac. 671. **Wis.**—St., 1898, §2649.

Is Not Raised By a Demurrer For Want of Facts.—*Joergenson v. Joergenson*, 28 Wash. 477, 68 Pac. 913; *Board, etc. v. First Presbyterian Church*, 19 Wash. 455, 53 Pac. 671.

It must affirmatively appear on the face of the pleading that the action is barred. *Goring v. Fitzgerald*, 105 Iowa 507, 75 N. W. 358; *Hawkins v. Donnerberg*, 40 Ore. 97, 66 Pac. 691; *Weiss v. Bethel*, 8 Ore. 523.

Will Not Lie To a Part Only of the Claim.—*Oregon v. Portland Gen. Elec. Co.*, 53 Ore. 162, 99 Pac. 427.

Is waived if not taken advantage of by demurrer where it appears on the face of the complaint. *Spaur v. McBee*, 19 Ore. 76, 23 Pac. 818.

May be raised by answer where it does not clearly appear on the face of the complaint. *Damon v. Leque*, 17 Wash. 573, 50 Pac. 485.

Contract Limitations.—As to whether this provision applies in the case of a contract limitation see *Ausplund v. Aetna Indemnity Co.*, 47 Ore. 10, 81 Pac. 577, 82 Pac. 12.

74. U. S.—*Hardt v. Heidweyer*, 152 U. S. 547, 14 Sup. Ct. 671, 38 L. ed. 548; *Bryan v. Kales*, 134 U. S. 126, 10 Sup. Ct. 435, 33 L. ed. 829; *Speidel v. Henrici*, 120 U. S. 377, 7 Sup. Ct. 610, 30 L. ed. 718; *Wollensak v. Reiher*, 115 U. S. 96, 5 Sup. Ct. 1137, 29 L. ed. 350; *Lansdale v. Smith*, 106 U. S. 391, 1 Sup. Ct. 350, 27 L. ed. 219; *Coddington v. Pensacola & G.*

R. Co., 103 U. S. 409, 26 L. ed. 400; *Maxwell v. Kennedy*, 8 How. 210, 12 L. ed. 1051; *Post v. Beacon Vacuum Pump & Electrical Co.*, 89 Fed. 1, 32 C. C. A. 151; *Robinson v. Mutual Reserve Life Ins. Co.*, 175 Fed. 629; *Taylor v. Holmes*, 14 Fed. 498. **Ala.**—*Snodgrass v. Snodgrass*, 58 So. 201; *Tyson v. Austil*, 168 Ala. 525, 53 So. 263; *Fowler v. Alabama Iron & Steel Co.*, 164 Ala. 414, 51 So. 393; *Van Ingen v. Duffin*, 158 Ala. 318, 48 So. 507; *Allen v. Clarke*, 106 Ala. 600, 17 So. 713. **Cal.**—*Kleinclaus v. Dutard*, 147 Cal. 245, 81 Pac. 516; *Hopkins v. Lewis* (Cal. App.), 122 Pac. 433. **Del.**—*Martin v. Martin*, 74 Atl. 864. **Fla.**—*Murrell v. Peterson*, 57 Fla. 480, 49 So. 31. **Ill.**—*Clary v. Schaaek*, 253 Ill. 471, 97 N. E. 1070; *Porter v. Armour & Co.*, 241 Ill. 145, 89 N. E. 356; *Venner v. Chicago City R. Co.*, 236 Ill. 349, 86 N. E. 266; *Schnell v. Rock Island*, 232 Ill. 89, 83 N. E. 462; *Coolidge v. Rhodes*, 199 Ill. 24, 64 N. E. 1074, 14 L. R. A. (N. S.) 874. **Kan.**—*City of Leavenworth v. Douglass*, 59 Kan. 416, 53 Pac. 123. **Md.**—*Noble v. Turner*, 69 Md. 519, 16 Atl. 124. **Mass.**—*Stewart v. Joyce*, 201 Mass. 301, 87 N. E. 613; *Tetrault v. Fournier*, 187 Mass. 58, 72 N. E. 351. **Minn.**—*Sanborn v. Eads*, 38 Minn. 211, 36 N. W. 333. **Neb.**—*Hawley v. Von Lancken*, 75 Neb. 597, 106 N. W. 456.

“Where the bill distinctly and without the aid of inference discloses laches, and no valid excuse for delay is pleaded.” *Bower v. Stein*, 177 Fed. 673, 101 C. C. A. 299.

Regardless of whether the bill attempts to excuse the delay. *Kerfoot v. Billings*, 160 Ill. 563, 43 N. E. 804; *Wieczorek v. Adamski*, 114 Ill. App. 161.

Only when it appears on the face of the bill. *Turners Falls Fire Dist. v. Miller's Falls Water Supply Dist.*, 159 Mass. 263, 75 N. E. 630.

It need not of necessity be considered on demurrer. *London Guarantee & Acc. Co. v. Bell Tel. Co.*, 171 Fed. 278.

Lapse of Time.—Adverse possession. *Williams v. First Presbyterian Soc.*, 1 Ohio St. 478.

the bill attempts to excuse the delay,⁷⁵ though there is authority to the contrary.⁷⁶

A.A. MISCELLANEOUS GROUNDS. — Want of proferet,⁷⁷ that the pleading sets out the evidence rather than the facts deduced therefrom,⁷⁸ that essential facts are hypothetically pleaded,⁷⁹ that matter in abatement is pleaded in bar,⁸⁰ and that a plea is not drawn out,⁸¹ have been held to be grounds of demurrer.

That a pleading was filed too late,⁸² or without leave of court,⁸³ is not ground for demurrer.

That the declaration is not entitled in any court or term,⁸⁴ that a pleading is sham or frivolous,⁸⁵ designating a party by initials instead of by his full Christian name,⁸⁶ unnecessarily numbering the paragraphs of a pleading,⁸⁷ failure to show that leave was obtained to sue,⁸⁸ clerical errors,⁸⁹ and impertinence,⁹⁰ are not reached by demurrer under the codes. A fraudulent omission to stamp an instrument sued on has been held not to be ground for demurrer.⁹¹

That the action is prematurely brought is ground for demurrer, both under the rules of common-law pleading and under the codes and practice acts.⁹²

Defects or mistakes in the writ are not ground for demurrer.⁹³

75. *Coryell v. Klehm*, 157 Ill. 462, 41 N. E. 864; *Wieczorek v. Adamski*, 114 Ill. App. 161.

76. *Mich.*—*People v. Detroit*, G. H. & M. R. Co., 135 N. W. 87. **N. Y.** *Sage v. Culver*, 147 N. Y. 241, 41 N. E. 513; *Zebble v. Farmers' Loan & Trust Co.*, 139 N. Y. 461, 34 N. E. 1067. **Vt.**—*Wilder's Exr. v. Wilder*, 82 Vt. 123, 72 Atl. 203; *Gleason v. Carpenter*, 74 Vt. 399, 52 Atl. 966; *Drake v. Wild*, 65 Vt. 611, 27 Atl. 427; *Payne v. Hathaway*, 3 Vt. 212.

77. *Tenn.* Shannon's Code, §4608.

78. *Hagerman v. Wigent*, 108 Mich. 192, 65 N. W. 756.

79. *Stroock Plush Co. v. Talcott*, 113 N. Y. Supp. 214.

80. *Norris v. Scott*, 6 Ind. App. 18, 32 N. E. 103.

81. Plea of set-off. *Voigtmann v. Wilmington Trust & Bldg. Corp.*, 7 Penn. (Del.), 265, 78 Atl. 920.

82. *Northum v. Kellogg*, 15 Conn. 569.

That a plea *puis darrein continuance* was not filed in proper time. *Rowell v. Hayden*, 40 Me. 582; *Thomas v. Van Doren*, Pease & Peers, 6 Mo. 201.

83. Amended pleading. *Harvey v. Meigs* (Cal. App.), 119 Pac. 941; *Columbia Sav. & Loan Assn. v. Clause*, 13 Wyo. 166, 78 Pac. 708.

84. *Jordan v. Hart*, 14 Ark. 184.

85. *Williams v. Williams*, 115 Iowa 520, 88 N. W. 1057.

Where an answer is evasive, equivocal and frivolous, the remedy is by motion to strike rather than general demurrer. *Fosdick v. Kingdoods*, 5 Ohio N. P. 330.

86. *Gardner v. McClure*, 6 Minn. 250.

87. Of a petition which states a single cause of action. *Minter v. Gose*, 13 Wyo. 178, 78 Pac. 948.

88. To sue a receiver. *Leuthold v. Young*, 32 Minn. 122, 19 N. W. 652.

Failure to obtain leave to sue on the bond of an assignee in insolvency. *McCollister v. Bishop*, 78 Minn. 228, 80 N. W. 1118; *Leuthold v. Young*, 32 Minn. 122, 19 N. W. 652.

89. In the copy of the complaint served. *Hall v. Marvin*, 126 N. Y. Supp. 206.

90. Remedy is by motion. *Hayden v. Anderson*, 17 Iowa 158; *Sparks v. Smeltzer*, 77 Kan. 44, 93 Pac. 338.

91. *Campbell v. Wilcox*, 10 Wall. (U. S.) 421, 19 L. ed. 973.

92. *Smith v. Jewell*, 71 Conn. 473, 42 Atl. 657. See also *Southey v. Dowling*, 70 Conn. 153, 39 Atl. 113; *Gate City Fire Ins. Co. v. Thornton*, 5 Ga. App. 585, 63 S. E. 638; *Realty Co. v. Ellis*, 4 Ga. App. 402, 61 S. E. 832.

93. Defendant cannot demur for de-

In equity the failure of a bill to pray for process,⁹⁴ or the failure to name the defendants against whom process is prayed,⁹⁵ is ground for demurrer.

Service.—That a pleading has not been served is not ground for demurrer,⁹⁶ nor is a defect in the service of a writ of replevin.⁹⁷

The question of venue may generally be raised by demurrer, where apparent on the face of the pleading.⁹⁸

That necessary facts are alleged by way of conclusion only is ground for demurrer under the common-law system of pleading,⁹⁹ and under the codes.¹

Argumentativeness is ground for demurrer under the common-law system of pleading,² but not under the codes.³

Objections to Amendments.—The objection that an amended pleading sets up a new cause of action,⁴ or defense,⁵ or substitutes new parties,⁶

facts or mistakes in the writ, since a demurrer never reaches the writ. Will's Gould Pl. 471.

The form and validity of the summons cannot be challenged by demurrer to the declaration, since it forms no part of it. *Lott v. Leventhal*, 80 N. J. L. 216, 76 Atl. 328.

94. *Armstrong Cork Co. v. Merchants Refrigerating Co.*, 171 Fed. 778; *United States v. Agler*, 62 Fed. 824.

95. Is a defect of form. *Keen v. Jordan*, 13 Fla. 327.

That the prayer for process of subpoena does not contain the names of all the defendants named in the introductory part of the bill. *Goebel v. American Ry. Supply Co.*, 55 Fed. 825.

96. That a bill has not been served is not ground for demurrer to the same. *Livingston v. Marshall*, 82 Ga. 281, 11 S. E. 542.

97. Objections to the authority of the officer who served a writ of replevin and to the form of the replevin bond taken in the course of the service. *Smith v. Dexter*, 121 Mass. 597.

98. In transitory actions the omission of a county in the declaration can be taken advantage of only by demurrer. Will's Gould Pl. 296.

May be raised by special demurrer when a special appearance is made for that purpose only, and before answering to the merits. *Ware-Kramer Tobacco Co. v. American Tobacco Co.*, 178 Fed. 117.

That a suit in equity is brought in the wrong county. *Pollard v. Phalen*, 98 Miss. 155, 53 So. 453.

99. *Mobile Electric Co. v. Sanges*, 169 Ala. 341, 53 So. 176; *Tyson v.*

Austill, 168 Ala. 525, 53 So. 263; *DeLeon v. Walters*, 163 Ala. 499, 50 So. 934.

In Georgia.—*Southern R. Co. v. King*, 217 U. S. 524, 30 Sup. Ct. 594, 54 L. ed. 868, affirming 160 Fed. 332.

1. *Middaugh v. Wilson*, 30 Ind. App. 112, 65 N. E. 555. See also *Norris v. Scott*, 6 Ind. App. 18, 32 N. E. 103; *Iselin v. Simon*, 62 Minn. 128, 64 N. W. 143.

2. Defenses which are merely argumentative denials are demurrable. *Sovereign Bank of Canada v. Stanley*, 176 Fed. 743.

3. *Davis v. Bonar & Kearns*, 15 Iowa 171.

4. Remedy is by motion to strike. *Ala.*—*North Italian Colonial Co. v. Janovich—Calafiore Co.*, 166 Ala. 201, 52 So. 339; *Moore v. First Nat. Bank*, 139 Ala. 595, 36 So. 777. *Ga.*—*McGehee v. Jones*, 10 Ga. 127. *Ia.*—*Williams v. Williams*, 115 Iowa 520, 88 N. W. 1057. *Mo.*—*Beattie Mfg. Co. v. Gerardi*, 166 Mo. 142, 65 S. W. 1035.

A demurrer cannot properly be sustained to an amended pleading at the next term on the ground that it is a departure from the original pleading. *Randolph's Admr. v. Snyder*, 139 Ky. 159, 129 S. W. 562.

5. That an amended answer is a departure from the original one cannot be raised by demurrer. *Tecumseh State Bank v. Maddox*, 4 Okla. 583, 46 Pac. 563.

6. Remedy is by motion to strike. *North Italian Colonial Co. v. Janovich—Calafiore Co.*, 166 Ala. 201, 52 So. 339.

or was filed without leave of court,⁷ or that there was no case made in the original pleading to be amended,⁸ cannot be taken by demurrer to such amended pleading, though it has been held that demurrer will lie where a count added by amendment is a departure from the cause of action originally stated.⁹ Failure to file an amended pleading after demurrer sustained is not ground for demurrer.¹⁰

VIII. GENERAL DEMURRERS. — A. DEFINITION AND NATURE. A general demurrer is one which does not specially assign any particular cause of demurrer, but merely asserts, in general terms, the legal insufficiency of the pleading to which it is directed.¹¹

In code states the term is generally applied to a demurrer on the ground that the pleading does not state facts sufficient to constitute a cause of action or defense.¹²

Abolished. — In some states general demurrers have been abolished.¹³

B. OBJECTIONS AND DEFECTS REACHED BY GENERAL DEMURRER. — 1. **Under the Rules of Common Law Pleading.** — Under the common-law system of pleading a general demurrer questions the sufficiency of the pleading to which it is addressed to state a cause of action or defense.¹⁴ Such a demurrer reaches only defects of substance in the

7. *Harvey v. Meigs* (Cal. App.), 119 Pac. 941; *Columbia Sav. & Loan Assn. v. Clause*, 13 Wyo. 166, 78 Pac. 708.

8. *McGehee v. Jones*, 10 Ga. 127.

9. *Southern Ry. Co. v. Adams Mach. Co.*, 165 Ala. 436, 51 So. 779.

10. That plaintiff did not file an amended bill after the sustaining of a demurrer to a part of the original bill. *Shipley v. Jacob Tome Institute*, 99 Md. 520, 58 Atl. 200.

11. Will's Gould Pl. 578; *Andrews Steph. Pl.* (2nd ed.) §139, p. 266.

"A general demurrer is an objection to a pleading because it does not state facts sufficient to constitute a cause of action or a defense, or because it does not state facts sufficient to support a cause of action or a defense." Ky. Code Civ. Pr., §93.

A demurrer is general when no particular cause is alleged. *Christmas v. Russell*, 5 Wall. (U. S.) 290, 18 L. ed. 475; *Neal v. Hanson*, 60 Me. 84.

It "excepts to the sufficiency of the pleading in general terms, without showing specially the nature of the objection." *Tyler v. Hand*, 7 How. (U. S.) 573, 12 L. ed. 824.

12. *Boldt v. Budwig*, 19 Neb. 739, 28 N. W. 280.

A demurrer to a complaint because it does not state facts sufficient to constitute a cause of action is equivalent to a general demurrer at common

law. *Alley v. Nott*, 111 U. S. 472, 4 Sup. Ct. 495, 28 L. ed. 491.

13. Alabama Code, 1907, §5340, providing that no demurrer can be allowed but to matter of substance, which the party demurring specifies, operates to abolish general demurrers and to substitute special demurrers therefor. *Henley v. Bush*, 33 Ala. 636.

14. It is only for failure to make out a *prima facie* case in the petition that a general demurrer will lie. *Superior City v. Ripley*, 138 U. S. 93, 11 Sup. Ct. 288, 32 L. ed. 914.

A general demurrer is sufficient where it is apparent that under the statements of the petition as made there can be no right of action. *Harrell v. Atkinson*, 9 Ga. App. 150, 70 S. E. 954.

The only question that can be considered under it is whether any cause of action or ground of defense is disclosed in the pleading demurred to. *Williams v. Warnell*, 28 Tex. 610.

A declaration is sufficient on general demurrer if it sets forth facts which, being proved and not avoided, would entitle plaintiff to judgment. *Jurnick v. Manhattan Optical Co.*, 66 N. J. L. 380, 49 Atl. 681.

On general demurrer to a plea, the only question is whether it sets forth a substantial defence to the action, regardless of defects of form. *Mitchell*

pleading to which it is addressed,¹⁵ and not defects of form.¹⁶ Thus, except as otherwise provided by statute, such a demurrer is sufficient

v. Wedderburn, 68 Md. 139, 11 Atl. 760.

"A general demurrer lies to a plea which on its face does not present a defense to the action." *Leathe v. Thomas*, 109 Ill. App. 434, *affirmed* 218 Ill. 246, 75 N. E. 810.

Under the Texas practice, the office of a general demurrer is similar to that assigned to it in the common law system of pleading, and the only question which will be entertained under it is whether the pleading demurred to discloses the existence of any cause of action or defense. *Warner v. Bailey*, 7 Tex. 517.

The petition is good on general demurrer if by evidence legally admissible under it plaintiff could show a right of recovery. *Maek v. Houston, E. & W. T. R. Co.* (Tex. Civ. App.), 134 S. W. 846.

The court should consider everything as properly alleged which by reasonable construction is embraced in the allegations contained in the petition. *Gibbens v. Bourland* (Tex. Civ. App.), 145 S. W. 274.

15. **U. S.**—*Tyler v. Hand*, 7 How. 573, 12 L. ed. 824. **Ill.**—*Wilkinson v. Cosmopolitan Life Ins. Assn.*, 154 Ill. App. 195. **Me.**—*Anderson v. Eastern Coupling Co.*, 81 Atl. 167. **Pa.**—*Com. v. Cross Cut R. Co.*, 53 Pa. 62.

A general demurrer is sufficient where the objection is on matter of substance. *Andrews Steph. Pl.* (2nd ed.), §139, p. 266. **U. S.**—*Christmas v. Russell*, 5 Wall. 290, 18 L. ed. 475. **Ga.**—*Wrightsville & T. R. Co. v. Vaughan*, 9 Ga. App. 371, 71 S. E. 691. **Ill.** *Mutual Acc. Assn. v. Tuggle*, 138 Ill. 428, 28 N. E. 1066, *reversing*, 39 Ill. App. 509.

In quo warranto. *Mayor v. Park Comrs.*, 44 Mich. 602, 7 N. W. 180.

16. **U. S.**—*Pendleton County v. Amy*, 13 Wall. 297, 20 L. ed. 579; *Christmas v. Russell*, 5 Wall. 210, 18 L. ed. 475. **Ga.**—*National Duck Mills v. Catlin & Co.*, 73 S. E. 413. **Me.**—*Anderson v. Eastern Coupling Co.*, 81 Atl. 167; *Trask v. Chase*, 107 Me. 137, 77 Atl. 698; *Hare v. Dean*, 90 Me. 308, 38 Atl. 227; *Inhabitants of Wellington v. Small*, 89 Me. 154, 36 Atl. 107; *Cairns v. Whittmore*, 88 Me. 501, 34 Atl. 404;

Mahan v. Sutherland, 73 Me. 158; *Neal v. Hanson*, 60 Me. 84. **Tex.**—*Williams v. Warnell*, 28 Tex. 610; *Boynton v. Tidwell*, 19 Tex. 118; *Warner v. Bailey*, 7 Tex. 517. **Vt.**—*Rudd v. Darling*, 64 Vt. 456, 25 Atl. 479; *Churchill v. Boyden*, 17 Vt. 319.

Amendable defects. *Kemp v. Central of Georgia R. Co.*, 122 Ga. 559, 50 S. E. 465; *Gonackey v. General Accident, Fire & Life Assn. Corp.*, 6 Ga. App. 381, 65 S. E. 53.

If the pleading contains enough to amend by, any incompleteness of statement will be treated as a defect of form rather than of substance. *Kemp v. Central of Georgia R. Co.*, 122 Ga. 559, 50 S. E. 465; *Wrightsville & T. R. Co. v. Vaughan*, 9 Ga. App. 371, 71 S. E. 691.

"No general demurrer shall be allowed for a mere informal statement of a cause of action or defense; provided such statement is sufficient in substance." Md. Pub. Gen. Laws, art. 75, §7, p. 1633; *Mitchell v. McCleary*, 42 Md. 374.

A defective statement of a cause of action is not subject to a general demurrer. As against such a demurrer the petition is good if a cause of action is so stated that it is amendable. *Erie Tel. Co. v. Grimes*, 82 Tex. 89, 17 S. W. 831; *Green v. Dallahan & Co.*, 54 Tex. 281.

Errors which might be deemed fatal on special demurrer will be disregarded. *Damren v. Trask*, 102 Me. 39, 65 Atl. 513; *Blake v. Maine Cent. R. Co.*, 70 Me. 60.

A general demurrer is properly overruled where the pleading is good in substance, though subject to special demurrer for defects of form. *Western Union Tel. Co. v. Jenkins*, 92 Ga. 398, 17 S. E. 620.

That a count states different facts or sets of facts, any one of which would justify a recovery, can only be taken advantage of by special demurrer. *Chicago C. R. Co. v. O'Donnell*, 207 Ill. 478, 69 N. E. 882.

Joinder in general demurrer does not open to the defendant defects of form when the meaning and intent of the declaration are plain. *Emmons v. Alvord*, 177 Mass. 466, 59 N. E. 126.

in the form of the action,¹⁷ that there is a misjoinder of counts,¹⁸ or that causes of action which cannot properly be united are joined in a single count,¹⁹ that essential facts are alleged by way of conclusion only,²⁰ or disjunctively,²¹ inconsistency in the averments of a single count,²² the omission of the date of the last continuance in a plea *puis darrein continuance*,²³ that there is a departure in pleading,²⁴ or that no damages are laid or claimed.²⁵ On the other hand, it will not reach amendable matter in abatement,²⁶ such as misjoinder²⁷ or nonjoinder of parties,²⁸ or formal defects, such as lack of definiteness and certainty,²⁹ argumentativeness,³⁰ impertinence,³¹ clerical errors and omissions,³² or that the pleading contains unnecessary or immate-

17. That the action should have been *ex contractu* instead of *ex delicto*. *Mercantile Co-operative Bank v. Frost*, 62 N. J. L. 476, 41 Atl. 685; *Van Blareom v. Delaware, L. & W. R. Co.*, 49 N. J. L. 179, 6 Atl. 503.

18. *Marter v. Henry Sanchez*, 77 N. J. L. 95, 71 Atl. 41; *Dunn v. Pennsylvania R. Co.*, 67 N. J. L. 377, 51 Atl. 465; *Smith v. Purmort's Admr.*, 63 Vt. 378, 20 Atl. 928.

19. Causes of action on contract and in tort. *Wilkins v. Standard Oil Co.*, 71 N. J. L. 399, 59 Atl. 14.

20. Ill.—*Woods v. Cox*, 149 Ill. App. 533; *Foss v. People's Gas Light & Coke Co.*, 145 Ill. App. 215, *affirmed*, 241 Ill. 238, 89 N. E. 351. Me.—*Bradbury v. Tarbox*, 95 Me. 519, 50 Atl. 710. N. J.—*Marples v. Standard Oil Co.*, 71 N. J. L. 352, 59 Atl. 32.

21. *Macurda v. Lewiston Journal Co.*, 104 Me. 554, 72 Atl. 490.

22. Where "the allegations of a declaration containing only one count are repugnant to and inconsistent with each other, such allegations neutralize each other, and the declaration will be held bad on general demurrer, provided such repugnancy and inconsistency relate to matters of substance and not of form only." *Kirton v. Atlantic Coast Line R. Co.*, 57 Fla. 79, 49 So. 1024; *Hoopes v. Crane*, 56 Fla. 395, 47 So. 992.

The rule does not apply where there is repugnancy or inconsistency between counts, but does apply in considering the sufficiency of particular counts in a declaration containing more than one count on a demurrer to particular counts separately. *Hoopes v. Crane*, 56 Fla. 395, 47 So. 992.

23. *Augusta v. Moulton*, 75 Me. 551.

24. Me.—*Pease v. McKusick*, 25 Me.

73. Mass.—*Keay v. Goodwin*, 16 Mass. 1. N. H.—*Tarleton v. Wells*, 2 N. H. 306; *Joy v. Simpson*, 2 N. H. 179.

25. In a tort action. *Treusch v. Kamke*, 63 Md. 274.

Assumpsit for goods sold. *McCor-mick v. Hogan*, 48 Md. 404.

26. Such as a defect in the form of a writ. *Marcus v. Rovinsky*, 95 Me. 106, 49 Atl. 420.

27. *Farmers' Nat. Bank v. Merchants' Nat. Bank (Tex. Civ. App.)*, 136 S. W. 1120.

28. *Farmers' Nat. Bank v. Merchants' Nat. Bank (Tex. Civ. App.)*, 136 S. W. 1120.

29. *Wade v. Watson (Ga.)*, 66 S. E. 922; *Trammell v. Columbus R. Co.*, 9 Ga. App. 98, 70 S. E. 892; *Pusheart v. New York Shipbuilding Co. (N. J.)*, 81 Atl. 113; *Esslinger v. Boehm (N. J.)*, 79 Atl. 267; *Harper v. Essex County Park Com.*, 73 N. J. L. 1, 62 Atl. 384.

30. U. S.—*Pendleton County v. Amy*, 13 Wall. 297, 20 L. ed. 579. Conn.—*Mathews v. Converse*, 83 Conn. 511, 77 Atl. 961. Ill.—*Massey v. People*, 201 Ill. 409, 66 N. E. 392; *Wright v. Craig*, 116 Ill. App. 493; *Lloyd v. Travelers Protective Assn.*, 115 Ill. App. 39. N. J.—*De Long v. Spring Lake Beach Improvement Co.*, 74 N. J. L. 250, 66 Atl. 591; *Salt Lake Nat. Bank v. Hendrickson*, 40 N. J. L. 52. Vt.—*Davis v. New England Fire Ins. Co.*, 70 Vt. 217, 39 Atl. 1095; *Willey v. Carpenter*, 64 Vt. 212, 23 Atl. 630; *Catlin v. Lyman*, 16 Vt. 44.

31. *Hull v. Thoms*, 82 Conn. 647, 74 Atl. 925.

32. *Meyer v. Ross*, 119 Ill. App. 485.

Omission of the word "county."

rial averments,³³ or has the wrong commencement,³⁴ or conclusion,³⁵ or is not verified,³⁶ failure to make profert,³⁷ that a special plea amounts to the general issue,³⁸ or that a pleading is not properly indorsed.³⁹

Duplicity. — In some jurisdictions duplicity is ground for general demurrer,⁴⁰ but the weight of authority is to the contrary.⁴¹

Limitations. — In some states limitations may be taken advantage of by general demurrer,⁴² while in others a special demurrer is necessary.⁴³

An exception to the rule that a general demurrer reaches only defects of substance exists in the case of dilatory pleas,⁴⁴ and especially pleas in abatement,⁴⁵ and to the jurisdiction,⁴⁶ all defects in such pleas,

White v. Manning, 46 Tex. Civ. App. 298, 102 S. W. 1160.

33. Immaterial allegations will be rejected as surplusage. Watson v. Walker, 23 N. H. 471.

That a pleading contains matter which might be eliminated on special exception. Magerstadt v. Martin (Tex. Civ. App.), 124 S. W. 459.

34. Goldberg v. Harney, 122 Ill. App. 106.

35. United States v. Girault, 11 How. (U. S.) 22, 13 L. ed. 587; Goldberg v. Harney, 122 Ill. App. 106.

That the conclusion of a replication is defective. Hooker v. Smith, 19 Vt. 151.

36. Nixon v. Malone (Tex. Civ. App.), 95 S. W. 577.

37. New York Trap Rock Co. v. Brown, 61 N. J. L. 536, 43 Atl. 100.

38. **U. S.**—Pendleton County v. Amy, 13 Wall. 297, 20 L. ed. 579. **Ill.**—Ogden v. Lucas, 48 Ill. 492; Supreme Lodge, etc. v. Albers, 106 Ill. App. 85. **Vt.**—Dufur v. Boston & M. R., 75 Vt. 165, 53 Atl. 1068; Hotchkiss v. Ladd, 36 Vt. 593, 86 Am. Dec. 679.

39. Perkins v. Davidson, 23 Tex. Civ. App. 31, 56 S. W. 121.

40. Milske v. Steiner Mantel Co., 103 Md. 235, 63 Atl. 471, 5 L. R. A. (N. S.) 1105; State v. McNay, 100 Md. 622, 60 Atl. 273.

See the title "**Duplicity.**"

41. **Ga.**—Central of Georgia R. Co. v. Banks & Fortson, 128 Ga. 785, 58 S. E. 352; Harris v. Wilcox, 7 Ga. App. 121, 66 S. E. 380. **Ill.**—Consolidated Coal Co. v. Peers, 205 Ill. 531, 68 N. E. 1065, affirming 97 Ill. App. 188; Yeazel v. Harber Bros. Co., 106 Ill. App. 408. **Vt.**—Willey v. Carpenter, 64 Vt. 212, 23 Atl. 630.

A general demurrer addressed to the whole declaration does not reach the objection that several breaches of the bond sued on are not separately assigned, since at least one breach is well assigned. The proper remedy is by motion to strike. Ordinary v. Barnes, 67 N. J. L. 80, 50 Atl. 903.

See also IX, *infra*.

42. Attrill v. Huntington, 70 Md. 191, 16 Atl. 651, 2 L. R. A. 779; Biays v. Roberts, 68 Md. 510, 13 Atl. 366.

43. Hudson v. Wheeler, 34 Tex. 356.

44. In dilatory pleas defects of form are reached by general demurrer. Will's Gould Pl. 577.

And the same is true in the case of demurrers to writs of error for duplicity in assigning errors in fact and in law together. Will's Gould Pl., 577.

45. All objections to pleas in abatement, whether of form or substance, may be raised by general demurrer. **Ill.**—Willard v. Zehr, 215 Ill. 148, 74 N. E. 107, affirming 116 Ill. App. 496; Finch v. Galigher, 181 Ill. 625, 54 N. E. 611. **Me.**—Getchell v. Boyd, 44 Me. 482. **Mass.**—Clifford v. Cony, 1 Mass. 495. **Vt.**—Landon v. Roberts, 20 Vt. 286.

Defects in the affidavit required by rule. Bellamy v. Oliver, 65 Me. 108.

A general demurrer to a plea in abatement has all the effect of a special one. Hortons v. Townes, 6 Leigh. (Va.) 47.

At common law defects in form in pleas in abatement, except duplicity, were reached by general demurrer. Sloss-Sheffield Steel & Iron Co. v. Milbra (Ala.), 55 So. 890.

46. United States v. United States Fidelity & Guaranty Co., 80 Vt. 84, 66 Atl. 809.

to reach the objection that there is a mistake whether of form or substance, being available on general demurrer.

2. In Equity.—In equity a general demurrer raises the question whether the facts stated in the bill entitle the complainant to any relief in equity.⁴⁷ As at law, it reaches defects of substance only, and not those of form.⁴⁸ All matters which go to the jurisdiction of the court as a court of equity may be taken advantage of under it,⁴⁹ such as that there is an adequate remedy at law.⁵⁰ Such a demurrer is also sufficient to raise the question of multifariousness,⁵¹ the joinder of one who is not a necessary or proper party to the suit,⁵² failure to verify a bill,⁵³ and laches.⁵⁴ It will not reach the failure of a bill to offer to do equity,⁵⁵ or want of definiteness and certainty.⁵⁶

3. Under the Codes.—A general demurrer, or demurrer for want of facts, under the codes only reaches the objection that the pleading to which it is addressed does not state a cause of action or defense.⁵⁷

47. *Kemp v. Division No. 241, etc.*, 153 Ill. App. 344.

"The assertion of a general demurrer is that the plaintiff has not, on his own showing, made out a case." *Taylor v. Holmes*, 14 Fed. 498.

48. *Miller v. Jamison*, 24 N. J. Eq. 41; *Stewart v. Flint*, 57 Vt. 216.

It challenges the equities, and not faults of pleading. *Day v. Cole*, 56 Mich. 294, 22 N. W. 811.

Formal and technical exceptions are not reached by general demurrer, but must be taken advantage of by special demurrer. *Trask v. Chase*, 107 Me. 137, 77 Atl. 698.

A general demurrer will be overruled if a case for equitable relief is set out, however imperfectly. *Gilligham v. Ray*, 157 Mich. 488, 122 N. W. 111; *Greenley v. Hovey*, 115 Mich. 504, 73 N. W. 808; *Glidden v. Norvell*, 44 Mich. 202, 6 N. W. 195.

A general demurrer to a bill, as for want of equity, will be overruled if there is any ground of equitable relief stated in the bill, even if there are any number of grounds of special demurrer. *Hartzell v. Brash*, 61 Fla. 606, 55 So. 401; *Crosby v. Andrews*, 61 Fla. 554, 55 So. 57.

49. "All matters which go to the jurisdiction of the court may be taken advantage of by demurrer, whether specially pointed out in the demurrer or not, for whenever it appears that the case made by the bill is not brought within the class of cases in which courts of equity assume the power to hear and determine, it shows, in the technical sense of the expression, 'there is no equity in the bill,' and this de-

fect may be pointed out *ore tenus*, on the argument." *Wetherell v. Eberle*, 123 Ill. 666, 14 N. E. 675.

The particular objection may be called to the court's attention on the argument of the demurrer. *Law v. Ware*, 238 Ill. 360, 87 N. E. 308.

50. *Law v. Ware*, 238 Ill. 360, 87 N. E. 308; *Wetherell v. Eberle*, 123 Ill. 666, 14 N. E. 675.

51. Where it is manifest on the face of the bill that two causes of action are presented, multifariousness can be taken advantage of by general, as well as by special, demurrer. *Emmons v. National Mut. Bldg. & Loan Assn.*, 135 Fed. 689, 67 C. C. A. 327.

52. The joinder as complainant of one who has no interest in the suit and is not a necessary or proper party. *Hubbard v. Manhattan Trust Co.*, 87 Fed. 51, 30 C. C. A. 520.

53. *Daschke v. Schellenberg*, 124 Mich. 16, 82 N. W. 665.

54. *Bryan v. Kales*, 134 U. S. 126, 10 Sup. Ct. 435, 33 L. ed. 829; *Wollensak v. Reiher*, 115 U. S. 96, 5 Sup. Ct. 1137, 29 L. ed. 350.

Laches may be taken advantage of by either a general or a special demurrer. *Clary v. Schaack*, 253 Ill. 471, 97 N. E. 1070; *Coolidge v. Rhodes*, 199 Ill. 24, 64 N. E. 1074.

55. *Greenley v. Hovey*, 115 Mich. 504, 73 N. W. 808.

56. *Pacific Live-Stock Co. v. Hanley*, 98 Fed. 327.

57. A general demurrer is sufficient where the petition fails to state a cause of action. *Hallock v. Brier*, 80 Mo. App. 331.

A complaint is bad on general de-

It reaches defects of substance only,⁵⁴ and not those of form.⁵⁵

murrer where it fails to set forth a material fact essential to the establishment of plaintiff's right to recover. *County of Birmingham v. Woodin*, 6 Idaho 284, 55 Pac. 662.

It can be sustained only where no cause of action whatever is alleged. *Kain v. Larkin*, 141 N. Y. 144, 36 N. E. 9; *Thompson v. Fox*, 21 Misc. 298, 47 N. Y. Supp. 176.

It will be overruled if the facts stated, with every reasonable inference reasonably deducible therefrom, constitute a cause of action. *Claxton v. Kay & Northcutt* (Ark.), 142 S. W. 517; *Cox v. Smith*, 93 Ark. 371, 125 S. W. 437, 137 Am. St. Rep. 37.

A complaint which alleges such facts specifically as makes the existence of another fact necessary to be shown clearly and necessarily appear therefrom is good as against a general demurrer. *Duryee v. Friars*, 18 Wash. 55, 50 Pac. 583.

"An answer should be held good on demurrer if it states a defense to any cause of action which the plaintiff pleads and on which he has a right to rely." *Frechette v. Ravn*, 145 Wis. 589, 130 N. W. 453.

58. *Thompson v. Fox*, 21 Misc. 298, 47 N. Y. Supp. 176; *Arnold v. Pope*, 37 Utah 204, 108 Pac. 351.

Such a demurrer goes to the merits. *Walton v. Washburn*, 23 Ky. L. Rep. 1008, 64 S. W. 634.

It reaches defects which cannot be cured. *Burnham v. De Bevoise*, 8 How. Pr. (N. Y.) 159.

The complaint must be fatally defective before it will be overthrown. *New Bern Banking & Trust Co. v. Duffy*, 156 N. C. 83, 72 S. E. 96; *Brewer v. Wynne*, 154 N. C. 467, 70 S. E. 947; *Blackmore v. Winders*, 144 N. C. 212, 56 S. E. 874.

A party improperly joined as defendant should demur on the ground that the complaint does not state a cause of action against him rather than on the ground of a defect of parties. *Mitchell v. Bank of St. Paul*, 7 Minn. 252; *Lewis v. Williams*, 3 Minn. 151.

Failure to join the personal representative of a joint obligee in a suit on a note may be taken advantage of by either a general or special demurrer.

Perry & Minor v. Perry, 16 Ky. L. Rep. 88.

Failure to state the Christian names of the plaintiffs as required by statute renders a complaint bad on demurrer for want of facts. *Bascom v. Toner*, 5 Ind. App. 229, 31 N. E. 856.

Failure to allege that defendant is a corporation may be taken advantage of on a demurrer for want of facts. *State v. Chicago, M. & St. P. R. Co.*, 4 S. D. 261, 56 N. W. 894.

59. *Cal.*—*Amestoy v. Electric R. T. Co.*, 95 Cal. 311, 30 Pac. 550. *Mo.* *State v. Edmundson*, 71 Mo. App. 172; *Eads v. Gains*, 58 Mo. App. 586. *Mont.* *Raymond v. Blancgrass*, 36 Mont. 449, 93 Pac. 648. *Nev.*—*Hershiser v. Ward*, 29 Nev. 228, 87 Pac. 171; *Deegan v. Deegan*, 22 Nev. 185, 37 Pac. 360. *N. Y.* *Kain v. Larkin*, 141 N. Y. 144, 36 N. E. 9; *Milliken v. Western Union Tel. Co.*, 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281; *Marie v. Garrison*, 83 N. Y. 14; *Pape v. Pratt Institute*, 127 App. Div. 147, 111 N. Y. Supp. 354; *Bottom v. Chamberlain*, 21 Misc. 556, 47 N. Y. Supp. 733; *Thompson v. Fox*, 21 Misc. 298, 47 N. Y. Supp. 176. *N. D.*—*Weber v. Lewis*, 19 N. D. 473, 126 N. W. 105. *Ohio.*—*Everett v. Waymire*, 30 Ohio St. 308. *Okla.* *Ryndak v. Seawell*, 13 Okla. 737, 76 Pac. 170.

It goes to the subject-matter proper of the action, and has no application to any dilatory matter whatever. *Marx & Jorgenson v. Croisan*, 17 Ore. 393, 21 Pac. 310.

That alternative allegations are not alleged in the manner prescribed by the code is not reached by general demurrer. *Matz v. Chicago & A. R. Co.*, 85 Fed. 180.

Where there is a defectively stated cause of action, a demurrer for want of facts will be overruled. *Aurora Water Co. v. City of Aurora*, 129 Mo. 540, 31 S. W. 946; *Cone v. Ivinston*, 4 Wyo. 203, 33 Pac. 31, 35 Pac. 933.

Will not lie where a petition shows by implication a contract between plaintiff and defendant and a right of recovery thereon. *Hallock v. Brier*, 80 Mo. App. 331.

If there is any cause of action stated in the complaint, however inartificially

Such a demurrer is sufficient to reach the objection that the facts alleged do not warrant a recovery,⁶⁰ that plaintiff has no right to maintain the action,⁶¹ that several plaintiffs have no right to sue jointly,⁶² that the action is prematurely brought,⁶³ or former adjudication.⁶⁴ In an equitable action such a demurrer raises the objection that plaintiff has an adequate remedy at law,⁶⁵ or that his claim is barred by laches.⁶⁶

expressed, the demurrer will be overruled. *Brewer v. Wynne*, 154 N. C. 467, 70 S. E. 947; *Jones v. Town of Henderson*, 147 N. C. 120, 60 S. E. 894; *Blackmore v. Winders*, 144 N. C. 212, 56 S. E. 874.

Where there is not an entire absence of a necessary averment, but the averment is merely defective, the defect can only be reached by special demurrer. *Burke v. Dittus*, 8 Cal. App. 175, 96 Pac. 330.

60. Whether the enactment of a municipal ordinance may be enjoined. *Basting v. City of Minneapolis*, 112 Minn. 306, 127 N. W. 1131.

61. *American Trust & Sav. Bank v. McGettigan*, 152 Ind. 582, 52 N. E. 793; *Kinsley v. Kinsley*, 150 Ind. 67, 49 N. E. 819; *Farris v. Jones*, 112 Ind. 498, 14 N. E. 484; *State v. Karr*, 37 Ind. App. 120, 76 N. E. 780.

Authority of a municipality to sue in the name of the state to recover taxes collected by a township of which it was formerly a part. *State v. Liberty Twp. (Ind. App.)*, 98 N. E. 149.

That the right of action is in a third person and not in plaintiff. *Ind.*—*Sinker v. Floyd*, 104 Ind. 291, 4 N. E. 10. *Mo.*—*Anable v. McDonald Land & Min. Co.*, 144 Mo. App. 303, 128 S. W. 38. *Utah.*—*Hunt v. Monroe*, 32 Utah 428, 91 Pac. 269, 11 L. R. A. (N. S.) 249.

The right of the personal representative of a decedent to sue is properly raised by a demurrer for want of facts. *Dickason Coal Co. v. Unverferth*, 30 Ind. App. 546, 66 N. E. 759.

That the complaint does not show that plaintiff is the administrator of the estate for the benefit of which the action is brought. *Toner v. Wagner*, 158 Ind. 447, 63 N. E. 859.

That a foreign administrator has no right to sue. *Louisville & N. R. Co. v. Brantley's Admr.*, 96 Ky. 297, 28 S. W. 477.

Right of Guardian To Sue.—The objection that a complaint by a guardian to partition lands of his deceased

ward's estate does not show authority in the guardian to settle the estate may be taken by a demurrer for want of facts, since the complaint must show a cause of action in plaintiff in the capacity in which he sues, and it is not necessary to demur on the ground of want of capacity to sue. *Martin v. Caldwell (Ind. App.)*, 96 N. E. 660.

62. *Frankel v. Garrard*, 160 Ind. 209, 66 N. E. 687; *Wells & Nellegar Co. v. Short (Ind. App.)*, 97 N. E. 183.

"The general rule is that a complaint to withstand a demurrer for want of facts must state a cause of action as to all who join in it." *Knepper v. Eggiman (Ind.)*, 97 N. E. 161; *Wells & Nellegar Co. v. Short (Ind. App.)*, 97 N. E. 183; *Louisville, E. & St. L. C. R. Co. v. Lohges*, 6 Ind. App. 288, 33 N. E. 449.

A cross-complaint interposed by two defendants jointly is demurrable unless it states a cause of action in favor of them both. *Deane v. Indiana Macadam & Const. Co.*, 161 Ind. 371, 68 N. E. 686.

The same is true as to a counterclaim. *Steinke v. Bentley*, 6 Ind. App. 663, 34 N. E. 912.

63. *Middaugh v. Wilson*, 30 Ind. App. 112, 65 N. E. 555. See also *Norris v. Scott*, 6 Ind. App. 18, 32 N. E. 103-865.

64. *Givens v. Thompson*, 110 Mo. 432, 19 S. W. 833.

65. *Planet Property & Financial Co. v. St. Louis, O. H. & C. R. Co.*, 115 Mo. 613, 22 S. W. 616; *Beck v. Ashland Cigar & Tobacco Co.*, 146 Wis. 324, 130 N. W. 464; *Ellis v. Southwestern Land Co.*, 102 Wis. 409, 78 N. W. 583; *Kruczinski v. Neuendorf*, 99 Wis. 264, 74 N. W. 974.

That plaintiff is not entitled to resort to a court of equity to seek the relief demanded. *Le Blond v. Peshigo*, 140 Wis. 604, 123 N. W. 157, 25 L. R. A. (N. S.) 511.

66. *Hopkins v. Lewis (Cal. App.)*, 122 Pac. 433.

It will not reach the objection that defendant is sued in the wrong name,⁶⁷ indefiniteness and uncertainty,⁶⁸ duplicity,⁶⁹ that the pleading contains unnecessary matter,⁷⁰ a variance between an exhibit and the complaint,⁷¹ or that a pleading has the wrong conclusion.⁷²

Conclusions.—In some states that necessary facts are alleged by way of conclusion only renders a pleading bad on general demurrer,⁷³ while in others a contrary doctrine prevails.⁷⁴

Argumentativeness.—In most states argumentativeness in a pleading is not reached by general demurrer,⁷⁵ though there is authority to the

67. *Bird v. St. John's Episcopal Church*, 154 Ind. 138, 56 N. E. 129; *Delaware Township v. Board of Comrs.*, 26 Ind. App. 97, 59 N. E. 189.

68. *Ind.*—*Gfroerer v. Gfroerer*, 173 Ind. 424, 90 N. E. 757; *Clow v. Brown*, 150 Ind. 185, 48 N. E. 1034, 49 N. E. 1057; *Louisville, N. A. & C. R. Co. v. Bates*, 146 Ind. 564, 45 N. E. 108; *Cleveland, C. C. & St. L. R. Co. v. Heineman*, 46 Ind. App. 388, 90 N. E. 899. *Minn.*—*Blunt v. Egeland*, 104 Minn. 351, 116 N. W. 653; *Matteson v. United States & Canada Land Co.*, 103 Minn. 407, 115 N. W. 195. *Mo.* *State v. Edmundson*, 71 Mo. App. 172. *Neb.*—*Hallstead v. Perrigo*, 87 Neb. 128, 126 N. W. 1078; *State v. Alter*, 80 Neb. 405, 114 N. W. 293; *Grant v. Commercial Nat. Bank*, 67 Neb. 219, 93 N. W. 185; *Kyd v. Cook*, 56 Neb. 71, 76 N. W. 524; *Roberts v. Samson*, 50 Neb. 745, 70 N. W. 384; *Mills v. Rice*, 3 Neb. 76. *N. Y.*—*Kain v. Larkin*, 141 N. Y. 144, 36 N. E. 9; *Milliken v. Western Union Tel. Co.*, 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281; *Marie v. Garrison*, 83 N. Y. 14; *Yarslowitz v. Bienenstock*, 141 App. Div. 64, 125 N. Y. Supp. 649; *Sullivan v. Murphy*, 120 N. Y. Supp. 55; *Bottom v. Chamberlain*, 21 Misc. 556, 47 N. Y. Supp. 733. *Wis.*—*Wilbert v. Sheboygan*, 121 Wis. 518, 99 N. W. 330; *Olson v. Phoenix Mfg. Co.*, 103 Wis. 337, 79 N. W. 409.

If the petition states a cause of action at all it must be held good as against a demurrer for want of facts, however general its statement of the facts may be. *Park v. Tinkham*, 9 Kan. 615.

Unless the pleading is so uncertain as not to state intelligibly a substantially good cause of action. *City of Connersville v. Connersville Hydraulic Co.*, 86 Ind. 235; *Lewis v. Edwards*, 44 Ind. 333; *Blanchard-Hamilton Furni-*

ture Co. v. Colvin, 32 Ind. App. 398, 69 N. E. 1032.

69. *Smith v. Jordan*, 13 Minn. 264.

70. *Victor Power & Mining Co. v. Cole*, 11 Cal. App. 497, 105 Pac. 758; *Boulware v. Parke*, 4 Idaho 692, 43 Pac. 680.

71. *Palmer v. Lavigne*, 104 Cal. 30, 37 Pac. 775; *Blasingame v. Home Ins. Co.*, 75 Cal. 633, 17 Pac. 925; *San Francisco Sulphur Co. v. Aetna Indemnity Co.*, 11 Cal. App. 695, 106 Pac. 111.

72. *Pierson v. Wallace*, 7 Ark. 282.

73. *Ariz.*—*Olney v. Bishop*, 13 Ariz. 336, 114 Pac. 559. *Ark.*—*Keith v. Freeman*, 43 Ark. 296. *Ind.*—*Funk v. Rentchler*, 134 Ind. 68, 33 N. E. 364-898. *Mo.*—*Mallinekrodt Chemical Works v. Nemnich*, 169 Mo. 388, 69 S. W. 355. *Okla.*—*Smith v. Board of Comrs.*, 26 Okla. 819, 110 Pac. 669; *Smith v. Kaufman & Co.*, 3 Okla. 568, 41 Pac. 722. See *Ft. Smith & W. R. Co. v. Chandler Cotton Oil Co.*, 25 Okla. 82, 106 Pac. 10.

74. *Harris v. Halverson*, 23 Wash. 779, 63 Pac. 549.

In *North Dakota* it is held that the allegation of a legal conclusion instead of the facts upon which it is based does not usually render the pleading bad on general demurrer. *Tisdale v. Ward County (N. D.)*, 127 N. W. 512; *Weber v. Lewis*, 19 N. D. 473, 126 N. W. 105), but the contrary has been held as to an answer setting forth new matter by way of conclusion only (*Van Dyke v. Doherty*, 6 N. D. 263, 69 N. W. 200).

75. *Missouri Pac. R. Co. v. Hemingway*, 63 Neb. 610, 88 N. W. 673; *Kain v. Larkin*, 141 N. Y. 144, 36 N. E. 9; *Milliken v. Western Union Tel. Co.*, 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281; *Marie v. Garrison*, 83 N. Y. 14; *Bottom v. Chamberlain*, 21 Misc. 556, 47 N. Y. Supp. 733.

contrary, and in some states the defect is reached by motion.⁷⁶

Inconsistency may render a pleading bad on general demurrer if it amounts to a failure to state a cause of action.⁷⁷

That necessary facts are alleged in the alternative may or may not render the pleading bad on a demurrer for want of facts.⁷⁸

Limitations.—That the claim sued on is barred by the statute of limitations is reached by a general demurrer in some states,⁷⁹ but not in others.⁸⁰

Defects Made Separate Grounds for Demurrer by Statute.—A demurrer for want of facts does not reach other objections or defects specifically enumerated by the statute as grounds of demurrer, such as want of jurisdiction,⁸¹ want of legal capacity to sue,⁸² another action pend-

The complaint will be held good when the requisite allegations can be gathered from all the averments, though the statement of them may be argumentative, and the pleading deficient in logical order and technical language. *Sage v. Culver*, 147 N. Y. 241, 41 N. E. 513.

76. *Rossman v. Mitchell*, 73 Minn. 198, 75 N. W. 1053.

77. *Indiana Rolling Mill Co. v. Livezey* (Ind. App.), 94 N. E. 732.

78. Where the only effect of alternative allegations is to render the pleading indefinite or uncertain, the remedy is by motion, but where the complaint alleges in the alternative two statements of fact, one of which would legally constitute a cause of action and the other not, they neutralize each other, and a demurrer for want of facts will lie. *Anderson v. Minneapolis, St. P. & S. S. M. R. Co.*, 103 Minn. 224, 114 N. W. 1123, 14 L. R. A. (N. S.) 886.

A demurrer for want of facts does not reach an inconsistency between the summons and the complaint in regard to the relief sought. *Freeman v. Paulson*, 107 Minn. 64, 119 N. W. 651.

79. **Minn.**—*Thornton v. East Grand Forks*, 106 Minn. 233, 118 N. W. 834; *Board of County Comrs. v. Miller*, 101 Minn. 294, 112 N. W. 276; *Minneapolis Threshing Mach. Co. v. Jones*, 89 Minn. 184, 94 N. W. 551; *Trebby v. Simmons*, 38 Minn. 508, 38 N. W. 693; *Litchfield v. McDonald*, 35 Minn. 167, 28 N. W. 191. **Neb.**—*Bank of Miller v. Moore*, 81 Neb. 566, 116 N. W. 167; *Newman Grove State Bank v. Linderholm*, 68 Neb. 364, 94 N. W. 616; *Hower v. Aultman*, 27 Neb. 251, 42 N. W. 1039; *Hurley v. Cox*, 9 Neb. 230. **Ohio.**

Seymour v. Railway Co., 44 Ohio St. 12, 4 N. E. 236; *Combs v. Watson*, 32 Ohio St. 228; *Commissioners v. Andrews*, 18 Ohio St. 49. **Wyo.**—*Columbia Sav. & Loan Assn. v. Clause*, 13 Wyo. 166, 78 Pac. 708; *Marks v. Board of Comrs.*, 11 Wyo. 488, 72 Pac. 894; *Cowhick v. Shingle*, 5 Wyo. 87, 37 Pac. 689, 25 L. R. A. 608.

80. The demurrer must be special. *Brown v. Bell*, 46 Colo. 163, 103 Pac. 380, 23 L. R. A. (N. S.) 1096.

It must be specially pleaded. *Fulleton v. Bailey*, 17 Utah 85, 53 Pac. 1020; *Thomas v. Glendinning*, 13 Utah 47, 44 Pac. 652.

Limitations cannot be raised by a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action, the fact that the cause of action is barred not depriving it of the elements which would otherwise constitute a good cause of action, but merely leaving it open to defendant to exercise his personal privilege to plead limitations. *Chemung Mining Co. v. Hanley*, 9 Idaho 786, 77 Pac. 226; *Keeley v. Leachman*, 3 Idaho 629, 33 Pac. 44.

81. Of the subject-matter. *Toledo, W. & W. R. Co. v. Milligan*, 52 Ind. 505.

That the court has no jurisdiction because the action is brought in the wrong county. *Chicago & S. E. R. Co. v. Wheeler*, 14 Ind. App. 62, 42 N. E. 489; *Lake Erie & W. R. Co. v. Fishback*, 5 Ind. App. 403, 32 N. E. 346.

82. **Idaho.**—*Valley Lumb. & Mfg. Co. v. Nickerson*, 13 Idaho 682, 33 Pac. 24; *Valley Lumb. & Mfg. Co. v. Driesel*, 13 Idaho 662, 93 Pac. 765, 15 L. R. A. (N. S.) 299. **Ind.**—*Aetna Life Ins. Co. v. Sellers*, 154 Ind. 370,

ing,⁸³ misjoinder of causes of action,⁸⁴ a defect,⁸⁵ or misjoinder⁸⁶ of parties, limitations,⁸⁷ or ambiguity, indefiniteness and uncertainty.⁸⁸

In Louisiana an exception of no cause of action does not reach formal defects.⁸⁹

IX. SPECIAL DEMURRERS.—A. DEFINITION AND NATURE.

56 N. E. 97; *La Plante v. State*, 152 Ind. 80, 52 N. E. 452. **Minn.**—*Walsh v. Byrnes*, 39 Minn. 527, 40 N. W. 831. **Mo.**—*Baxter v. St. Louis Transit Co.*, 198 Mo. 1, 95 S. W. 856. **Mont.**—*Knight v. Le Beau*, 19 Mont. 223, 47 Pac. 952. **N. Y.**—*Phoenix Bank v. Donnell*, 40 N. Y. 410. **Ore.**—*Owings v. Turner*, 48 Ore. 462, 87 Pac. 160. **S. C.**—*Dawkins v. Mathis*, 47 S. C. 64, 24 S. E. 990. **S. D.**—*Evans v. Fall River County*, 9 S. D. 130, 68 N. W. 195. **Wash.**—*Birmingham v. Cheetham*, 19 Wash. 657, 54 Pac. 37.

By demurring for want of facts defendant waives any possible objection that plaintiff did not have legal capacity to sue. *Chicago & E. R. Co. v. Cummings*, 24 Ind. App. 192, 53 N. E. 1026.

83. *Basye v. Basye*, 152 Ind. 172, 52 N. E. 797; *Williams v. Lewis*, 124 Ind. 344, 24 N. E. 733; *Somers v. Dawson*, 86 Minn. 42, 90 N. W. 119.

84. **Ind.**—*Nesbit v. Miller*, 125 Ind. 106, 25 N. E. 148; *Board of Comrs. v. Redifer*, 32 Ind. App. 93, 69 N. E. 305. **Minn.**—*Clark v. Lovering*, 37 Minn. 120, 33 N. W. 776; *Smith v. Jordan*, 13 Minn. 264. **Neb.**—*Culbertson I. & W. P. Co. v. Wildman*, 45 Neb. 663, 63 N. W. 947. **Nev.**—*Ruhling v. Hackett*, 1 Nev. 360. **Wash.**—*Ames v. Kinnear*, 42 Wash. 80, 84 Pac. 629; *Marvin v. Yates*, 26 Wash. 50, 66 Pac. 131. **Wis.**—*Cummings v. C. W. Noble Co.*, 143 Wis. 175, 126 N. W. 664.

85. **Idaho.**—*Bonham Nat. Bank v. Grimes Pass Placer Mining Co.*, 18 Idaho 629, 111 Pac. 1078. **Ind.**—*Leedy v. Nash*, 67 Ind. 311; *Cox v. Bird*, 65 Ind. 277; *Supreme Tribe of Ben Hur v. Hall*, 24 Ind. App. 316, 56 N. E. 780; *Loufer v. Stottlemeyer*, 16 Ind. App. 221, 44 N. E. 1008. **Minn.**—*Svanburg v. Fosseen*, 75 Minn. 350, 78 N. W. 4, 43 L. R. A. 427; *Bell v. Mendenhall*, 71 Minn. 331, 73 N. W. 1086. **Mo.**—*Tapana v. Shaffray*, 97 Mo. App. 337, 71 S. W. 119. **Neb.**—*Holway v. American Exchange Nat. Bank*, 64 Neb.

67, 89 N. W. 382. **N. D.**—*Ross v. Page*, 11 N. D. 458, 92 N. W. 822. **Okl.**—*Choctaw, O. & G. R. Co. v. Burgess*, 21 Okla. 653, 97 Pac. 271; *Helm & Son v. Briley*, 17 Okla. 314, 87 Pac. 595. **Utah.**—*Arnold v. Pope*, 37 Utah 204, 108 Pac. 351. **Wash.**—*Buckles v. Reynolds*, 58 Wash. 485, 108 Pac. 1072.

In view of the provision requiring the grounds of demurrer to be distinctly specified. *Eagle v. Beard*, 33 Ark. 497.

Though ordinarily the objection that there is a defect of parties must be taken by special rather than general demurrer, it is not prejudicial error to sustain a general demurrer to a complaint which fails to state a cause of action against the only defendant, though it states a good cause of action against one not a party. *Arnold v. Pope*, 37 Utah 204, 108 Pac. 351.

86. *Cummings v. C. W. Noble Co.*, 143 Wis. 175, 126 N. W. 664.

A general demurrer to one count does not reach the objection that one of the defendants is not interested in the cause of action therein stated. *Bronson v. Markey*, 53 Wis. 98, 10 N. W. 166.

87. *Joergenson v. Joergenson*, 28 Wash. 477, 68 Pac. 913; *Board, etc. v. First Presbyterian Church*, 19 Wash. 455, 53 Pac. 671.

88. **Cal.**—*Yordi v. Yordi*, 6 Cal. App. 20, 91 Pac. 348; *Watkins v. Glas*, 5 Cal. App. 68, 89 Pac. 840. **Colo.**—*Downey v. Colorado Fuel & Iron Co.*, 48 Colo. 27, 108 Pac. 972. *Informalities. Carpenter v. Smith*, 20 Colo. 39, 36 Pac. 789. **Idaho.**—*Dittemore v. Cable Milling Co.*, 16 Idaho 298, 101 Pac. 593; *Naylor v. Vermont Loan & Trust Co.*, 6 Idaho 251, 55 Pac. 297. **Nev.**—*Burgess v. Helm*, 24 Nev. 242, 51 Pac. 1025.

89. Vagueness is not reached by an exception of no cause of action, but the proper remedy is by an exception of vagueness. *Goldsmith v. Virgin*, 122 La. 831, 48 So. 279.

A special demurrer is one which assigns and points out specially some particular cause or causes for demurring.⁹⁰

In code states the term is frequently used to designate demurrers on any of the statutory grounds other than the failure to state a cause of action or defense.⁹¹

In some states its office has been said to be to point out defects in the pleading so that they may be obviated by amendment.⁹²

Abolished in Some States.—In some states special demurrers have been abolished, and a demurrer reaches only defects of substance,⁹³

90. Will's Gould Pl. 578; Andrews Steph. Pl. (2nd ed.), §136, p. 266, Christ-mas v. Russell, 5 Wall. (U. S.) 290, 18 L. ed. 475; Neal v. Hanson, 60 Me. 84.

"A special demurrer is only for defects in form, and adds to the terms of a general demurrer a specification of the particular ground of exception." Tyler v. Hand, 7 How. (U. S.) 573, 12 L. ed. 824. See also Com. v. Cross Cut R. Co., 53 Pa. 62.

"A special demurrer lies to a fatal defect in the plea, which, if called to the attention of the court, can be cured, but which if not pointed out is not fatal to the plea." Leathe v. Thomas, 109 Ill. App. 434, 451, *af-firmed* 218 Ill. 246, 75 N. E. 810.

"A special demurrer is only in the nature of a plea in abatement that gives a better writ, and saying to the plaintiff he may recover on the merits if he sues in a particular way." Louis-ville & N. R. Co. v. Brantley's Admr., 96 Ky. 297, 28 S. W. 477.

The office of exceptions under the Texas practice is similar to that of a special demurrer under the common-law system of pleading; not only to question the existence of any cause of action or ground of defense, but to point out particularly wherein the pleading is defective. Warner v. Bailey, 7 Tex. 517.

91. Ky. Code Civ. Pr., §92. As a defect of parties. Boldt v. Budwig, 19 Neb. 739, 28 N. W. 280.

92. News Pub. Co. v. Lowe, 8 Ga. App. 333, 69 S. E. 128; Western Union Tel. Co. v. Cates (Tex. Civ. App.), 132 S. W. 92.

To compel plaintiff to set forth his charge or ground of complaint plainly, fully, and distinctly, where he has failed to do so. Wrightsville & T. R. Co. v. Vaughan, 9 Ga. App. 371, 71

S. E. 691; Cedartown Cotton Co. v. Miles, 2 Ga. App. 79, 58 S. E. 289.

The pleader is not required to set forth the evidence by which he expects to prove the traversable facts alleged, and hence a demurrer cannot properly be used to compel him to do so. Wrightsville & T. R. Co. v. Vaughan, 9 Ga. App. 371, 71 S. E. 691; Cedar-town Cotton Co. v. Miles, 2 Ga. App. 79, 58 S. E. 289.

93. Florida.—"No pleading shall be deemed insufficient for any defect which could heretofore only be objected to by special demurrer." Gen. St., 1906, §1430.

The effect of this section is to dis-pense with the use of demurrers ex-cept to test the sufficiency of the matters of substance pleaded, without reference to the form or manner of statement. Benedict Pineapple Co. v. Atlantic Coast Line R. Co., 55 Fla. 514, 46 So. 732, 20 L. R. A. (N. S.) 92.

It abolishes special demurrers. Hart-ford Fire Ins. Co. v. Hollis, 58 Fla. 268, 50 So. 985; Hoopes v. Crane, 56 Fla. 395, 47 So. 992; Florida C. & P. R. Co. v. Ashmore, 43 Fla. 272, 32 So. 832; Camp & Bros. v. Hall, 39 Fla. 535, 22 So. 792.

Maryland.—"No special demurrer shall be allowed in any civil case." Pub. Gen. Laws, art. 75, §6, p. 1633; State v. German Sav. Bank, 103 Md. 196, 63 Atl. 481; Chesapeake & P. Tel. Co. v. Mackenzie, 74 Md. 36, 21 Atl. 690; Mitchell v. Wedderburn, 68 Md. 139, 11 Atl. 760; Gott v. State, 44 Md. 319.

Massachusetts.—No mere defects of form in the declaration or subsequent pleadings shall be assigned as causes of demurrer. Rev. Laws, 1902, c. 173, §13, p. 1552.

This provision operates to abolish

the remedy for defects of form being by motion.⁶⁴ An exception is sometimes made in the case of pleas in abatement.⁶⁵

B. GROUNDS.—Where special demurrers are recognized, they are the proper method of reaching defects of form in a pleading,⁶⁶ such as

special demurrers. *King v. Howard*, 1 Cush. (Mass.) 137.

Michigan.—Special demurrers are not allowed in justices' courts. Comp. Laws, 1897, §767.

Mississippi.—"A pleading shall not be deemed insufficient for any defect which could heretofore be objected to only by special demurrer." Code, 1906, §761; *Wilmot v. Yazoo & M. v. R. Co.*, 76 Miss. 374, 24 So. 701; *State v. Swinney*, 60 Miss. 39; *Northrop v. Flagg*, 57 Miss. 754.

New Jersey.—No pleading shall be deemed insufficient for any defect which could heretofore be objected to only by special demurrer, and judgment shall be rendered on demurrer without regard to them. Comp. St., 1910, p. 4093, §127; *Stratton v. Essex County Park Com.*, 164 Fed. 901; *Harper v. Essex County Park Com.*, 73 N. J. L. 1, 62 Atl. 384; *Peter v. Middlesex & S. Traction Co.*, 69 N. J. L. 456, 55 Atl. 35.

Failure to state the venue in the body of the declaration is within the statute. *Mehrof Bros. Brick Mfg. Co. v. Delaware, L. & W. R. Co.*, 51 N. J. L. 56, 16 Atl. 12.

In New York it is held that special demurrers as known to common law practice have been abolished. *Neis v. Yocum*, 16 Fed. 168; *Marie v. Garrison*, 83 N. Y. 14; *Bottom v. Chamberlain*, 21 Misc. 556, 47 N. Y. Supp. 733.

In Oregon special demurrers as known in the common law practice are not recognized. *Marx v. Croisan*, 17 Ore. 393, 21 Pac. 310.

Tennessee.—Demurrers for formal defects are abolished, and those only for substantial defects are allowed. *Shannon's Code*, §4655; *Evans v. Thompson*, 12 Heisk. 534.

Virginia.—Code, §3272; *Norfolk & W. R. Co. v. Ampey*, 93 Va. 108; *Grayson v. Buchanan*, 88 Va. 251.

West Virginia.—Code, §3649; *Cook v. Dorsey*, 38 W. Va. 196, 18 S. E. 468; *Sweeney v. Baker*, 13 W. Va. 158; *Coyle v. Baltimore & O. R. Co.*, 11 W. Va. 94.

94. Fla.—*Hoopes v. Crane*, 56 Fla.

395, 47 So. 992. **N. J.**—*Stratton v. Essex Co. Park Com.*, 164 Fed. 901 (a New Jersey case); *Harper v. Essex County Park Com.*, 73 N. J. L. 1, 62 Atl. 384; *Peter v. Middlesex & S. Traction Co.*, 69 N. J. L. 456, 55 Atl. 35; *Malberti v. United Electric Co.*, 69 N. J. L. 55, 54 Atl. 251; *Karnuff v. Kelch*, 69 N. J. L. 499, 56 Atl. 163, affirmed 71 N. J. L. 558, 60 Atl. 364. **N. Y.**—*Neis v. Yocum*, 16 Fed. 168.

95. Va. Code, §3272; W. Va. Code, §3849.

96. Ga.—*Western Union Tel. Co. v. Jenkins*, 92 Ga. 398, 17 S. E. 620; *Wrightsville & T. R. Co. v. Vaughan*, 9 Ga. App. 371, 71 S. E. 691; *Harrell v. Atkinson*, 9 Ga. App. 150, 70 S. E. 954; *Souders v. Carolina Cement Co.*, 3 Ga. App. 99, 59 S. E. 467. **Me.**—*Trask v. Chase*, 107 Me. 137, 77 Atl. 698; *Hare v. Dean*, 90 Me. 308, 38 Atl. 227; *Inhabitants of Wellington v. Small*, 89 Me. 154, 36 Atl. 107; *Mahan v. Sutherland*, 73 Me. 158; *Neal v. Hanson*, 60 Me. 84. **Pa.**—*Haldeman v. Martin*, 10 Pa. 369. **Vt.**—*Rudd v. Darling*, 64 Vt. 456, 25 Atl. 479.

In Equity.—*Trask v. Chase*, 107 Me. 137, 77 Atl. 698; *Glidden v. Norvell*, 44 Mich. 202, 6 N. W. 195.

Errors which might be deemed fatal on special demurrer will be disregarded on general demurrer. *Damren v. Trask*, 102 Me. 39, 65 Atl. 513; *Blake v. Maine Cent. R. Co.*, 70 Me. 60.

Since the statutes 27 Eliz. c. 5, §1, and 4 & 5 Ann. c. 16, special demurrers are necessary to reach defects of form. *Will's Gould Pl.*, 576; *Andrews Steph. Pl.* (2nd ed.), §139, p. 266; *Commonwealth v. Cross Cut R. Co.*, 53 Pa. 62.

"If the matter pleaded be in itself insufficient, without reference to the manner of pleading it, the defect is *substantial*; but . . . if the only fault is in the form of alleging it, the defect is but *formal*." *Will's Gould Pl.* 579.

A special demurrer goes to the structure merely, and not to the substance. *Martin v. Bartow Iron Works*, 35 Ga. 320.

ambiguity,⁹⁷ indefiniteness and uncertainty,⁹⁸ immateriality,⁹⁹ irrelevancy,¹ that matter of evidence is pleaded,² clerical and grammatical errors,³ misjoinder of counts,⁴ that a special plea amounts to the general issue,⁵ duplicity,⁶ argumentativeness,⁷ failure to make profert,⁸ that a pleading has not the proper conclusion,⁹ or is not verified,¹⁰ that a prayer for relief is not germane to the suit,¹¹ or matter in abatement,¹² such

A violation of the rules of pleading "occasionally amounts to matter of substance, but usually to matter of form only." *Andrews* Steph. Pl. (2nd ed.), §138, p. 265.

The remedy for a defective statement is special demurrer rather than a motion to strike. *Swain v. Burnette*, 76 Cal. 299, 18 Pac. 394.

Failure to make the essential parts of the contract a part of the petition in an action on an insurance policy. *Gonackey v. General Accident, Fire & Life Assur. Corp.*, 6 Ga. App. 381, 65 S. E. 53.

97. *Wrightsville & T. R. Co. v. Vaughan*, 9 Ga. App. 371, 71 S. E. 691.

98. *U. S.*—*Pacific Live-Stock Co. v. Hauley*, 98 Fed. 327. *Ga.*—*James v. Atlanta St. R. Co.*, 90 Ga. 695, 16 S. E. 642; *Printup v. Rome Land Co.*, 90 Ga. 180, 15 S. E. 764. *Idaho.*—*Dittmore v. Cable Milling Co.*, 16 Idaho 298, 101 Pac. 593; *Younie v. Blackfoot Light & Water Co.*, 15 Idaho 56, 96 Pac. 193; *Naylor v. Vermont Loan & Trust Co.*, 6 Idaho 251, 55 Pac. 297. *Ill.*—*American Car & Foundry Co. v. Hill*, 128 Ill. App. 176, *affirmed*, 226 Ill. 227, 80 N. E. 784. *Mich.*—*McDonald v. Smith*, 139 Mich. 211, 102 N. W. 668. In equity. *Glidden v. Norvell*, 44 Mich. 202, 6 N. W. 195.

99. *Dyer v. Stevens*, 6 Mass. 389.

1. *Chattanooga Southern R. Co. v. Thompson*, 133 Ga. 127, 65 S. E. 285; *Wilson v. Central of Georgia Ry. Co.*, 132 Ga. 215, 63 S. E. 1121.

2. *Hobson v. New Mexico & A. R. Co.*, 2 Ariz. 171, 11 Pac. 545.

3. *Meyer v. Ross*, 119 Ill. App. 485.

4. *Thompson v. Lewis*, 83 Me. 223, 22 Atl. 104.

5. *U. S.*—*Pendleton County v. Amy*, 13 Wall. 297, 20 L. ed. 579. *Ill.*—*Ogden v. Lucas*, 48 Ill. 492; *Supreme Lodge, etc., v. Albers*, 106 Ill. App. 85. *Vt.*—*Dufur v. Boston & M. R.*, 75 Vt. 165, 53 Atl. 1068; *Hotchkiss v. Ladd*, 36 Vt. 593, 86 Am. Dec. 679.

6. *Will's Gould Pl. 341, and the fol-*

lowing cases: Conn.—*Taylor v. Knapp*, 25 Conn. 510. *Ga.*—*Central of Georgia R. Co. v. Banks & Fortson*, 128 Ga. 785, 58 S. E. 352; *Harris v. Wilcox*, 7 Ga. App. 121, 66 S. E. 380. *Me.*—*Anderson v. Eastern Coupling Co.*, 81 Atl. 167; *Briggs v. Grand Trunk R. Co.*, 54 Me. 375. *Mass.*—*Otis v. Blake*, 6 Mass. 336. *Mich.*—*Douglas v. Marsh*, 141 Mich. 209, 104 N. W. 624. *Vt.*—*Dubois v. Roby*, 84 Vt. 465, 80 Atl. 150; *Lewis v. Crane & Sons*, 78 Vt. 216, 62 Atl. 60. *Va.*—*See Norfolk & W. R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226; *Grayson v. Buchanan*, 88 Va. 251, 13 S. E. 457. *W. Va.*—*See Sweeney v. Baker*, 13 W. Va. 158; *Coyle v. Baltimore & O. R. Co.*, 11 W. Va. 94.

7. *Massey v. People*, 201 Ill. 409, 66 N. E. 392; *Wilkinson v. Cosmopolitan Life Ins. Assn.*, 154 Ill. App. 195; *Wright v. Craig*, 116 Ill. App. 493; *Lloyd v. Travelers Protective Assn.*, 115 Ill. App. 39; *Webster v. State Mut. Fire Ins. Co.*, 81 Vt. 75, 69 Atl. 319; *Walker v. Wooster's Admr.*, 61 Vt. 403, 17 Atl. 792; *Catlin v. Lyman*, 16 Vt. 44.

8. *See New York Trap Rock Co. v. Brown*, 61 N. J. L. 536, 43 Atl. 100.

9. *United States v. Girault*, 11 How. (U. S.) 22, 13 L. ed. 587; *Hooker v. Smith*, 19 Vt. 151, 47 Am. Dec. 679.

10. *Nixon v. Malone* (Tex. Civ. App.), 95 S. W. 577.

11. *White v. North Georgia Electric Co.*, 136 Ga. 21, 70 S. E. 639; *White v. Seofield*, 84 Ga. 56, 10 S. E. 591.

12. "A special demurrer is only in the nature of a plea in abatement that gives a better writ, and saying to the plaintiff he may recover on the merits if he sues in a particular way." *Louisville & N. R. Co. v. Brantley's Admr.*, 96 Ky. 297, 28 S. W. 477.

"A special demurrer presents matter in abatement of the action, and if it is sustained the dismissal is without prejudice." *Walton v. Washburn*, 23 Ky. L. Rep. 1008, 64 S. W. 634.

as want of jurisdiction,¹³ the question of venue,¹⁴ that plaintiff has no capacity to sue,¹⁵ a defect¹⁶ or misjoinder¹⁷ of parties, or that there is another action pending between the same parties for the same cause of action.¹⁸ Multifariousness is ground for special demurrer in equity.¹⁹

X. FILING AND SERVICE OF DEMURRERS.—The necessity for, and the time, place and manner of filing,²⁰ and of serv-

13. Ky. Civ. Code Pr., §92; Hall's Admr. v. Louisville & N. R. Co., 102 Ky. 480, 43 S. W. 698.

Of the person. Kentucky Cent. R. Co. v. Holliday, 5 Ky. L. Rep. 695.

14. May be raised by special demurrer when a special appearance is made for that purpose only. The right to raise it is waived by pleading to the merits or filing a general demurrer. Ware-Kramer Tobacco Co. v. American Tobacco Co., 178 Fed. 117.

15. Ky. Civ. Code Pr., §92; De Haven v. De Haven's Admr., 104 Ky. 41, 46 S. W. 215, 47 S. W. 597.

16. Ky.—Civ. Code Pr., §92; Rittenhouse v. Clark, 110 Ky. 147, 61 S. W. 33; Fidelity & Casualty Co. v. Ballard & Ballard, 105 Ky. 253, 48 S. W. 1074; De Haven v. De Haven's Admr., 104 Ky. 41, 46 S. W. 215, 47 S. W. 597; Pritchard's Exx. v. Peace, 98 Ky. 99, 32 S. W. 296; McCallister's Admr. v. Savings Bank, 80 Ky. 684; Gragg v. Home Ins. Co., 28 Ky. L. Rep. 988, 90 S. W. 1045; Comb's Admx. v. Krish, 27 Ky. L. Rep. 154, 84 S. W. 562; Walton v. Washburn, 23 Ky. L. Rep. 1008, 64 S. W. 857; Becker v. Neason, 21 Ky. L. Rep. 356, 51 S. W. 446; Anderson v. Eminence, etc., Turnpike Co., 14 Ky. L. Rep. (abstract) 110; O'Brien v. City of Covington, 11 Ky. L. Rep. (abstract) 813; Stacy v. Coleman, 10 Ky. L. Rep. 78; C., N. O. & T. P. R. Co. v. Pemberton, 7 Ky. L. Rep. (abstract) 680.

Want of parties in equity must be taken advantage of by special demurrer, and the defect is not reached by general demurrer. Hughes v. Hughes, 72 Ga. 173.

Where the want of parties is merely formal, a demurrer because of their omission must be special, but where the omitted parties are so inseparably connected with the subject of the suit that a decree could not be made without directly affecting their interest, the objection is reached by general de-

murder. Strout v. Lord, 103 Me. 410, 69 Atl. 694; Laughton v. Harden, 68 Me. 208; Davis v. Rogers, 33 Me. 222.

17. Misjoinder of parties, or that some facts were superfluous or afforded no cause for relief, or that some of the relief prayed for is inappropriate, are matters for special demurrer, and on general demurrer the petition should not be dismissed for these reasons. Reese v. Reese, 89 Ga. 645, 15 S. E. 846.

18. Ky. Civ. Code Pr., §92.

19. May be taken advantage of either by general or special demurrer, where it is manifest on the face of the bill that two causes of action are presented. Emmons v. National Mut. Bldg. & Loan Assn., 135 Fed. 689, 67 C. C. A. 327.

A demurrer for multifariousness is special. Case v. Longyear (Mich.), 134 N. W. 459; Kerr v. Rupp, 144 Mich. 269, 107 N. W. 1059.

20. Arkansas.—Filing in the clerk's office in vacation with notice to the opposite party is equivalent to a filing in court as of that date. Kirby's Dig., §6118.

Florida.—In actions at law defendant must file his demurrer on the rule day succeeding that on which the declaration is filed, unless, upon motion, further time be given by the court. Gen. St., 1906, §1418.

In equity defendant must file his demurrer in the clerk's office on the rule day next succeeding that fixed for an entry of appearance, unless the time is extended on motion for good cause shown. Gen. St., 1906, §1896.

Iowa.—Must file a copy of the demurrer for the use of the adverse party, and, on failure to do so, the cause may be continued at the option of the adverse party, or the demurrer stricken from the files. Code, §3558.

Michigan.—In chancery demurrers shall be filed in the office of the register with whom the bill or petition in

ing²¹ demurrers depends entirely on the statutes and rules of court of the various states.

XI. JOINDER IN DEMURRER.—At common law the party to whose pleading a demurrer was taken was required to join in such demurrer, and his failure to do so operated as a discontinuance of his action or defense.²² This rule still obtains in some jurisdictions,²³ though a formal joinder is generally no longer required.²⁴ Statutes in some states specifically provide that if the adverse party does not amend the pleadings demurred to, he shall be deemed to have joined in demurrer.²⁵ Want of a joinder is waived by proceeding with the case without objection.²⁶

The joinder comprises simply a statement that the pleading de-

the cause was filed, unless otherwise directed by rule or order of the court. Comp. Laws, 1897, §457.

21. **California.**—A demurrer filed in time cannot be stricken out because not served. *Davis v. Honey Lake Water Co.*, 98 Cal. 415, 30 Pac. 270.

Entertaining and ruling on demurrers improperly served is harmless, where the pleading demurred to is fatally defective. *Moran v. Bonyngue*, 157 Cal. 295, 107 Pac. 312.

New York.—Where a copy of the complaint is served with the summons, a copy of the demurrer must be served upon plaintiff's attorney, within the time for answering. Code Civ. Proc., §422. Service in mandamus. Code Civ. Proc., §2081.

See *Stilwell v. Kellogg*, 14 Wis. 461. 22. Plaintiff is "obliged to accept, or join in the issue of law, and does so by a set form of words called *joinder in demurrer*." *Andrews Steph. Pl.* (2nd ed.), §106, p. 193; *Brown v. Jones*, 10 Gil. & J. (Md.) 334.

A refusal or omission to do so has the same effect as an omission to plead, when pleading is necessary, and hence is a virtual abandonment of his side of the case. *Will's Gould Pl.* 584.

It is necessary to constitute a technical issue. *McCracken v. West*, 17 Ohio 16.

It is error to overrule a demurrer on motion. *Edmiston v. Edmiston*, 2 Ohio 251.

Where plaintiff fails to join in a demurrer interposed by defendant, the latter should move for a rejoinder, or procure a rule for one. *Townsend v. Jemison*, 7 How. (U. S.) 706, 12 L. ed. 880.

"The harshest penalty proper for de-

lay in the joinder would seem to be, that the demurrer may be considered, when requested by the party making it, though no formal joinder has taken place." *Townsend v. Jemison*, 7 How. (U. S.) 706, 12 L. ed. 880.

A joinder "in short" is improper, and may be stricken on proper objection. *Headley v. Roby*, 6 Ohio 521.

23. **Maine.**—Rev. St., 1903, c. 84, §35. It is error to allow an amendment before there has been any joinder of the demurrer or ruling thereon. *Wakefield v. Littlefield*, 52 Me. 21.

Michigan.—Plaintiff is bound to join in demurrer within the time fixed by the rule, or he is liable to be defaulted. *Wyckoff, Seamans & Benedict v. Bishop*, 98 Mich. 352, 57 N. W. 170.

North Carolina.—Plaintiff must join issue on the demurrer. Rev., 1905, §484.

24. **Ill.**—*Mix v. Chandler*, 44 Ill. 174. **Miss.**—Code, 1906, §758. **N. J.** Comp. St., 1910, p. 4094, §128. In quo warranto. Comp. St., 1910, p. 4214, §8. **R. I.**—Gen. Laws, 1909, c. 289, §18. **Va.**—Code, §3268. **W. Va.**—Code, §3845.

25. **Ia.**—Code, §3565. **Mass.**—Rev. Laws, 1902, c. 173, §13, 1552. **N. J.** Comp. St., 1910, p. 4094, §132.

26. "If a demurrer is tendered, as the other party can only join in the demurrer, that will be considered as done, whenever the parties proceed with the cause without objection." *Blydenburgh v. Miles*, 39 Conn. 484, 496.

That there was no joinder is not ground for reversal where the demurrer was argued and decided on its merits without objection. *Hart v. Baltimore & O. R. Co.*, 6 W. Va. 336.

If a failure is objected to at the time, a joinder may be filed instantly, and if

murred to is sufficient in law.²⁷ It is in the nature of a *similiter* in the case of an issue of fact,²⁸ and no new matter can be set up therein.²⁹

Joining in the demurrer is a waiver of the right to contend that it is not the proper method of reaching the defects complained of,³⁰ but joinder in a general demurrer does not open to a party defects of form when the meaning and intention of the pleading are plain.³¹

XII. FORCE AND EFFECT OF DEMURRERS. — A. EFFECT IN GENERAL. — Filing a demurrer suspends the necessity of filing any other pleading until the same is determined.³² Demurrant is bound by admissions and concessions in the demurrer.³³

Except in a few states,³⁴ a demurrer to the original pleading does not extend to an amended one subsequently filed unless the demurrer is refiled after the amendment is made.³⁵ This rule has been held not to apply to amendments by way of interlineation which do not change the issues or obviate the objections originally made.³⁶ A demurrer

not, and exception is subsequently taken for this cause, the court will consider it as having been in. *McCracken v. West*, 17 Ohio 16.

27. *Wyckoff, Seamans & Benedict v. Bishop*, 98 Mich. 352, 57 N. W. 170.

Form of joinder in demurrer. *Andrews Steph. Pl.* (2nd ed.), §106, p. 193.

28. *Brown v. Jones*, 10 Gill & J. (Md.) 334; *McCracken v. West*, 17 Ohio 16.

29. This objection is waived by failure to take it at the proper time. *Bradstreet v. Thomas*, 12 Pet. (U. S.) 59, 9 L. ed. 999.

30. *Kimball v. Boston, C. & M. R. Co.*, 55 Vt. 95.

31. *Emmons v. Alvord*, 177 Mass. 466, 59 N. E. 126.

32. In Iowa the code provides that a demurrer assailing any pleading or count thereof suspends the necessity of filing any other pleading thereto until the same has been determined, and the next pleading shall be filed by the morning of the day succeeding such determination. Code, §3555.

It is error to render judgment on the same day on which the demurrer is sustained. *Newcom v. Dubois*, 95 Iowa 194, 63 N. W. 677.

33. *Hot Springs Lumber & Mfg. Co. v. Revercomb*, 110 Va. 240, 65 S. E. 557.

34. In Arizona a demurrer to the original pleading still stands to the amended one where no other pleading

is filed by demurrant. *Rev. St.*, 1901, par. 1367; *Leatherwood v. Hill*, 10 Ariz. 243, 89 Pac. 521.

In Georgia "where the court permits an amendment to a petition after a demurrer has been filed thereto, but before ruling upon the demurrer, the demurrer need not be again formally presented in order to permit the filing of exceptions pendente lite to the overruling of the demurrer." *Thorn-ton & Warren v. Cordell*, 8 Ga. App. 588, 70 S. E. 17.

In Michigan, under circuit court rule 10, when a declaration is amended after plea or demurrer, such plea or demurrer stands as the plea or demurrer to the amended declaration, unless defendant files another one within ten days after receiving such amendment. *Marvin v. Bowlby*, 135 Mich. 640, 93 N. W. 399.

35. See *Hawthorn v. Siegel*, 88 Cal. 159, 25 Pac. 1114; *Powell v. Cheshire*, 70 Ga. 357.

A ruling on a demurrer to the original complaint made after the filing of an amended complaint presents no question as to the sufficiency of the latter. *Cincinnati, B. & C. R. R. v. Wall* (Ind. App.), 96 N. E. 389.

The amended pleading is the only one before the court. *Harvey v. Hand* (Ind. App.), 95 N. E. 1020.

36. In such case a new demurrer is not necessary, and it is not error to refuse to permit one to be filed. *Flood v. Templeton*, 148 Cal. 374, 83 Pac. 148.

interposed after the addition of new counts by amendment will generally be regarded as directed to such new counts only.³⁷

B. EFFECT OF DEMURRER BY ONE OF SEVERAL CO-PARTIES. — A separate demurrer by one only of several co-parties tests the sufficiency of the pleading as to him in the same manner and with the same effect as if he were the only party,³⁸ and usually inures to his benefit alone,³⁹ at least in so far as defects of form are concerned.⁴⁰ In some states, however, it is held that the sustaining of a demurrer to the complaint for want of facts interposed by one of several defendants inures to the benefit of them all where they all stand on the same ground.⁴¹

C. EFFECT ON PLEADINGS PREVIOUSLY FILED. — In some states a party who demurs after answering or replying thereby waives, withdraws, or abandons his answer or reply.⁴² There seems to be a conflict of authority as to whether a plea in abatement is waived or overruled by a subsequent demurrer.⁴³

37. Where a ruling sustaining a demurrer to a declaration containing one count is not excepted to, and, under leave to amend, plaintiff files new counts, but does not amend the original one, a subsequent demurrer will be confined to the new counts. *Plais-ted v. Walker*, 77 Me. 459.

Where, to a declaration containing one count a general answer is filed, and an additional count is then added by amendment, a subsequent demurrer will be restricted in its application to the added count, or to some impropriety in joining the two. *Lynn Safe Deposit & Trust Co. v. Andrews*, 180 Mass. 527, 62 N. E. 1061.

38. Though the demurrer alleges generally that the pleading does not state facts sufficient to constitute a cause of action, without the words "as to him." *Frankel v. Garrard*, 160 Ind. 209, 66 N. E. 687.

In equity the object of a demurrer is to obtain a decree dismissing the bill only as to the demurring defendants. Hence a demurrer by a part only of the defendants should be sustained where the bill does not warrant the granting of any relief against them, though it does warrant relief against the other defendants not joining in the demurrer. *Swinley v. Force*, 78 N. J. Eq. 52, 73 Atl. 249.

39. *Sapp v. Williamson*, 128 Ga. 743, 58 S. E. 447; *Byrom v. Gunn*, 111 Ga. 805, 35 S. E. 649; *Ballin & Co. v. Ferst & Co.*, 55 Ga. 546; *Gray v. New Mexico Pumice Stone Co.*, 15 N. M. 473, 110 Pac. 603.

In *Hollingsworth v. Johns & Co.*, 92 Ga. 428, 17 S. E. 621, sustaining a demurrer as to defendants, against whom the petition stated no cause of action was held not to warrant the dismissal of the action as to other defendants who did not demur and made no resistance to the action.

40. *Wood v. De Coster*, 66 Me. 542.

41. Ark.—*Beidler v. Beidler*, 71 Ark. 318, 74 S. W. 13; *State v. Williams*, 17 Ark. 371. Ga.—*Tate v. Goode*, 135 Ga. 738, 70 S. E. 571. Ia.—*Dillavou v. Dillavou*, 142 Iowa 291, 120 N. W. 628.

The reversal of a judgment overruling a demurrer interposed by a part only of the defendants will operate in favor of all the defendants where those excepting and those not excepting stand on the same ground and their rights are involved in the same question and are equally affected by the judgment. *Tate v. Goode*, 135 Ga. 738, 70 S. E. 571.

42. *State v. Bright*, 224 Mo. 514, 123 S. W. 1057; *Dunklin County v. Clark*, 51 Mo. 60.

Insisting upon a demurrer filed with a reply is regarded as a withdrawal of the latter. *Henley v. Henley*, 93 Mo. 95, 5 S. W. 701.

43. In equity a plea of another action pending is not necessarily overruled by a demurrer. *Snyder v. De Forest Wireless Tel. Co.*, 154 Fed. 142.

In Illinois the plea is waived. *Ferguson v. Rawlings*, 23 Ill. 69.

D. RIGHT TO SUBSEQUENTLY PLEAD TO THE MERITS.—Except where the rule has been changed by statute,⁴⁴ a party who has filed a demurrer cannot thereafter plead to the merits until the demurrer is withdrawn,⁴⁵ by leave of court,⁴⁶ the matter of permitting him to do so resting in the court's discretion.⁴⁷ In some states consent of the

44. In Maryland, where a demurrer is overruled, demurrant may plead over without withdrawing his demurrer. Pub. Gen. Laws, art. 75, §8, p. 1633.

45. Chesapeake & O. R. Co. v. American Exchange Bank, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449; Camden Clay Co. v. Town of New Martinsville, 67 W. Va. 525, 68 S. E. 118.

After a demurrer is overruled the adverse party is entitled as matter of right to a final judgment unless the demurrer is withdrawn. *Peters v. Needham Piano & Organ Co.*, 109 N. Y. Supp. 572; *National Contracting Co. v. Hudson River Water Power Co.*, 110 App. Div. 133, 97 N. Y. Supp. 92.

The demurrer must be withdrawn before demurrant can plead over. A failure to withdraw it is an election to abide by it and justifies a judgment on the demurrer. *Lowy v. Andreas*, 20 Ill. App. 521; *Gammon v. Bunnell*, 22 Utah 421, 64 Pac. 958.

Until withdrawn it remains in the record as an admission of the facts alleged in the pleading demurred to. *Lowy v. Andreas*, 20 Ill. App. 521.

"Formerly, if the party demurring wished to plead, he was required to obtain leave to withdraw his demurrer and to apply to the court for leave to plead over (*Godfrey v. Buckmaster*, 1 Scam. 447), and that practice is still followed to some extent, although it is not now required that a party should ask leave to withdraw his demurrer." *Nordhaus v. Vandalia R. Co.*, 242 Ill. 166, 89 N. E. 974.

In Massachusetts.—See Rev. Laws, 1902, c. 173, §17, p. 1553.

Where plaintiff is permitted to reply without objection, there is an implied withdrawal in which defendant will be deemed to have acquiesced. *Camden Clay Co. v. Town of New Martinsville*, 67 W. Va. 525, 68 S. E. 118.

Where a replication is filed and a trial had on the merits, on appeal the demurrer will be regarded as having been waived or withdrawn. *Chesapeake & O. R. Co. v. American Exchange Bank*, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449.

46. Leave of court is essential. *Herington v. Stevens*, 26 Ill. 298.

After it has been overruled. *Peters v. Needham Piano & Organ Co.*, 109 N. Y. Supp. 572; *National Contracting Co. v. Hudson River Water Power Co.*, 110 App. Div. 133, 97 N. Y. Supp. 92.

In Maryland, it is provided by statute that, in equity cases, where a demurrer is withdrawn without leave of court, demurrant "shall pay to the opposite party the sum of ten dollars, and the costs thereof, and be in contempt until the said sum of money and costs are fully paid, unless the court shall otherwise specially order." Pub. Gen. Laws, art. 16, §154, p. 425; *Collateral Security Bank v. Fowler*, 42 Md. 393.

A defendant who is in contempt by reason of the nonpayment of such fine has no right to file an answer, and if he does so it may be ignored. *Gilbert v. Arnold*, 30 Md. 29.

In Georgia in equity a defendant may withdraw his demurrer before the court has pronounced and entered his final judgment thereon, and this though the court has intimated that the demurrer will be overruled. This right is included in the privilege of amending pleadings at any stage of the case, which is given by statute. *Smith v. Hornsby*, 70 Ga. 552.

47. *Humphrey v. Hughes' Guardian*, 79 Ky. 487; *Simson v. Satterlee*, 64 N. Y. 657; *Peters v. Needham Piano & Organ Co.*, 109 N. Y. Supp. 572; *National Contracting Co. v. Hudson River Water Power Co.*, 110 App. Div. 133, 97 N. Y. Supp. 92.

Unless it appears that it was interposed in bad faith, leave should be granted on payment of costs. *Asphalt Const. Co. v. Bouker*, 127 App. Div. 730, 112 N. Y. Supp. 31.

As a rule leave will not be granted where there has been judgment upon the demurrer overruling it, without leave to answer, or with leave to answer not availed of. *Fisher v. Gould*, 81 N. Y. 228.

Where a party whose demurrer is

opposite party is also essential,⁴⁸ or may take the place of consent by the court.⁴⁹

E. RIGHT TO SUBSEQUENTLY AMEND.—It has been held that an amendment cannot properly be allowed after a demurrer has been filed and before joinder of the demurrer,⁵⁰ or a ruling thereon.⁵¹ Statutes in many states, however, permit the adverse party to amend as of course within a specified time after the filing of a demurrer,⁵² or authorize the court to allow him to do so.⁵³ It has been held that plaintiff cannot, under such a statute, cure a misjoinder of causes of action by amendment after a demurrer on that ground has been filed.⁵⁴

The federal courts will follow in actions at law the state practice as to the right to amend.⁵⁵

F. DEMURRER AS AN APPEARANCE.—As a general rule a demurrer constitutes an appearance, and precludes the party who interposes it from thereafter contending that the court in which the action is pending has no jurisdiction over his person.⁵⁶ Such an appearance

overruled refuses to plead over and judgment is rendered against him, he will not be permitted, on appeal, to withdraw his demurrer and plead over. *Dunlap & Co. v. Cody*, 31 Iowa 260.

48. A demurrer not filed at the first term, and which has been overruled. *Rev. St.*, 1903, c. 84, §35; *Fryeburg v. Brownfield*, 68 Me. 145.

49. In Iowa it may not be withdrawn without the consent of the adverse party in writing, or given in open court, or of the court. *Code*, §3556.

50. *Wakefield v. Littlefield*, 52 Me. 21.

51. *Wakefield v. Littlefield*, 52 Me. 21.

52. **U. S.**—*Rosenbach v. Dreyfuss*, 1 Fed. 391. **Ala.**—*Code*, 1907, §3125. **Idaho.**—*Rev. Codes*, §4228. **Kan.**—*Gen. St.*, 1909, §5731. **Mo.**—*Rev. St.*, 1909, §1803. **Neb.**—*Comp. St.*, 1911, §6713. **Nev.**—*Comp. Laws*, §3162, as amended by *St.*, 1907, c. 188, p. 412. **N. J.** *Comp. St.*, 1910, p. 4094, §132. **N. Y.** *Code Civ. Proc.*, §542. **N. D.**—*Rev. Codes*, 1905, §6882. **Ohio.**—*Code*, 1910, §1361. **Okla.**—*Comp. Laws*, 1909, §5677. **S. C.**—*Code Civ. Proc.*, §193; *Sullivan v. Sullivan*, 24 S. C. 474. **S. D.**—*Code Civ. Proc.*, §149. **Utah.**—*Comp. Laws*, 1907, §3004. **Wis.**—*St.*, 1898, §2685. **Wyo.**—*Comp. St.*, 1910, §4435.

In Florida, "upon demurrer to any declaration or other pleading, the party plaintiff or defendant may admit the cause of demurrer by filing an

amended declaration or pleading, which shall do away with the cause of demurrer." *Circuit court common law rule 30. Benedict Pineapple Co. v. Atlantic Coast Line R. Co.*, 55 Fla. 514, 46 So. 732, 20 L. R. A. (N. S.) 92.

In Kentucky, where a demurrer is filed with an answer or subsequent pleading in vacation, "the adverse party may, during that vacation, and after notice to the party filing the demurrer, or his attorney, file an amended pleading to cure any defect suggested by the demurrer." *Code Civ. Pr.*, §109.

53. In Massachusetts may allow a party to whose pleadings a demurrer has been filed to amend, within such time as the court orders. *Rev. Laws*, 1902, c. 173, §49, p. 1558.

54. Nor is he entitled to a severance on motion prior to the sustaining of the demurrer. *Neun v. B. H. Bacon Co.*, 121 N. Y. Supp. 718.

55. Under the conformity act. *Rosenbach v. Dreyfuss*, 1 Fed. 391.

56. It waives the necessity of a summons. *Iowa Rev. Codes*, §4139; *Chaffin v. Fulkerson*, 95 Ky. 277, 24 S. W. 1066.

Amounts to a general appearance. **Ind.** *Darnell v. State*, 174 Ind. 143, 90 N. E. 769. **Ky.**—*McDowell v. Chesapeake O. & S. W. R. Co.*, 90 Ky. 346, 14 S. W. 338. **Mich.**—*Stevens v. Harris*, 99 Mich. 230, 58 N. W. 230; *Norberg v. Heine-man*, 59 Mich. 210, 26 N. W. 481. **Mont.** *McKiernan v. King*, 2 Mont. 72. **Utah.**

cannot be defeated by a subsequent attempt to withdraw the demurrer.⁵⁷

G. ISSUES RAISED.—The purpose of a demurrer is to raise an issue of law.⁵⁸ It admits the truth of the facts alleged in the pleading demurred to but questions their legal sufficiency.⁵⁹ A demurrer which

Farnsworth v. Union Pac. Coal Co., 32 Utah 112, 89 Pac. 74. See also *Stone v. Union Pac. R. Co.*, 32 Utah 185, 89 Pac. 715. **Vt.**—*Bank of Bellows Falls v. Rutland & B. R. Co.*, 28 Vt. 478.

It admits the jurisdiction, but attacks the pleadings. *Littlefield v. Maine Cent. R. Co.*, 104 Me. 126, 71 Atl. 657.

Though it contains a reservation of any right acquired under a previous motion to set aside the summons. *Sweeney v. Schultes*, 19 Nev. 53, 6 Pac. 44.

The right to raise the question of venue in equity is waived by filing a general demurrer. *Ware-Kramer Tobacco Co. v. American Tobacco Co.*, 178 Fed. 117.

A demurrer for want of jurisdiction over the defendant's person is a general appearance and confers jurisdiction unless the court can under no circumstances acquire it. *Reynolds v. La Crosse & Minn. Packet Co.*, 10 Minn. 178.

A demurrer for misjoinder of causes of action and parties is a general appearance to each of such causes of action, and no further process is necessary on separation of such causes. *Davis v. Public Service Corporation*, 77 N. J. L. 275, 72 Atl. 82.

See also the title "Appearances."

57. *Stevens v. Harris*, 99 Mich. 230, 58 N. W. 230. See also the title "Appearances."

58. *Andrews* Steph. Pl. (2nd ed.), §105, p. 192, and the following cases: **U. S.**—*Scharff v. Levy*, 112 U. S. 711, 5 Sup. Ct. 360, 28 L. ed. 825; *Alley v. Nott*, 111 U. S. 472, 4 Sup. Ct. 495, 28 L. ed. 491; *Lessee of Walden v. Craig's Heirs*, 14 Pet. 147, 10 L. ed. 393. **Cal.**—*Philip v. Durkee*, 108 Cal. 300, 41 Pac. 407; *Brennan v. Ford*, 46 Pac. 7; *Cook v. Pablo de la Guerra*, 24 Cal. 237. **Conn.**—*Havens v. Hartford & N. H. R. Co.*, 28 Conn. 69. **Ga.** Code, 1895, §5049. **Idaho.**—Rev. Codes, §4366. **Ind.**—*Merrill v. Pepperdine*, 9 Ind. App. 416, 36 N. E. 921. **Minn.** Rev. Laws, 1905, §4162; *Disbrow v. Creamery Package Mfg. Co.*, 104 Minn.

17, 115 N. W. 751; *Knoblauch v. Fogle-song*, 38 Minn. 459, 38 N. W. 366; *Porter v. Fletcher*, 25 Minn. 493. **N. M.** *Mulvey v. Staab & Co.*, 4 N. M. 172, 12 Pac. 699. **N. Y.**—Code Civ. Proc., §964; *Mills Power Co. v. Mohawk Hydro-Electric Co.*, 128 N. Y. Supp. 810. **N. C.**—*Wood v. Kincaid*, 144 N. C. 393, 57 S. E. 4. **N. D.**—Rev. Codes, 1905, §7005. **Ohio.**—*Alter v. City of Cincinnati*, 4 Ohio N. P. 427. **Okla.**—*Adams v. Couch*, 1 Okla. 17, 26 Pac. 1009. **Ore.**—*L. O. L.*, §10; *Mulkey v. Day*, 49 Ore. 312, 89 Pac. 957; *Hume v. Woodruff*, 26 Ore. 373, 38 Pac. 191; *Rice v. Rice*, 13 Ore. 337, 10 Pac. 495. **S. C.**—Code Civ. Proc., §270; *Charlotte, C. & A. R. Co. v. Gibbes*, 23 S. C. 370. **S. D.**—Code Civ. Proc., §240. **Utah.**—Comp. Laws, 1907, §3125. **Wash.** Rem. & Ball. Ann. Codes & St., §310.

"A demurrer, though frequently called 'an issue' in law, may, with more propriety, be said to tender such an issue. For the issue is not formed, until there is a joinder in demurrer; which affirms the legal sufficiency of the allegations demurred to, in contradiction of the demurrer, which affirms their legal insufficiency." Will's Gould Pl. 571.

Whether it is special or general. *State v. Peck*, 60 Me. 498.

Its purpose is to obtain a ruling of the court on a question of law. *Western Union Telegraph Co. v. Ashley* (Tex. Civ. App.), 137 S. W. 1165.

59. **Conn.**—*Scovill v. Seeley*, 14 Conn. 238. **Fla.**—*H. W. Metcalf Co. v. Orange County*, 56 Fla. 829, 47 So. 363. **Ga.**—Code, 1895, §5048; *Callaway v. Martin*, 7 Ga. App. 357, 66 S. E. 1101. **Ia.**—*Hayden v. Anderson*, 17 Iowa 158. **Md.**—*Collateral Security Bank v. Fowler*, 42 Md. 393. **Mo.** *Pidgeon v. United Rys. Co.*, 154 Mo. App. 20, 133 S. W. 130. **N. J.**—*Riley v. Hodgkins*, 57 N. J. Eq. 278, 41 Atl. 1099. **S. D.**—*Cumins v. Lawrence County*, 1 S. D. 158, 46 N. W. 182. **Tenn.**—*Trust Co. v. Weaver*, 102 Tenn. 66, 50 S. W. 763; *Insurance Co. v. Thornton*, 97 Tenn. 1, 40 S. W. 136. **Tex.**—*Williams v. Warnell*, 28 Tex.

raises only an issue of fact is bad and should be overruled.⁶⁰

H. ADMISSIONS BY DEMURRER.—1. What Is Admitted by a Demurrer.—It is a universal rule that a demurrer admits all the allegations of fact in the pleading to which it is addressed,⁶¹ which are

610; *Jefferson v. Scott* (Tex. Civ. App.), 135 S. W. 705.

"A demurrer is but a legal exception to the sufficiency of a pleading." *Wapello State Sav. Bank v. Colton*, 143 Iowa 359, 122 N. W. 149.

Its office is to test the sufficiency of the pleading. *Sprunt v. Gordon* (S. C.), 71 S. E. 1033.

"It admits the facts and refers the law arising thereon to the court." *Tyler v. Hand*, 7 How. (U. S.) 573, 12 L. ed. 824.

"A demurrer submits to the court the legal effect of what appears upon the face of the preceding record." *Lee v. Follensby*, 80 Vt. 182, 67 Atl. 197.

"It in effect says to the court that the facts properly pleaded are true, but demands the judgment of the court as to the law when applied to those facts." *Mayor, etc., of Baltimore v. Thomas*, 115 Md. 212, 80 Atl. 726.

Overruling a demurrer to a count in libel does not necessarily mean more than that the judge cannot say as matter of law that the words used are libelous. *Fay v. Harrington*, 176 Mass. 270, 57 N. E. 369.

60. *Ala.*—*Corpening & Co. v. Worthington & Co.*, 99 Ala. 541, 12 So. 426. *Mo.*—*Spears v. Bond*, 79 Mo. 467. *Tex.*—Exception. *Burgess v. New York Life Ins. Co.* (Tex. Civ. App.), 53 S. W. 602.

Demurrants cannot allege as a matter of fact that there was no contract in writing as a cause of demurrer, but must aver that the allegations of the bill do not show such a contract. *Riley v. Hodgkins*, 57 N. J. Eq. 278, 41 Atl. 1099.

Merely denying the allegations of the pleading. *Ledoux Bros. v. City of Nashua*, 75 N. H. 481, 76 Atl. 249.

As a demurrer which denies the truth of the allegations of a plea, where the court does not judicially know whether they are true or false. *Mobile Electric Co. v. Sanges*, 169 Ala. 341, 53 So. 176.

Where the declaration does not allege that the instrument sued on is a sealed instrument, the question

whether it is or not is one of fact, and cannot be raised by demurrer. *Grubbs v. National Life Maturity Ins. Co.*, 94 Va. 589, 27 S. E. 464.

Whether an agreement was a device to evade the usury laws was held to be a question of fact, and not one of law which could be determined on demurrer. *Stevens v. Staples*, 64 Minn. 3, 65 N. W. 959.

61. *Will's Gould Pl.*, 572, 573; *Andrews Steph. Pl.* (2nd ed.), §140, p. 267, and the following cases: *U. S.* *Interstate Land Co. v. Maxwell Land Co.*, 139 U. S. 569, 11 Sup. Ct. 656, 35 L. ed. 278; *Pennie v. Reis*, 132 U. S. 464, 10 Sup. Ct. 149, 33 L. ed. 426; *Bissell v. Spring Valley Township*, 124 U. S. 225, 8 Sup. Ct. 495, 31 L. ed. 411; *Hanley v. Donoghue*, 116 U. S. 1, 6 Sup. Ct. 242, 29 L. ed. 535; *Maxwell v. Kennedy*, 8 How. 210, 12 L. ed. 1051; *Tyler v. Hand*, 7 How. 573, 12 L. ed. 824; *Gonsoulard v. Rosomano*, 176 Fed. 481, 100 C. C. A. 97; *Calhoun v. Pullman Co.*, 159 Fed. 387, 86 C. C. A. 387; *Southern Pac. Co. v. Railroad Comr.*, 193 Fed. 699; *In re Putman*, 193 Fed. 464; *French v. Busch*, 189 Fed. 480; *Larabee v. Dolley*, 175 Fed. 365; *Risley v. City of Utica*, 173 Fed. 502; *United States v. Sixty-eight Cases of Syrup*, 172 Fed. 781. *Ala.*—*Norton v. Randolph*, 58 So. 283; *Bluthenthal & Bickert v. City of Columbia*, 57 So. 814; *Mayor, etc., of City of Columbiana v. J. W. Kelley & Co.*, 55 So. 526; *City of Birmingham v. Coffman*, 55 So. 500; *First Ave. Coal & Lumber Co. v. Johnston*, 54 So. 598. *Ark.*—*Adams v. Primmer*, 144 S. W. 522; *Walker v. Files*, 94 Ark. 453, 127 S. W. 739; *Drilling v. Armstrong*, 94 Ark. 505, 127 S. W. 725; *Greer v. Newbill*, 89 Ark. 509. *Cal.*—*French v. Senate of Cal.*, 146 Cal. 604, 80 Pac. 1031; *Branham v. Mayor, etc., of San Jose*, 24 Cal. 585; *People v. Town of Antioch* (Cal. App.), 121 Pac. 945; *Pacific Union Club v. Commercial Union Assur. Co.*, 12 Cal. App. 503, 107 Pac. 728; *Shannon v. Cavanaugh*, 12 Cal. App. 434, 107 Pac. 574; *Richards v. Farmers' & Merchants' Bank*, 7 Cal. App.

- 387, 94 Pac. 393. **Colo.**—City of Goldfield *v.* MacDonald, 119 Pac. 1069; Downey *v.* Colorado Fuel & Iron Co., 48 Colo. 27, 108 Pac. 972; Denver Jobbers' Assn. *v.* People (Colo. App.), 122 Pac. 404. **Conn.**—Rogers *v.* Hendrick (Conn.), 82 Atl. 590; Ryan *v.* Knights of Columbus, 82 Conn. 91, 72 Atl. 574; Coughlin *v.* Knights of Columbus, 79 Conn. 218, 64 Atl. 223; Brown *v.* Town of Southbury, 53 Conn. 212, 1 Atl. 819; Daniels *v.* Town of Saybrook, 34 Conn. 377. **Del.**—Perry *v.* Philadelphia, B. & W. R. Co., 77 Atl. 725. **Fla.**—Brown *v.* Avery, 58 So. 34; City of Miami *v.* Shuts, 59 Fla. 462, 51 So. 929; Holt *v.* Hillman-Sutherland Co., 56 Fla. 801, 47 So. 934; Benedict Pineapple Co. *v.* Atlantic Coast Line R. Co., 55 Fla. 514, 46 So. 732, 20 L. R. A. (N. S.) 92; Barbee *v.* Jacksonville & A. P. R. Co., 6 Fla. 262. **Ga.**—Code, 1895, §5048; Morel *v.* Sylvania & G. R. Co., 134 Ga. 687, 68 S. E. 588; Brown *v.* Massachusetts Mills, 7 Ga. App. 642, 67 S. E. 832; Callaway *v.* Martin, 7 Ga. App. 357, 66 S. E. 1101. **Idaho.**—Burkhart *v.* Reed, 2 Idaho 503, 22 Pac. 1. **Ill.**—Hoyt *v.* McLaughlin, 250 Ill. 442, 95 N. E. 464; Moore *v.* Brandenburg, 248 Ill. 232, 93 N. E. 733; Martin *v.* McCall, 247 Ill. 484, 93 N. E. 418; Cragg *v.* Levinson, 238 Ill. 69, 87 N. E. 121; Kemp *v.* Division No. 241, etc., 153 Ill. App. 344; Dempster *v.* Lansing, 150 Ill. App. 55; Smith *v.* Alexander, 128 Ill. App. 507. **Ind.**—Wabash R. Co. *v.* Railroad Commission, 95 N. E. 673; Gray *v.* National Benefit Assn., 111 Ind. 531, 11 N. E. 477; Andre *v.* Murray (Ind. App.), 98 N. E. 322; Olecott *v.* McClure (Ind. App.), 98 N. E. 82; Roemler *v.* Dice (Ind. App.), 97 N. E. 364; Brett *v.* Pretorious (Ind. App.), 96 N. E. 211; Leonard *v.* City of Terre Haute (Ind. App.), 93 N. E. 872. **Ia.**—Code, §3564; Turner Imp. Co. *v.* City of Des Moines, 136 N. W. 656; Reed *v.* Hollingsworth, 135 N. W. 37; Durst *v.* Des Moines, 150 Iowa 370, 130 N. W. 163; Case *v.* Davis County, 150 Iowa 552, 129 N. W. 804; Griffith *v.* Merchants' Life Assn., 148 Iowa 727, 127 N. W. 1079; Smith *v.* Keeley, 146 Iowa 660, 125 N. W. 669; Jefferies *v.* Fraternal Bankers' Reserve Society, 135 Iowa 284, 112 N. W. 786; Iowa Mut. Tornado Ins. Assn. *v.* Gilbertson, 129 Iowa 658, 106 N. W. 153; Harris-Emery Co. *v.* Pitcairn, 122 Iowa 595, 98 N. W. 476. **Kan.**—Bollinger *v.* Beacham, 81 Kan. 746, 106 Pac. 1094; Bartholomew *v.* Guthrie, 71 Kan. 705, 81 Pac. 491; Leavenworth, L. & G. R. Co. *v.* Leahy, 12 Kan. 124; Voss *v.* Bachop, 5 Kan. 59. **Ky.**—Lewis' Admr. *v.* Bowling Green R. Co., 144 S. W. 377; Bonta *v.* Fiscal Court, 144 Ky. 241, 137 S. W. 1084; Sublett *v.* Gardner, 144 Ky. 190, 137 S. W. 864; Newport Sand Bank Co. *v.* Monarch Sand Mining Co., 144 Ky. 7, 137 S. W. 784, 34 L. R. A. (N. S.) 1040; See *v.* Leidecker, 142 Ky. 752, 135 S. W. 284; Allnutt *v.* Allnutt's Exx., 127 S. W. 986; Perkins & Manning Co. *v.* Drew & Landrum's Assignee, 122 S. W. 526; Blue Grass Canning Co.'s Assignee *v.* Illinois Cent. R. Co., 119 S. W. 769; Spring Garden Ins. Co. *v.* Imperial Tobacco Co., 132 Ky. 7, 116 S. W. 234; Simons *v.* Gregory, 120 Ky. 116, 85 S. W. 751. **La.**—Exception of no cause of action. Malbrough *v.* Roundtree, 128 La. 39, 54 So. 463; Trahan *v.* Broussard Cotton Oil Co., 125 La. 785, 51 So. 898; Oglesby *v.* Turner, 124 La. 1084, 50 So. 859; Goldsmith *v.* Virgin, 122 La. 831, 48 So. 279; Ramos Lumber & Mfg. Co. *v.* Labarre, 116 La. 559, 40 So. 898; Kird *v.* New Orleans & N. W. R. Co., 105 La. 226, 29 So. 729; Southern Chemical & Fertilizing Co. *v.* Wolf & Sons, 48 La. Ann. 631, 19 So. 558. **Me.**—Anderson *v.* Eastern Coupling Co., 81 Atl. 167; Trask *v.* Chase, 107 Me. 137, 77 Atl. 698; Cairn *v.* Whittemore, 88 Me. 501, 34 Atl. 404; Inhabitants of Cape Elizabeth *v.* Lombard, 70 Me. 396; Portland, S. & P. R. Co. *v.* Boston & M. R. Co., 65 Me. 122; Baker *v.* Atkins, 62 Me. 205; Stilphen *v.* Stilphen, 58 Me. 508. **Md.**—Mayor, etc., of Baltimore *v.* Thomas, 115 Md. 212, 80 Atl. 726; Hogan *v.* McMahon, 115 Md. 195, 80 Atl. 695; Ruhe *v.* Ruhe, 113 Md. 595, 77 Atl. 797; Mayor, etc., of Havre De Grace *v.* Fletcher, 112 Md. 562, 77 Atl. 114; Dulaney *v.* United Rys. Co., 104 Md. 423, 65 Atl. 45; Carroll *v.* Smith, 99 Md. 653, 59 Atl. 131; Dusdorff *v.* Schleisner, 85 Md. 360, 37 Atl. 170; Ulman *v.* Charles St. Ave. Co., 83 Md. 130, 34 Atl. 366. **Mass.**—Davis *v.* New England Ry. Pub. Co., 203 Mass. 470, 89 N. E. 565; Miller *v.* Aldrich, 202 Mass. 109, 83 N. E. 441; Troy & G. R. Co. *v.* Newton, 1 Gray 544. **Mich.**—People's Outfitting Co. *v.* People's Outlet Co., 136 N. W. 599; Cole *v.* Cole Realty Co., 135 N. W. 329; Laubengayer *v.* Rohde, 133 N. W.

- 535; Frost v. Frost, 165 Mich. 591, 131 N. W. 60; Michigan Trust Co. v. McNamara, 165 Mich. 200, 130 N. W. 653; Traders' Bank v. Fraser, 162 Mich. 315, 127 N. W. 291; Fitschen v. Olson, 155 Mich. 320, 119 N. W. 3; Blair v. Grand Rapids & I. R. Co., 60 Mich. 124, 26 N. W. 855; Day v. Cole, 56 Mich. 294, 22 N. E. 811. **Minn.** Basting v. City of Minneapolis, 112 Minn. 306, 127 N. W. 1131; Branton v. McLaughlin, 109 Minn. 244, 123 N. W. 808; Vukelis v. Virginia Lumber Co., 107 Minn. 68, 119 N. W. 509; Wessel v. Wessel Mfg. Co., 106 Minn. 66, 118 N. W. 157; Bena Townsite Co. v. Sauve, 104 Minn. 472, 116 N. W. 947; Sorensen v. Carey, 96 Minn. 202, 104 N. W. 958; Kosmerl v. Snively, 85 Minn. 228, 88 N. W. 753. **Miss.**—Globe & Rutgers Fire Ins. Co. v. Firemen's Fund Fire Ins. Co., 97 Miss. 148, 52 So. 454; Myers v. Martinez, 95 Miss. 104, 48 So. 291; Corroero v. Wright, 47 So. 379; Delano v. Holly-Matthews Mfg. Co., 47 So. 475. **Mo.**—Heron v. Peisch, 144 S. W. 413; Lackawanna Coal & Iron Co. v. Long, 231 Mo. 605, 133 S. W. 35; Atty. Gen. *ex rel.* State v. Ryan, 232 Mo. 77, 133 S. W. 8; National Hollow Brake Beam Co. v. Bakewell, 224 Mo. 203, 123 S. W. 561; Meek v. Hurst, 223 Mo. 688, 122 S. W. 1022; Randolph v. Wheeler, 182 Mo. 145, 81 S. W. 419; Verdin v. City of St. Louis, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52; Pidgeon v. United Rys. Co., 154 Mo. App. 20, 133 S. W. 130; United Rys. Co. v. O'Connor, 153 Mo. App. 128, 132 S. W. 262; Anable v. McDonald Land & Mining Co., 144 Mo. App. 303, 128 S. W. 38; Perkins v. Baer, 95 Mo. App. 70; Hallock v. Brier, 80 Mo. App. 331. **Mont.**—State v. Hindson, 120 Pac. 485; State v. Butte Electric & Power Co., 43 Mont. 118, 115 Pac. 44. **Neb.**—Bressee v. Preston, 135 N. W. 544; City of Crawford v. Darrow, 87 Neb. 494, 127 N. W. 891; Hallstead v. Perrigo, 87 Neb. 128, 126 N. W. 1078; Spalding v. Douglas County, 85 Neb. 265, 122 N. W. 889; State v. Porter, 69 Neb. 203, 95 N. W. 769; McArthur v. H. T. Clark Drug Co., 48 Neb. 899, 67 N. W. 861; Dillon v. Seofield, 11 Neb. 419, 9 N. W. 554. **Nev.**—Levy v. Ryland, 32 Nev. 460, 109 Pac. 905. **N. H.**—Forest Products Co. v. Publishers' Paper Co., 75 N. H. 493, 76 Atl. 642; State v. B. & M. R. Co., 75 N. H. 327, 71 Atl. 542; Williams v. Mathewson, 73 N. H. 242, 60 Atl. 687; Pearson v. Tower, 55 N. H. 36; Craft v. Thompson, 51 N. H. 536; Coe v. Winnepisiogee Lake Cotton & Woolen Mfg. Co., 37 N. H. 254. **N. J.**—Swinley v. Force, 78 N. J. Eq. 52, 78 Atl. 249; New Jersey Title Guarantee & Trust Co. v. Rector, 76 N. J. Eq. 587, 75 Atl. 831, *reversing* 75 N. J. Eq. 423, 72 Atl. 968; Camden Safe Deposit & Trust Co. v. Dialogue, 75 N. J. Eq. 600, 72 Atl. 358; Vanderbilt v. Mitchell, 72 N. J. Eq. 910, 67 Atl. 97; Trimble v. American Sugar Refining Co., 61 N. J. Eq. 340, 48 Atl. 912; Riley v. Hodgkins, 57 N. J. Eq. 278, 41 Atl. 1099; Dringer v. Jewett, 43 N. J. Eq. 701, 13 Atl. 664; Fivey v. Pennsylvania R. Co., 66 N. J. L. 23, 48 Atl. 553; Hendrickson v. Pennsylvania R. Co., 43 N. J. L. 464. **N. M.** De Vigil v. Stroup, 15 N. M. 544, 110 Pac. 830. **N. Y.**—Kidder v. Port Henry Iron Ore Co., 201 N. Y. 445, 94 N. E. 1070; Clark v. West, 193 N. Y. 349, 86 N. E. 1; Blum v. Whitney, 185 N. Y. 232, 77 N. E. 1159; Park & Sons Co. v. Nat. Wholesale Druggists' Assn., 175 N. Y. 1, 67 N. E. 136; Greeff v. Equitable Life Assur. Soc., 160 N. Y. 19, 54 N. E. 712, 73 Am. St. Rep. 659, 46 L. R. A. 288; Douglass v. Phenix Ins. Co., 138 N. Y. 209, 33 N. E. 938; Rosenthal v. Rubin, 132 N. Y. Supp. 1053; Mahar v. Harrington Park Villa Sites, 131 N. Y. Supp. 514; Krauss v. Brunett, 130 N. Y. Supp. 1086; Gross v. Hochstim, 72 Misc. 343, 130 N. Y. Supp. 315; Mills Power Co. v. Mohawk Hydro-Electric Co., 128 N. Y. Supp. 810; Hart v. City Theaters Co., 128 N. Y. Supp. 678. **N. C.**—Brewer v. Wynne, 154 N. C. 467, 70 S. E. 947; Miller v. Atlantic C. L. R. Co., 154 N. C. 441, 70 S. E. 838; Wilcox v. Durham & C. R. Co., 152 N. C. 316, 67 S. E. 758; McEachin v. Stewart, 106 N. C. 336, 11 S. E. 274; Harris v. Johnson, 65 N. C. 478. **N. D.**—Zellmer v. Patterson, 18 N. D. 360, 122 N. W. 381; Foster County Implement Co. v. Smith, 17 N. D. 178, 115 N. W. 663. **Ohio.**—Pittsburgh, C. & St. L. R. Co. v. Moore, 33 Ohio St. 384; Faurot v. Neff, 32 Ohio St. 44; Everett v. Waymire, 30 Ohio St. 308; Hamilton & Rossville Hydraulic Co. v. Cincinnati, H. & D. R. Co., 29 Ohio St. 341; Hance v. Hair, 25 Ohio St. 349; Union Bank v. Bell, 14 Ohio St. 200; Shellenberger v. Scripps Pub. Co., 8 Ohio N. P. (N. S.) 633; Boswell v. Hall, 6 Ohio N. P. 497; State v. City

of Mt. Vernon, 4 Ohio N. P. (N. S.) 317; *Alter v. City of Cincinnati*, 4 Ohio N. P. 427. **Okl.**—*De Roberts v. Town of Cross*, 23 Okla. 888, 101 Pac. 1114; *Smith-Wogan Hardware & Implement Co. v. Moon Buggy Co.*, 26 Okla. 161, 108 Pac. 1103; *Tecumseh State Bank v. Maddox*, 4 Okla. 583, 46 Pac. 563; *Adams v. Couch*, 1 Okla. 17, 26 Pac. 1009. **Ore.**—*Terwilliger Land Co. v. City of Portland*, 123 Pac. 57; *McDaniel v. Chiaramonte*, 122 Pac. 33; *Johnson v. Crook County*, 53 Ore. 329, 100 Pac. 294; *Wills v. Nehalem Coal Co.*, 52 Ore. 70, 96 Pac. 528; *Longshore Printing Co. v. Howell*, 26 Ore. 527, 38 Pac. 547. **Pa.**—*Kaufmann v. Kaufmann*, 222 Pa. 58, 70 Atl. 956; *Getty v. Pennsylvania Institution*, 194 Pa. 571, 45 Atl. 333; *Commonwealth v. Cross Cut R. Co.*, 53 Pa. 62; *Dilworth Coal Co. v. Kidney*, 43 Pa. Super. Ct. 625; *Schuler v. Schuler*, 39 Pa. Super. Ct. 635. **R. I.**—*Newell v. Franklin*, 30 R. I. 258, 74 Atl. 1009; *Darcey v. Darcey*, 29 R. I. 384, 71 Atl. 595. **S. C.**—*Herbert v. Parham*, 88 S. C. 410, 70 S. E. 1038; *McLees v. City of Anderson*, 82 S. C. 565, 64 S. E. 750. **S. D.**—*Sioux Falls Sav. Bank v. Minnehaha County*, 135 N. W. 689; *Ward v. Brown*, 133 N. W. 699; *Shaw v. Circuit Court*, 129 N. W. 907; *Baldwin v. City of Aberdeen*, 23 S. D. 636, 123 N. W. 80; *Lyman County v. State*, 11 S. D. 391, 78 N. W. 17; *Hudson v. Archer*, 4 S. D. 128, 55 N. W. 1099. **Tenn.**—*Johnson v. Brice*, 112 Tenn. 59, 83 S. W. 791; *Donaldson v. Walker*, 101 Tenn. 236, 47 S. W. 417; *Insurance Co. v. Thornton*, 97 Tenn. 1, 40 S. W. 136. **Tex.**—*Williams v. Warnell*, 28 Tex. 160; *Middleton v. Nibbling* (Tex. Civ. App.), 142 S. W. 968; *Matthews v. Towell* (Tex. Civ. App.), 138 S. W. 169; *Western Union Tel. Co. v. Ashley* (Tex. Civ. App.), 137 S. W. 1165; *Kruegel v. Porter* (Tex. Civ. App.), 136 S. W. 801; *Jefferson v. Scott* (Tex. Civ. App.), 135 S. W. 705. **Utah.**—*Hunt v. Monroe*, 32 Utah 428, 91 Pac. 269; *Reams v. Taylor*, 31 Utah 288, 87 Pac. 1089; *Nelden-Judson Drug Co. v. Commercial Nat. Bank*, 27 Utah 59, 27 Pac. 195; *Gammon v. Bunnell*, 22 Utah 421, 64 Pac. 958; *State v. Board of Education*, 21 Utah 401, 60 Pac. 1013. **Vt.** *Douglas & Varnum v. Village of Morrisville*, 84 Vt. 302, 79 Atl. 391; *Stevens v. Goodenough*, 83 Vt. 303, 75 Atl. 398; *Crompton v. Beedle*, 83 Vt. 287, 75 Atl. 331; *Currier v. King*, 81 Vt.

285, 69 Atl. 873; *Drake v. Wild*, 65 Vt. 611, 27 Atl. 427; *Whitton v. Goddard*, 36 Vt. 730. **Va.**—*Van Dyke v. Norfolk So. R. Co.*, 72 S. E. 659; *Harris v. Cary*, 71 S. E. 551; *Equitable Life Assur. Soc. v. Kitt's Admr.*, 109 Va. 105, 63 S. E. 455; *Trumbo v. Fulk*, 103 Vt. 73, 48 S. E. 525. **Wash.** *White Bros. & Crum Co. v. Watson*, 64 Wash. 666, 117 Pac. 497; *Green v. McLaughlin Realty Co.*, 64 Wash. 147, 116 Pac. 641; *Salhinger v. Salhinger*, 56 Wash. 134, 105 Pac. 236; *Barnett v. Ashmore*, 5 Wash. 163, 31 Pac. 466. **Wis.**—*Le Blonde v. Peshigo*, 140 Wis. 604, 123 N. W. 157; *Chicago, St. P., M. & O. R. Co. v. Douglas County*, 134 Wis. 197, 114 N. W. 511, 14 L. R. A. (N. S.) 1074; *Brown v. Phillips*, 71 Wis. 239, 36 N. W. 242; *Ludwig v. Cramer*, 53 Wis. 193, 10 N. W. 81; *State v. Lean*, 9 Wis. 279. **Wyo.**—*State v. Irvine*, 14 Wyo. 318, 84 Pac. 90; *Butler v. Conwell*, 14 Wyo. 166, 82 Pac. 950; *Ricketts v. Crewdson*, 13 Wyo. 284, 79 Pac. 1042, 81 Pac. 1; *Turner v. Hamilton*, 13 Wyo. 408, 80 Pac. 664.

"A demurrer admits facts that are well pleaded in that it does not deny them." *Doolittle v. Selectmen*, 59 Conn. 402, 22 Atl. 336; *Lamphear v. Buckingham*, 33 Conn. 237.

"Every demurrer directed to the incapacity of the plaintiff to sue, the misjoinder of parties or causes of action, or jurisdiction, admits the facts alleged for the purpose of the demurrer." *Merriman v. Southern Paving Co.*, 142 N. C. 539, 556, 55 S. E. 366. Quoted with approval in *Balfour Quarry Co. v. West Const. Co.*, 151 N. C. 345, 66 S. E. 217.

"The averments that are to be deemed admitted must be averments of those ultimate facts essential to the maintenance of the right asserted." *Southern Pac. Co. v. Railroad Comrs.*, 193 Fed. 699.

In an action on a bond conditioned to pay for ice delivered pursuant to a contract for delivery of ice during "the coming season," it was held that a demurrer to the declaration admitted that the ice, the price of which was sued for, was delivered during the period meant by the quoted expression, and hence that its meaning was immaterial on demurrer. *Booske v. Gulf Ice Co.*, 24 Fla. 550, 5 So. 247.

In a negligence case it was held to be of no importance that the court,

issuable,⁶² relevant,⁶³ and material,⁶⁴ and which are well pleaded.⁶⁵

on a hearing in damages, found that there was no negligence in fact, since the existence of enough negligence to give a right of recovery was conclusively admitted by the demurrer. *Lamphear v. Buckingham*, 33 Conn. 237.

A replication to a plea alleged a former adjudication of the matters set up in the plea, and it was held that a demurrer on the ground that it did not appear that defendants were parties to the former action was inapt, since if the averment were true, as the demurrer admitted, the very matter spoken of by the demurrer was the matter formerly adjudicated. *Broadus v. Russell*, 106 Ala. 353, 49 So. 327.

A demurrer to a declaration upon any promise or agreement within the statute of frauds confesses that the promise is in writing. *Will's Gould Pl.* 376.

"The protestation usually inserted in a demurrer is a practice derived from the common law, and has no effect in limiting admissions as to facts properly alleged in the pending suit." *Taylor v. Holmes*, 14 Fed. 498.

62. **Cal.**—*Branham v. Mayor, etc.*, of San Jose, 24 Cal. 585. **Conn.**—*State v. New Haven & Northampton Co.*, 37 Conn. 153. **Ga.**—*Smith v. Usher*, 108 Ga. 231, 33 S. E. 876.

Admits only traversable facts. *Griggs v. City of St. Paul*, 9 Minn. 246.

63. **U. S.**—*Young v. Mercantile Trust Co.*, 140 Fed. 61. **Ala.**—*Georgia Home Ins. Co. v. Warten*, 113 Ala. 479, 22 So. 288. **Ill.**—*Martin v. McCall*, 247 Ill. 484, 93 N. E. 418. **Ky.**—*Bennett v. Bennett*, 137 Ky. 47, 121 S. W. 495. **Md.**—*Whalen v. Baltimore & O. R. Co.*, 108 Md. 11, 69 Atl. 390; *Ulman v. Charles St. Ave. Co.*, 83 Md. 130, 34 Atl. 366; *Miller v. Baltimore County Marble Co.*, 52 Md. 642. **Mich.**—*Churchill v. Cummings*, 51 Mich. 446, 16 N. W. 805. **Va.**—*Van Dyke v. Norfolk So. R. Co.*, 72 S. E. 659.

64. *Will's Gould Pl.*, 583, and the following cases: **Cal.**—*Riverside County v. Yawman & Erbe Mfg. Co.*, 3 Cal. App. 691, 86 Pac. 900. **Del.**—*Perry v. Philadelphia, B. & W. R. Co.*, 77 Atl. 725. **Md.**—*Brooke v. Widdecombe*, 39 Md. 386. **Mo.**—*Verdin v. City of St. Louis*, 131 Mo. 26, 33 S. W. 480,

36 S. W. 52; *Missouri-Lincoln Trust Co. v. Third Nat. Bank*, 154 Mo. App. 89, 133 S. W. 357. **Ohio.**—*Faurot v. Neff*, 33 Ohio St. 44. **Va.**—*Van Dyke v. Norfolk So. R. Co.*, 72 S. E. 659. **Wyo.**—*State v. Irvine*, 14 Wyo. 318, 84 Pac. 90.

65. **U. S.**—*Equitable Life Assur. Soc. v. Brown*, 213 U. S. 25, 29 Sup. Ct. 404, 53 L. ed. 682; *Interstate Land Co. v. Maxwell Land Co.*, 139 U. S. 569, 11 Sup. Ct. 656, 35 L. ed. 278; *Hopper v. Covington*, 118 U. S. 148, 6 Sup. Ct. 1025, 30 L. ed. 190; *Gould v. Evansville & C. R. Co.*, 91 U. S. 526, 23 L. ed. 416; *Calhoun v. Pullman Co.*, 159 Fed. 387, 86 C. C. A. 387, 16 L. R. A. (N. S.) 575; *Larabee v. Dolley*, 175 Fed. 365; *United States v. Sixty-eight Cases of Syrup*, 172 Fed. 781; *Young v. Mercantile Trust Co.*, 140 Fed. 61. **Ark.**—*Pierson v. Wallace*, 7 Ark. 282. **Colo.**—*Denver Jobbers' Assn. v. People (Colo. App.)*, 122 Pac. 404. **Del.**—*Perry v. Philadelphia, B. & W. R. Co.*, 77 Atl. 725. **Fla.**—*Brown v. Avery*, 58 So. 34; *City of Miami v. Shotts*, 59 Fla. 462, 51 So. 929; *Holt v. Hillman-Sutherland Co.*, 56 Fla. 801, 47 So. 934; *Benedict Pineapple Co. v. Atlantic Coast Line R. Co.*, 55 Fla. 514, 46 So. 723; *McClinton v. Chapin*, 54 Fla. 510, 45 So. 35. **Ga.**—*Code*, 1895, §5048; *Anderson v. Goodwin*, 125 Ga. 663, 54 S. E. 679; *Williams v. Stewart*, 115 Ga. 864, 45 S. E. 256; *Smith v. Usher*, 108 Ga. 231, 33 S. E. 876; *Carter v. Anderson*, 4 Ga. 516. **Idaho.**—*Burkhart v. Reed*, 2 Idaho 503, 22 Pac. 1. **Ill.**—*Martin v. McCall*, 247 Ill. 484, 93 N. E. 418; *American Loan & Trust Co. v. Minnesota & N. W. R. Co.*, 157 Ill. 641, 42 N. E. 153; *Fish v. Farwell*, 160 Ill. 236, 43 N. E. 367; *Kemp v. Division No. 241, etc.*, 153 Ill. App. 344; *Dempster v. Lansingh*, 150 Ill. App. 55. **Ind.**—*Andre v. Murray (Ind. App.)*, 98 N. E. 322; *Brett v. Pretorious (Ind. App.)*, 96 N. E. 211. **Ia.**—*Reed v. Hollingsworth*, 135 N. W. 37; *Eckles v. Des Moines Casket Co.*, 130 N. W. 113; *Cowell v. City Water Supply Co.*, 130 Iowa 671, 105 N. W. 1016; *Iowa Mut. Tornado Ins. Assn. v. Gilbertson*, 129 Iowa 658, 106 N. W. 153; *Freeman v. Hart*, 61 Iowa 525; *Bailey, Wood &*

Co. v. Ludingham, 52 Iowa 415; Scofield v. McDowell, 47 Iowa 129. **La.**—Exception of no cause of action. Watkins v. North American Land & Timber Co., 107 La. 107, 31 So. 683. **Me.**—Anderson v. Eastern Coupling Co., 81 Atl. 167; Hone v. Presque Isle Water Co., 104 Me. 217, 71 Atl. 769; Blanding v. Mansfield, 72 Me. 427; Stimson v. Gardiner, 33 Me. 94. **Md.**—Ruhe v. Ruhe, 113 Md. 595, 77 Atl. 797; Whalen v. Baltimore & O. R. Co., 108 Md. 11, 69 Atl. 390; County Comrs. v. Baltimore Sugar Refining Co., 99 Md. 481, 58 Atl. 211; Ulman v. Charles St. Ave. Co., 83 Md. 130, 34 Atl. 366; Miller v. Baltimore County Marble Co., 52 Md. 642; Brooke v. Widdicombe, 39 Md. 386. **Mich.**—Blair v. Grand Rapids & I. R. Co., 60 Mich. 124, 26 N. W. 855; Churchill v. Cummings, 51 Mich. 446, 16 N. W. 805. **Minn.**—Wessel v. Wessel Mfg. Co., 106 Minn. 66, 118 N. W. 157; Johnson v. Howard, 20 Minn. 370 (only allegations well pleaded). **Mo.**—Atty. Gen. *ex rel.* State v. Ryan, 232 Mo. 77, 133 S. W. 8; Lackawanna Coal & Iron Co. v. Long, 231 Mo. 605, 133 S. W. 35; National Hollow Brake Beam Co. v. Bakewell, 224 Mo. 203, 123 S. W. 561; Meek v. Hurst, 223 Mo. 688, 122 S. W. 1022; Missouri-Lincoln Trust Co. v. Third Nat. Bank (Mo. App.), 133 S. W. 357; Eau Claire-St. Louis Lumber Co. v. Banks, 136 Mo. App. 44; Powell v. Palmer, 45 Mo. App. 236. **Mont.**—State v. Butte Electric & Power Co., 43 Mont. 118, 115 Pac. 44. **Neb.**—Bresee v. Preston, 135 N. W. 544; Spalding v. Douglas County, 85 Neb. 265, 122 N. W. 889; Moriarty v. Cochran, 75 Neb. 835, 106 N. W. 1011; State v. Porter, 69 Neb. 203, 95 N. W. 769. **N. H.**—Forest Products Co. v. Publishers' Paper Co., 75 N. H. 493, 76 Atl. 642; Williams v. Mathewson, 73 N. H. 242, 60 Atl. 687; Pearson v. Tower, 55 N. H. 36; Craft v. Thompson, 51 N. H. 536. **N. J.**—Davis v. Minch, 80 N. J. L. 214, 76 Atl. 328; Swinley v. Force, 78 N. J. Eq. 52, 78 Atl. 249. **N. Y.**—Bogardus v. New York Life Ins. Co., 101 N. Y. 328, 4 N. E. 522. **Ohio.**—Pittsburgh, C. & St. L. R. Co. v. Moore, 33 Ohio St. 384; Fautot v. Neff, 32 Ohio St. 44; Hamilton & Rossville Hydraulic Co. v. Cincinnati, H. & D. R. Co., 29 Ohio St. 341; Union Bank v. Bell, 14 Ohio St. 200; Schellenberger v. Scripps Pub. Co., 8 Ohio N. P. (N. S.) 633; State v. City of Mt. Vernon, 4 Ohio N. P. (N. S.) 317; Alter v. City of Cincinnati, 4 Ohio N. P. 427. **Okl.**—Adams v. Couch, 1 Okla. 17, 26 Pac. 1009. **Ore.**—Wills v. Nehalem Coal Co., 52 Ore. 70, 96 Pac. 528; O'Hara v. Parker, 27 Ore. 156, 39 Pac. 1004. **Pa.**—Kaufmann v. Kaufmann, 222 Pa. 58, 70 Atl. 956; Commonwealth v. Cross Cut R. Co., 53 Pa. 62; Dilworth Coal Co. v. Kidney, 43 Pa. Super. Ct. 625. **Tenn.**—Insurance Co. v. Thornton, 97 Tenn. 1, 40 S. W. 136. **Tex.**—Holman v. Criswell, 13 Tex. 38. **Utah.**—Reams v. Taylor, 31 Utah 288, 87 Pac. 1089. **Vt.**—Currier v. King, 81 Vt. 285, 69 Atl. 873; Watkins v. Childs, 80 Vt. 99, 66 Atl. 805; Columbian Granite Co. v. Townsend & Co., 74 Vt. 183, 52 Atl. 432; Matthews v. Tower, 39 Vt. 433. **Va.**—Van Dyke v. Norfolk So. R. Co., 72 S. E. 659. **Wash.**—Green v. McLaughlin Realty Co., 64 Wash. 147, 116 Pac. 641; Salhinger v. Salhinger, 56 Wash. 134, 105 Pac. 236; Barnett v. Ashmore, 5 Wash. 163, 31 Pac. 466. **Wis.**—State v. District Board, etc., 76 Wis. 177, 44 N. W. 967, 7 L. R. A. 330. **Wyo.**—Edwards v. City of Cheyenne, 114 Pac. 677. **Eng.**—Ford v. Peering, 1 Ves. Jr. 72, 30 Eng. Reprint 236.

"A demurrer, so far as it is an admission at all, is so of that only which is well pleaded. And one of the offices of the demurrer is, to inquire whether the matter is well pleaded, or can be pleaded." Harkins v. Edwards & Turner, 1 Iowa 426.

The rule that only those allegations are admitted which are material and are well pleaded must be taken in connection with the rule that, on general demurrer the complaint will be held sufficient where the necessary facts are shown by it to exist, though they are inaccurately or ambiguously stated, or appear by necessary implication only. Amestoy v. Electric R. T. Co., 95 Cal. 311, 30 Pac. 550.

The admissions do not make good vague and insufficient allegations or conclusions or supply essential facts which are omitted. Bennett v. Bennett, 137 Ky. 17, 121 S. W. 495.

A demurrer to a brief statement filed with the general issue does not admit matter improperly included therein, or insufficiently alleged. Corthell v. Holmes, 87 Me. 24, 32 Atl. 715.

If the demurrer is general instead of special, it amounts to a confession though the matter is informally

Want of verity of the facts alleged cannot be availed of,⁶⁶ nor may the court consider whether they can be sustained by proof.⁶⁷

A demurrer admits allegations only of fact.⁶⁸ It does not admit conclusions of the pleader,⁶⁹ except when they are supported

pleaded. *Andrews Steph. Pl.* (2nd ed.), §140, p. 268.

Originally, when no distinction was recognized between the offices of demurrers assigning a special cause and those assigning none, a demurrer confessed only such allegations as were sufficient both in substance and form. Under the statutes, 27 Eliz., c. 5. §1, and 4 & 5 Ann. c. 16, requiring demurrers to be special for formal defects, all such defects, except in dilatory pleas, are aided on general demurrer, and a demurrer confesses, not only all sufficient matter, well pleaded, but also all material facts informally pleaded, except such as are expressly and specially assigned for cause of demurrer. *Will's Gould Pl.*, 574-581.

The rule has been greatly modified by the code, and where no attempt has been made by motion to have the defects corrected everything stated in the pleading will be taken as true, and considered, whether well pleaded or not. But where a motion to make more definite and certain is made and overruled, a subsequent demurrer will be deemed to admit only such facts as are well pleaded. *Stewart v. Balderston*, 10 Kan. 131.

66. *McGregor v. McGregor*, 21 Iowa 441.

That they are probably untrue cannot be considered. *Nelson v. Howe Machine Co.*, 10 Ky. L. Rep. 37.

67. *Davis v. Wetherell*, 13 Allen (Mass.) 60.

It must be assumed that every allegation of the pleading will be proved at the trial. *Watkins v. North American Land & Timber Co.*, 107 La. 107, 31 So. 683.

"The defendant, by demurring, admits the ability of the plaintiff to sustain all the allegations in his declaration, by proper proof." *Gilmer v. Allen*, 9 Ga. 208.

68. *Eliot's Appeal*, 74 Conn. 586, 51 Atl. 558.

69. **U. S.**—*Equitable Life Assur. Soc. v. Brown*, 213 U. S. 25, 29 Sup. Ct. 404, 53 L. ed. 682; *Chicot County v. Sherwood*, 148 U. S. 529, 13 Sup. Ct. 695, 37 L. ed. 546; *Pennie v. Reis*,

132 U. S. 464, 10 Sup. Ct. 149, 33 L. ed. 426; *Hopper v. Covington*, 118 U. S. 148, 6 Sup. Ct. 1025, 30 L. ed. 190; *United States v. Ames*, 99 U. S. 35, 25 L. ed. 295; *Gould v. Evansville & C. R. Co.*, 91 U. S. 526, 23 L. ed. 416; *Dillon v. Barnard*, 21 Wall. 430, 22 L. ed. 673; *Southern Pac. Co. v. Railroad Commission*, 193 Fed. 699; *Risley v. City of Utica*, 173 Fed. 502; *United States v. Sixty-eight Cases of Syrup*, 172 Fed. 781; *Continental Securities Co. v. Interborough R. T. Co.*, 165 Fed. 945; *Young v. Mercantile Trust Co.*, 140 Fed. 61. **Ala.**—*Tyson v. Austill*, 168 Ala. 525, 53 So. 263; *Sloss-Sheffield Steel & Iron Co. v. Smith*, 166 Ala. 437, 52 So. 38. **Ariz.** *Gill v. Manhattan Life Ins. Co.*, 11 Ariz. 232, 95 Pac. 89. **Cal.**—*Branham v. Mayor, etc., of San Jose*, 24 Cal. 585. **Colo.**—*Denver Jobbers' Assn. v. People* (Colo. App.), 122 Pac. 404. **Conn.**—*Perkins v. Coffin*, 84 Conn. 275, 79 Atl. 1070; *Coughlin v. Knights of Columbus*, 79 Conn. 218, 64 Atl. 223. **D. C.**—*Butler v. Indian Protective Assn.*, 34 App. Cas. 284. **Fla.**—*Brown v. Avery*, 58 So. 34; *H. W. Metcalf Co. v. Orange County*, 56 Fla. 829, 47 So. 363. General allegations of fraud. *McClinton v. Chapin*, 54 Fla. 510, 45 So. 35. **Ga.**—*Williams v. Stewart*, 115 Ga. 864, 42 S. E. 256; *Smith v. Usher*, 108 Ga. 231, 33 S. E. 876; *Southern R. Co. v. Covenia*, 100 Ga. 46, 29 S. E. 219; *Brown v. Massachusetts Mills*, 7 Ga. App. 642, 67 S. E. 832. **Idaho.** *Burkhart v. Reed*, 2 Idaho 503, 22 Pac. 1. **Ill.**—*Martin v. McCall*, 247 Ill. 484, 93 N. E. 418; *Ross v. Clark*, 225 Ill. 326, 80 N. E. 275; *Blake v. Ogden*, 223 Ill. 204, 79 N. E. 68; *Stannard v. Aurora, E. & C. R. Co.*, 220 Ill. 469, 77 N. E. 254; *Fish v. Farwell*, 160 Ill. 236, 43 N. E. 367; *American Loan & Trust Co. v. Minnesota & N.W. R. Co.*, 157 Ill. 641, 42 N. E. 153; *Bradbury v. Waukegan & Wash. Mining Co.*, 113 Ill. App. 600; *People v. Blair*, 82 Ill. App. 570, affirmed 181 Ill. 460, 54 N. E. 1024; *Ebersole v. First Nat. Bank*, 36 Ill. App. 207. **Ind.**—*Pein v. Miznerr*, 170 Ind. 659, 84 N. E. 981; *Western Union Tel. Co. v. Taggart*, 141 Ind. 231, 40

- N. E. 1051, 60 L. R. A. 671; *Winsteadley v. Rariden*, 110 Ind. 140, 11 N. E. 15; *Read v. Yeager*, 104 Ind. 195; *Williams v. Hanley*, 16 Ind. App. 464, 45 N. E. 622. **Ia.**—*Eckles v. Des Moines Casket Co.*, 130 N. W. 113; *Birmingham v. Hand*, 127 N. W. 826; *Cowell v. City Water Supply Co.*, 130 Iowa 671, 105 N. W. 1016; *Iowa Mut. Tornado Ins. Co. v. Gilbertson*, 129 Iowa 658, 106 N. W. 153; *Peatman v. Centerville L. T. & P. Co.*, 100 Iowa 245, 69 N. W. 541; *State v. Nichols*, 78 Iowa 747, 41 N. W. 4; *Freeman v. Hart*, 61 Iowa 525, 16 N. W. 597. **Kan.** *Leavenworth, L. & G. R. Co. v. Leahy*, 12 Kan. 124. **Ky.**—*Bennett v. Bennett*, 137 Ky. 17, 121 S. W. 495; *Simons v. Gregory*, 120 Ky. 116, 85 S. W. 751; *Norman v. Kentucky Board of Managers*, 93 Ky. 537, 20 S. W. 901. **La.** *Exception. Malbrough v. Roundtree*, 128 La. 39, 54 So. 463; *Trahan v. Broussard Cotton Oil Co.*, 125 La. 785, 51 So. 898; *Oglesby v. Turner*, 124 La. 1084, 50 So. 859; *State v. Hackley*, *Hume & Joyce*, 124 La. 854, 50 So. 772; *Southern Chemical & Fertilizing Co. v. Wolf & Sons*, 48 La. Ann. 631, 19 So. 558. **Me.**—*Brown v. Kennebec Water Dist.*, 79 Atl. 907; *Houe v. Presque Isle Water Co.*, 104 Me. 217, 71 Atl. 769. **Md.**—*Ward v. Newbold*, 115 Md. 689, 81 Atl. 793; *Whalen v. Baltimore & O. R. Co.*, 108 Md. 11, 69 Atl. 390; *Dulaney v. United Rys. Co.*, 104 Md. 423, 65 Atl. 45; *Carroll v. Smith*, 99 Md. 653, 59 Atl. 131; *County Comrs. v. Baltimore Sugar Refining Co.*, 99 Md. 481, 58 Atl. 211; *Ulman v. Charles St. Ave. Co.*, 83 Md. 130, 34 Atl. 366; *Reddington v. Lanahan*, 59 Md. 429. **Mass.**—*Jones v. Dow*, 137 Mass. 119; *Everett v. Drew*, 129 Mass. 150; *Millard v. Baldwin*, 3 Gray 484. **Mich.**—*Blair v. Grand Rapids & I. R. Co.*, 60 Mich. 124, 26 N. W. 855. **Minn.** *Taylor v. Blake*, 11 Minn. 255; *Griggs v. City of St. Paul*, 9 Minn. 246. **Mo.** *Lackawanna Coal & Iron Co. v. Long*, 231 Mo. 605, 133 S. W. 35; *State v. Denton*, 229 Mo. 187, 129 S. W. 709; *Gibson v. Chicago, G. W. R. Co.*, 225 Mo. 473, 125 S. W. 453; *National Hollow Brake Beam Co. v. Bakewell*, 224 Mo. 203, 123 S. W. 561; *Donovan v. Boeck*, 217 Mo. 70, 116 S. W. 543; *Mallinckrodt Chemical Works v. Nemnich*, 169 Mo. 388, 69 S. W. 355; *Missouri-Lincoln Trust Co. v. Third Nat. Bank*, 154 Mo. App. 89, 133 S. W. 357; *Kleekamp v. Meyer*, 5 Mo. App. 444. **Mont.**—*State v. Butte Electric & Power Co.*, 43 Mont. 118, 115 Pac. 44. **Neb.**—*Bresce v. Preston*, 135 N. W. 544; *Moriarty v. Cochran*, 75 Neb. 835, 106 N. W. 1011; *State v. Porter*, 69 Neb. 203, 95 N. W. 769; *Markey v. School Dist.*, 58 Neb. 479, 78 N. W. 932; *State v. Ramsey*, 50 Neb. 166, 69 N. W. 758; *American Water Works Co. v. State*, 46 Neb. 194, 64 N. W. 711; *Scott v. Twiss*, 4 Neb. 133. **N. H.**—*Williams v. Mathewson*, 73 N. H. 242, 60 Atl. 687; *Eastman v. Thayer*, 60 N. H. 408; *Pearson v. Tower*, 55 N. H. 36; *Craft v. Thompson*, 51 N. H. 536. **N. J.**—*Davis v. Minch*, 80 N. J. L. 214, 76 Atl. 328; *Marples v. Standard Oil Co.*, 71 N. J. L. 352, 59 Atl. 32; *Schuler v. Southern Iron & Steel Co.*, 77 N. J. Eq. 60, 75 Atl. 552; *Sullivan v. Brown*, 67 N. J. Eq. 391, 58 Atl. 302. **N. M.**—*First Nat. Bank v. Lewinson*, 12 N. M. 147, 76 Pac. 288. **N. Y.**—*Kidder v. Port Henry Iron Ore Co.*, 201 N. Y. 445, 94 N. E. 1070; *Trotter v. Lisman*, 199 N. Y. 497, 92 N. E. 1052, *affirming* 116 N. Y. Supp. 1149; *Blum v. Whitney*, 185 N. Y. 232, 77 N. E. 1159; *Park & Sons Co. v. National Wholesale Druggists' Assn.*, 175 N. Y. 1, 67 N. E. 136; *Greeff v. Equitable Life Assur. Soc.*, 160 N. Y. 19, 54 N. E. 712, 43 Am. St. Rep. 659, 46 L. R. A. 288; *Bogardus v. New York Life Ins. Co.*, 101 N. Y. 328, 4 N. E. 522; *Carlin Const. Co. v. New York & Brooklyn Brewing Co.*, 134 N. Y. Supp. 493; *Rosenthal v. Rubin*, 132 N. Y. Supp. 1053; *Irving v. Rees*, 131 N. Y. Supp. 523; *Walbridge v. Brooklyn Trust Co.*, 128 N. Y. Supp. 686; *Poland v. Hollander*, 115 N. Y. Supp. 1042; *Ellis v. Keeler*, 110 N. Y. Supp. 542; *Schiefer v. Freygand*, 109 N. Y. Supp. 848. **Ohio.**—*Pittsburgh, C. & St. L. R. Co. v. Moore*, 33 Ohio St. 384; *Peterson v. Roach*, 32 Ohio St. 374; *Hamilton & Rossville Hydraulic Co. v. Cincinnati, H. & D. R. Co.*, 29 Ohio St. 341; *Wegner v. Wiltsie*, 3 Ohio C. C. (N. S.) 410; *Lewis v. Taylor*, 18 Ohio C. C. 443; *Alter v. City of Cincinnati*, 4 Ohio N. P. 427. **Ore.**—*State v. Williams*, 45 Ore. 314, 77 Pac. 965, 67 L. R. A. 166; *O'Hara v. Parker*, 27 Ore. 156, 39 Pac. 1004; *Longshore Printing Co. v. Howell*, 26 Ore. 527, 38 Pac. 547, 28 L. R. A. 464. **Pa.**—*Kaufmann v. Kaufmann*, 222 Pa. 58, 70 Atl. 956; *Getty v. Pennsylvania Institution*, 194 Pa. 571, 45 Atl. 333; *Dilworth Coal Co. v. Kidney*, 43 Pa. Super. Ct. 625. **Tenn.**—*Crockett*

by,⁷⁰ and necessarily result from,⁷¹ the facts stated in the pleading. It does not admit inferences of the pleader from the facts alleged,⁷² nor mere expressions of opinion,⁷³ nor theories of the

v. McLanahan, 109 Tenn. 517, 72 S. W. 950, 61 L. R. A. 914. **Tex.**—*Holman v. Criswell*, 13 Tex. 38; *Ball v. Texarkana Water Corp.* (Tex. Civ. App.), 127 S. W. 1068; *Harris v. Santa Fe Townsite Co.* (Tex. Civ. App.), 125 S. W. 77. **Va.**—*Van Dyke v. Norfolk So. R. Co.*, 72 S. E. 659; *Trumbo v. Fulk*, 103 Va. 73, 48 S. E. 525. **Wis.**—*Wadhams Oil Co. v. Tracy*, 141 Wis. 150, 123 N. W. 785; *Elmergreen v. Weimer*, 138 Wis. 112, 119 N. W. 836; *State v. District Board, etc.*, 76 Wis. 177, 44 N. W. 967; *Brown v. Phillips*, 71 Wis. 239, 36 N. W. 242. **Wyo.**—*State v. Irvine*, 14 Wyo. 318, 84 Pac. 90; *Ricketts v. Crewdson*, 13 Wyo. 284, 79 Pac. 1042, 81 Pac. 1. **Eng.**—*Ford v. Peering*, 1 Ves. Jr. 72, 30 Eng. Reprint 236.

Whether correctly or incorrectly drawn, it being for the court to adjudge and lay down the law which it shall adjudge to be applicable to the facts stated. *Dempster v. Lansingh*, 150 Ill. App. 55.

Conclusions either of law or fact, where the facts are not averred upon which such conclusions are supposed to rest. *Graham v. Marks & Co.*, 98 Ga. 67, 25 S. E. 931.

"A demurrer only admits facts positively alleged, and not conclusions of law or mere pretenses and suggestions, nor the correctness of the ascription of a purpose to parties when not justified by the language used and facts positively alleged." *Taylor v. Holmes*, 14 Fed. 498.

The rule that a demurrer in equity admits all the allegations of the bill for the purposes of the demurrer is subject to the qualification that mere general statements not supported by the statement of particular facts in the bill will not render the pleading good. *Greenville-Murray v. Earl of Clarendon*, L. R., 9 Eq. 11.

70. **U. S.**—*Gould v. Evansville & C. R. Co.*, 91 U. S. 526, 23 L. ed. 416. **Mass.**—*Everett v. Drew*, 129 Mass. 150. **Tex.**—*Harris v. Santa Fe Townsite Co.* (Tex. Civ. App.), 125 S. W. 77. **Wyo.**—*State v. Irvine*, 14 Wyo. 318, 84 Pac. 90; *Ricketts v. Crewson*, 13 Wyo. 284, 79 Pac. 1042, 81 Pac. 1.

Only to the extent that they are justifiable inferences from such alleged facts. *Chittenden v. Carter*, 82 Conn. 585, 74 Atl. 884.

71. **U. S.**—*Risley v. City of Utica*, 173 Fed. 502. **Fla.**—*H. W. Metcalf Co. v. Orange County*, 56 Fla. 829, 47 So. 363. **Mich.**—*Blair v. Grand Rapids & I. R. Co.*, 60 Mich. 124, 26 N. W. 855.

72. **U. S.**—*Dillon v. Barnard*, 21 Wall. 430, 22 L. ed. 673. **Ill.**—*People v. Blair*, 82 Ill. App. 570, affirmed 181 Ill. 460, 54 N. E. 1024; *Ebersole v. First Nat. Bank*, 36 Ill. App. 267. **Minn.**—*Taylor v. Blake*, 11 Minn. 255; *Griggs v. City of St. Paul*, 9 Minn. 246. **Mont.**—*State v. Butte Electric & Power Co.*, 43 Mont. 118, 115 Pac. 44. **N. H.**—*Inferences. Williams v. Mathewson*, 73 N. H. 242, 60 Atl. 687; *Eastman v. Thayer*, 60 N. H. 408; *Craft v. Thompson*, 51 N. H. 536. **N. Y.**—*Greeff v. Equitable Life Assur. Soc.*, 160 N. Y. 19, 54 N. E. 712, 73 Am. St. Rep. 659, 46 L. R. A. 288; *Bogardus v. New York Life Ins. Co.*, 101 N. Y. 328, 4 N. E. 522. **Pa.**—*Kaufman v. Kaufman*, 222 Pa. 58, 70 Atl. 956; *Getty v. Pennsylvania Institution*, 194 Pa. 571, 45 Atl. 333. **Tenn.**—*Crockett v. McLanahan*, 109 Tenn. 517, 72 S. W. 950, 61 L. R. A. 914.

Unless the facts alleged are sufficient to authorize them. *Harris v. Santa Fe Townsite Co.* (Tex. Civ. App.), 125 S. W. 77.

Where they are not supported by the facts alleged. *State v. Irvine*, 14 Wyo. 318, 84 Pac. 90; *Ricketts v. Crewdson*, 13 Wyo. 284, 79 Pac. 1042, 81 Pac. 1.

Does not admit "the correctness of legal inferences, nor any deductions of fact which are not reasonable, nor any meanings or implications which are opposed to the principles of reasoning or the rules of equity." *Churchill v. Cummings*, 51 Mich. 446, 16 N. W. 805.

73. Not mere deductions or opinions, unsupported by the underlying facts appearing. *Southern Pac. Co. v. Railroad Commission*, 193 Fed. 669; *Equitable Life Assur. Soc. v. Brown*, 213

pleader as to the effect of the facts,⁷⁴ nor allegations as to what will happen in the future,⁷⁵ nor arguments.⁷⁶

In many states it is held to admit all reasonable inferences from the facts alleged,⁷⁷ and all that can by reasonable and fair intendment be implied therefrom.⁷⁸

It does not admit facts which are insufficient in substance,⁷⁹ nor matters of evidence,⁸⁰ nor recitals,⁸¹ nor facts the pleading of which makes a departure,⁸² nor vague and indefinite allegations,⁸³ nor surplusage,⁸⁴ nor unnecessary,⁸⁵ or impertinent⁸⁶ allegations.

It does not admit allegations contrary to facts of which judicial notice is taken,⁸⁷ or which are contrary to law,⁸⁸ or which are absurd

U. S. 25, 29 Sup. Ct. 404, 53 L. ed. 682.

As an allegation that irreparable injury will result. *Boston & M. R. Co. v. Portsmouth & D. R. Co.*, 57 N. H. 200.

Ordinarily the only admission as to allegations as to matters of opinion is that the pleader entertains them. "An opinion, however, may be such and so pleaded as to present a material issue. This is when it is a conclusion as to a material point that reasonably follows from certain premises, which either are established or may be a proper subject for proof." *Eliot's Appeal*, 74 Conn. 586, 51 Atl. 558.

74. *Whalen v. Baltimore & O. R. Co.*, 108 Md. 11, 69 Atl. 390, 17 L. R. A. (N. S.) 130; *Ulman v. Charles St. Ave. Co.*, 83 Md. 130, 34 Atl. 366.

75. *Equitable Life Assur. Soc. v. Brown*, 213 U. S. 25, 29 Sup. Ct. 404, 53 L. ed. 682.

Does not admit that they will happen as alleged. *Heaton v. Packer*, 131 App. Div. 812, 116 N. Y. Supp. 46.

76. *Dillon v. Barnard*, 21 Wall. (U. S.) 430, 22 L. ed. 673; *State v. Irvine*, 14 Wyo. 318, 84 Pac. 90.

77. *N. Y.—Blum v. Whitney*, 185 N. Y. 232, 77 N. E. 1159; *Greeff v. Equitable Life Assur. Soc.*, 160 N. Y. 19, 54 N. E. 712, 73 Am. St. Rep. 659, 46 L. R. A. 288; *Carlin Const. Co. v. New York & Brooklyn Brewing Co.*, 134 N. Y. Supp. 493. **Ore.**—*Wills v. Nehalem Coal Co.*, 52 Ore. 70, 96 Pac. 528.

All necessary intendments and inferences. *Downey v. Colorado Fuel & Iron Co.*, 48 Colo. 27, 108 Pac. 972.

Such inferences as may legitimately be drawn therefrom. *Wessel v. Wessel Mfg. Co.*, 106 Minn. 66, 118 N. W. 157.

All necessary legal inferences. *Bena Townsite Co. v. Sauve*, 104 Minn. 472, 116 N. W. 947.

Every allowable and proper deduction therefrom. *Commercial Bank of New Orleans v. Newport Mfg. Co.*, 1 B. Mon. (Ky.) 13.

78. *Vanderbilt v. Mitchell*, 72 N. J. Eq. 910, 67 Atl. 97; *Clark v. West*, 193 N. Y. 349, 86 N. E. 1; *Davis v. Cornue*, 151 N. Y. 172, 45 N. E. 449; *Krauss v. Brunnett*, 130 N. Y. Supp. 1086; *Greene v. Mercantile Trust Co.*, 111 N. Y. Supp. 802.

79. *Brooke v. Widdicombe*, 39 Md. 386.

80. *Southern Chemical & Fertilizing Co. v. Wolf & Sons*, 48 La. Ann. 631, 19 So. 558.

81. *Pein v. Miznerr*, 170 Ind. 659, 84 N. E. 981; *Taylor v. Blake*, 11 Minn. 255.

82. *Will's Gould Pl.*, 583.

83. *Butler v. Indian Protective Assn.*, 34 App. Cas. (D. C.) 284.

84. *Georgia Home Ins. Co. v. Warten*, 113 Ala. 479, 22 So. 288.

85. *French v. Senate*, 146 Cal. 604, 80 Pac. 1031, 69 L. R. A. 556.

86. *Will's Gould Pl.*, 583.

87. **Cal.**—*French v. Senate*, 146 Cal. 604, 80 Pac. 1031, 69 L. R. A. 556; *Ohm v. San Francisco*, 92 Cal. 437, 28 Pac. 580. **Ga.**—*Southern R. Co. v. Covenia*, 100 Ga. 46, 29 S. E. 219, 40 L. R. A. 253. **Ia.**—*Cooke v. Tallman*, 40 Iowa 133.

That a certain territory is part of the United States. *Pearcy v. Stranahan*, 205 U. S. 257, 27 Sup. Ct. 545, 51 L. ed. 793.

Where the fact is shown to be otherwise by a public record of which the court takes judicial notice. *Southern Pac. R. Co. v. Groeck*, 68 Fed. 609.

88. *Iowa Mut. Tornado Ins. Co. v.*

or impossible,⁸⁰ nor matters contrary to common knowledge,⁸⁰ nor allegations which the law would not permit to be proved,⁸¹ nor negative allegations not susceptible of absolute proof,⁸² nor the amount of damages claimed, where they are unliquidated,⁸³ nor allegations which the pleader is estopped to make,⁸⁴ nor any allegations which the pleading demurred to itself contradicts,⁸⁵ nor matters of

Gilbertson, 129 Iowa 658, 106 N. W. 153; *Crockett v. McLanahan*, 109 Tenn. 517, 72 S. W. 950, 61 L. R. A. 914.

89. *Lackawanna Coal & Iron Co. v. Long*, 231 Mo. 605, 143 S. W. 35; *Meek v. Hurst*, 223 Mo. 688, 122 S. W. 1022.

Which are legally impossible. *Louisville & N. R. Co. v. Palmes*, 109 U. S. 244, 3 Sup. Ct. 193, 27 L. ed. 922; *Iowa Mut. Tornado Ins. Assn. v. Gilbertson*, 129 Iowa 658, 106 N. W. 153.

Naturally or legally impossible. *Will's Gould Pl.*, 583.

As to the earning capacity of a child of tender years. *Southern R. Co. v. Covenia*, 100 Ga. 46, 29 S. E. 219, 40 L. R. A. 253.

90. *State v. Irvine*, 14 Wyo. 318, 84 Pac. 90.

Such as that there is no material difference between the King James version of the Bible and the Donay version. *State v. District Board, etc.*, 76 Wis. 177, 44 N. W. 967.

91. *Martin v. McCall*, 247 Ill. 484, 93 N. E. 418.

Allegations contrary to conclusive presumptions of law arising from facts admitted by the pleading. *Scofield v. McDowell*, 47 Iowa 129.

That an instrument purporting to be a will was not intended to operate as a will. *Brown v. Avery (Fla.)*, 58 So. 34.

Averments as to the intention of the testator, where the facts pleaded would not be competent to add to or change the will. *Smith v. Usher*, 108 Ga. 231, 33 S. E. 876.

Allegations of a parol agreement inconsistent with the written contract sued on. *Lea v. Robeson*, 12 Gray (Mass.) 280.

A demurrer to a plea in abatement in a criminal case cannot operate as an admission of allegations of the plea which could not be proved except by violating the rule requiring secrecy as to the proceedings of the grand jury in the jury-room. *State v. Hamlin*, 47 Conn. 95.

92. As an allegation that there are no debts which can be proved against the estate of a deceased person. *Powell v. Palmer*, 45 Mo. App. 236.

93. *Ga.—Southern R. Co. v. Covenia*, 100 Ga. 46, 29 S. E. 219, 40 L. R. A. 253. *Me.—Hawley v. Sutherland*, 74 Me. 212. *N. Y.—Thompson v. Fox*, 21 Misc. 298, 47 N. Y. Supp. 176.

In actions of tort for unliquidated damages, defendant, by demurring to the declaration, admits the wrong and the consequent right of the plaintiff to recover to some extent, but not the extent of the injury. *Lamphear v. Buckingham*, 33 Conn. 237.

The contrary is true where the action is to recover a specific sum, as upon a promissory note, account annexed, or for money received, in which case the sum named is a fact. *State v. Peck*, 60 Me. 498.

94. *Will's Gould Pl.*, 582; *Columbia Granite Co. v. Townsend & Co.*, 74 Vt. 183, 52 Atl. 432.

Such as an allegation that lands described in a tax deed were not advertised for sale, where the pleader admits the execution of the deed from which the law raises a conclusive presumption that there was a proper advertisement. *Scofield v. McDowell*, 47 Iowa 129.

95. *Searcy v. Clay County*, 176 Mo. 493, 75 S. W. 657.

Allegations which are inconsistent with, and negated by, other allegations of the pleading. *Peterson v. Roach*, 32 Ohio St. 374.

It "does not confess any averment, contradicting what before appears certain, on the record. Thus, if a party having admitted an allegation on the other side, afterwards makes an averment inconsistent with it, a demurrer does not confess the latter averment." *Will's Gould Pl.*, 582.

Allegations contrary to facts shown by an exhibit made a part of the pleading. *Blue Grass Canning Co.'s Assignee v. Illinois Cent. R. Co. (Ky.)*, 119 S. W. 769.

law,⁹⁶ nor allegations as to the existence or time of taking effect of a public statute,⁹⁷ nor allegations that such a statute is invalid,⁹⁸ nor the pleader's construction of a statute,⁹⁹ nor the pleader's construction of a written instrument.¹

Does not admit an allegation that certain notices were not signed, where they are made a part of the bill as exhibits and affirmatively show that they were signed. *Williams v. Olson*, 141 Mich. 580, 104 N. W. 1101.

Where the bill alleges a fact expressly negated by a contract filed therewith as an exhibit, such representation of fact cannot be said to be properly pleaded, and cannot be accepted as true. *Gusdorff v. Schleisner*, 85 Md. 360, 37 Atl. 170.

96. *Ohm v. San Francisco*, 92 Cal. 449, 28 Pac. 580; *Donovan v. Boeck*, 217 Mo. 70, 116 S. W. 543; *Missouri-Lincoln Trust Co. v. Third Nat. Bank*, 154 Mo. App. 89, 133 S. W. 357.

Matter of law deduced by either party from the facts pleaded by him. *Will's Gould Pl.*, 583.

97. *Idaho*.—*Burkhart v. Reed*, 2 Idaho 503, 22 Pac. 1. *Ky.*—*Norman v. Kentucky Board of Managers, etc.*, 93 Ky. 537, 20 S. W. 901, 18 L. R. A. 556. *Wis.*—*State v. Foote*, 11 Wis. 16.

98. *State v. Withrow*, 154 Mo. 397, 55 S. W. 460; *State v. Aloe*, 152 Mo. 466, 54 S. W. 494, 47 L. R. A. 393.

Ordinance. *Crosdale v. City of Cynthiana*, 21 Ky. L. Rep. 36, 50 S. W. 977.

99. *Conn.*—*Woodruff v. New York & N. E. R. Co.*, 59 Conn. 63, 20 Atl. 17. *Ill.*—*Compher v. People*, 12 Ill. 290; *People v. Blair*, 82 Ill. App. 570, affirmed 181 Ill. 460, 54 N. E. 1024. *Ky.*—*Norman v. Kentucky Board of Managers*, 93 Ky. 537, 20 S. W. 901, 18 L. R. A. 556. *N. Y.*—*Polo v. Stevens*, 120 N. Y. Supp. 227. *Wyo.*—*State v. Irvine*, 14 Wyo. 318, 84 Pac. 90.

Allegations construing the statutes of a foreign state, though in the form of averments of fact. *Finney v. Guy*, 189 U. S. 335, 23 Sup. Ct. 558, 47 L. ed. 839.

It does not admit the truth of allegations that there is a mistake in a statute, or allegations as to the intention of the legislature, since the force and legal effect of a statute cannot be altered or changed by averment in a

pleading. *State ex rel. Fay v. Archibald*, 52 Ohio St. 1, 38 N. E. 314.

"If the pleading misstates the effect and purpose of the statute upon which the party demurring relies, the adverse party, in demurring to such pleading, does not admit the correctness of the construction, or that the statute imposes the obligations or confers the rights which the party alleges." *Pennie v. Reis*, 132 U. S. 464, 10 Sup. Ct. 149, 33 L. ed. 426.

1. *U. S.*—*Equitable Life Assur. Soc. v. Brown*, 213 U. S. 25, 29 Sup. Ct. 404, 53 L. ed. 682; *Chicot County v. Sherwood*, 148 U. S. 529, 13 Sup. Ct. 695, 37 L. ed. 546; *Dillon v. Barnard*, 21 Wall. 430, 22 L. ed. 673. *Fla.*—*Brown v. Avery*, 58 So. 34. *Kan.*—*Craft v. Bent*, 8 Kan. 328. *Md.*—*Ryan v. McLane*, 91 Md. 175, 41 Atl. 340. *Mass.*—*Lear v. Robeson*, 12 Gray 280. *Mo.*—*Meek v. Hunt*, 223 Mo. 688, 122 S. W. 1022; *Donovan v. Boeck*, 217 Mo. 70, 116 S. W. 543; *Eau Claire-St. Louis Lumber Co. v. Banks*, 136 Mo. App. 44, 117 S. W. 611. *N. Y.*—*Greeff v. Equitable Life Assur. Soc.*, 160 N. Y. 19, 54 N. E. 712, 73 Am. St. Rep. 659, 46 L. R. A. 238; *Bogardus v. New York Life Ins. Co.*, 101 N. Y. 328, 4 N. E. 522; *Gminder v. Zeltner Brewing Co.*, 111 N. Y. Supp. 215. *Tenn.*—*Crockett v. McLanahan*, 109 Tenn. 517, 72 S. W. 950, 61 L. R. A. 914.

"It does not admit the accuracy of an alleged construction of an instrument when the instrument is set forth in the record, if the alleged construction is not supported by the terms of the instrument." *Gould v. Evansville & C. R. Co.*, 91 U. S. 526, 23 L. ed. 416.

"Does not admit that the construction of a written instrument set forth in the bill is the true one, or that its legal effect is contrary to that which its language imports. The very object of a demurrer in such case is to submit the question presented by the instrument as a matter of law for the determination of the court." *Interstate Land Co. v. Maxwell Land Co.*, 139 U. S. 569, 11 Sup. Ct. 656, 35 L. ed. 278.

Some courts hold that a demurrer does not admit the truth of matters alleged on information and belief.² Others recognize a distinction in this regard between an allegation of fact based on information and belief and a mere allegation of information and belief, holding that a demurrer to the former admits the fact alleged,³ provided the matter is one which may properly be so pleaded,⁴ while a demurrer to the latter admits only the pleader's confidence in the truth of the information.⁵

The admission extends to denials in the pleading demurred to of the allegations of the opposite party.⁶ Allegations under a *videlicet* are admitted.⁷

2. Force and Effect of the Admission.—A demurrer confesses only the averments of the pleading,⁸ or that part of it,⁹ to which it

2. *Huselson & Co. v. Duire*, 77 N. J. Eq. 437, 77 Atl. 1042; *Schuler v. Southern Iron & Steel Co.*, 77 N. J. Eq. 60, 75 Atl. 552; *Trimble v. American Sugar Refining Co.*, 61 N. J. Eq. 340, 48 Atl. 912. But see, *McCarter v. Pitman*, *Glassboro & Clayton Gas Co.*, 74 N. J. Eq. 255, 69 Atl. 211.

3. *Crompton v. Beedle*, 83 Vt. 287, 75 Atl. 331, 30 L. R. A. (N. S.) 748; *Watkins v. Childs*, 80 Vt. 99, 66 Atl. 805. See *Wells v. Bridgeport Hydraulic Co.*, 30 Conn. 316.

A demurrer to a bill alleging that bonds will be issued and disposed of to innocent purchasers, "as your orators have good reason to believe and do believe," admits the truth of the fact so alleged. *Bates v. City of Hastings*, 145 Mich. 574, 108 N. W. 1005.

An averment that "complainant is informed and believes, and, therefore, avers," is a direct and positive averment of the fact; and the fact is, therefore, admitted by a demurrer, and this is particularly true where the facts so averred are peculiarly within the knowledge of the defendant, and discovery is sought. *McCarter v. Pitman*, *Glassboro & Clayton Gas Co.*, 74 N. J. Eq. 255, 69 Atl. 211.

4. *Crompton v. Beedle*, 83 Vt. 287, 75 Atl. 331, 30 L. R. A. (N. S.) 748; *Watkins v. Childs*, 80 Vt. 99, 66 Atl. 805.

It does not admit such allegations in a petition which the statute requires to be verified by oath. *Hunt v. Burbank*, 73 Vt. 273, 50 Atl. 1058.

5. See *Bates v. City of Hastings*, 145 Mich. 574, 108 N. W. 1005; *Crompton v. Beedle*, 83 Vt. 287, 75 Atl. 331, 30 L. R. A. (N. S.) 748; *Quinn v.*

Valiquette, 80 Vt. 434, 68 Atl. 515, 14 L. R. A. (N. S.) 962; *Watkins v. Childs*, 80 Vt. 99, 66 Atl. 805.

6. "The demurrer to the answer admits not only the facts alleged therein, but, also, for the purpose of determining the sufficiency of the answer, that the facts alleged in the complaint, which are denied in the answer, form no part of the plaintiffs cause of action, and are not to be regarded by the court." *Sheward v. Citizens Water Co.*, 90 Cal. 635, 27 Pac. 439.

7. Dates, especially where the pleader announces that he will stand by them. *Prudent Patricians v. Marr*, 20 App. Cas. (D. C.) 363.

8. *Ala.*—*Louisville & N. R. Co. v. Holland*, 164 Ala. 73, 51 So. 365; *Steamboat Farmer v. McCraw*, 31 Ala. 659. *Conn.*—*Ryan v. Knights of Columbus*, 82 Conn. 91, 72 Atl. 574. *Ia.* *Johns v. Bailey*, 45 Iowa 241. *Pa.*—*Palethorp v. Schmidt*, 12 Pa. Super. Ct. 214.

It does not admit new facts. *Van Doren v. Tjader*, 1 Nev. 380.

A demurrer to a plea of the general issue does not admit the facts alleged in the brief statement filed with it. *Moore v. Knowles*, 65 Me. 493.

9. A demurrer which merely attacks the sufficiency of a copy of the account annexed to the petition does not admit the correctness of the averments of the petition, and where defendant fails to plead over after it is overruled, the amount plaintiff is entitled to recover must be established by evidence as on default. *Buehler v. Reed*, 11 Iowa 182.

is addressed. A demurrer by one in his individual capacity is not an admission of anything by him in his representative capacity.¹⁰ It has been held that the admission is equivalent to proof by a witness in open court.¹¹

The admission is only for the purposes of the demurrer.¹² It is not evidence,¹³ and does not conclude the party demurring on a subsequent trial on the merits,¹⁴ nor in any other suit.¹⁵ It does not

10. *Links v. Connecticut River Banking Co.*, 66 Conn. 277, 33 Atl. 1003.

11. *Francis v. Wood*, 81 Ky. 16.

12. **U. S.**—*Anheuser-Busch Brewing Assn. v. Bond*, 66 Fed. 653, 13 C. C. A. 665. **Conn.**—*Doolittle v. Selectmen*, 59 Conn. 402, 22 Atl. 336; *Tyler v. Waddingham*, 58 Conn. 375, 20 Atl. 335, 8 L. R. A. 657; *Havens v. Hartford & N. H. R. Co.*, 28 Conn. 69; *Gray v. Finch*, 23 Conn. 495. **Ind.**—*Suin v. Deschamp*, 138 Ind. 502, 38 N. E. 176. **Mich.**—*Cook v. Detroit & M. R. Co.*, 45 Mich. 453, 8 N. W. 74. **N. C.**—*Merriman v. Southern Paving Co.*, 142 N. C. 539, 55 S. E. 366, 8 L. R. A. (N. S.) 574. **Ore.**—*Rice v. Rice*, 13 Ore. 337, 10 Pac. 495. **S. D.**—*Shaw v. Circuit Court*, 129 N. W. 907. **Tex.**—*Perry v. Rice*, 10 Tex. 367.

To determine the legal sufficiency of the facts alleged. *Alexander v. Sutlive*, 3 Ga. 27; *Belden v. Blackman*, 124 Mich. 667, 83 N. W. 616.

To enable the court to determine on the pleading objected to, and no further. *Bush v. Critchfield*, 5 Ohio 109.

It is not such an admission as is contemplated by the statutory provision that in divorce suits defendant may admit the facts and show in bar of the suit that it has not been commenced within the statutory time. *Rice v. Rice*, 13 Ore. 337.

In Florida, the statute provides that no demurrer shall be considered as an admission of the facts set forth in the pleadings demurred to, so as to debar the person demurring from any substantial claim or defense which he might have urged if said demurrer had not been filed. Gen. St., 1906, §1443.

In Iowa, the code provides that "when a demurrer shall be overruled and the party demurring shall answer or reply, the ruling on the demurrer shall not be considered as an adjudication of any question raised by the demurrer and in such case the suffi-

ciency of the pleading thus attacked shall be determined as if no demurrer had been filed." Code, §3564.

In Nevada, the code provides that if a demurrer to the answer is overruled, the facts alleged therein shall still be construed as denied. Comp. Laws, §3162; as amended by St., 1907, c. 188, p. 412.

In Utah, there is a similar provision. Comp. Laws, 1907, §3004.

To the Reply. *Kan. Gen. St.*, 1909, §5722; *Okla. Comp. Laws*, 1909, §5668.

13. **Conn.**—*Doolittle v. Selectman*, 59 Conn. 402, 22 Atl. 336; *Tyler v. Waddingham*, 58 Conn. 375, 20 Atl. 335, 8 L. R. A. 657; *Lamphear v. Buckingham*, 33 Conn. 237; *Gray v. Finch*, 23 Conn. 495; *Pease v. Phelps*, 10 Conn. 62. **Ga.**—*Alexander v. Sutlive*, 3 Ga. 27. **Ore.**—*Rice v. Rice*, 13 Ore. 337, 10 Pac. 495.

"The rule is modified in actions on notes, bills of exchange, and the like, but even here the amount due is not conceded by the demurrer, but the note or bill must be produced, that the real debt may appear, while the execution of the instrument is not denied." *Havens v. Hartford & N. H. R. Co.*, 28 Conn. 69.

14. **U. S.**—*Anheuser-Busch Brew. Assn. v. Bond*, 66 Fed. 653, 13 C. C. A. 665. **Ind.**—*Sinn v. Deschamp*, 138 Ind. 502, 38 N. E. 176. **Me.**—*Stinson v. Gardiner*, 33 Me. 94. **Mich.**—*Cole v. Cole Realty Co.*, 135 N. W. 329; *Belden v. Blackman*, 124 Mich. 667, 83 N. W. 616. **Mo.**—*Donovan v. Boeck*, 217 Mo. 70, 116 S. W. 543. **Tex.**—*Perry v. Rice*, 10 Tex. 367.

In Louisiana.—What is admitted by an exception for the purpose of testing the petition may be denied by an answer filed therewith, and if the exception is overruled, final judgment can only be rendered after a regular trial on the merits. *State v. Crescent Mut. Ins. Co.*, 14 La. Ann. 825.

15. *Gray v. Finch*, 23 Conn. 495.

The admission by demurrer that an

dispense with proof of damages on a hearing in damages after it is overruled where the amount claimed is unliquidated,¹⁶ but the contrary is true in an action for a precise statutory penalty.¹⁷ But where a demurrer is overruled and the demurrant elects to abide by it, no further proof of the facts so admitted is necessary.¹⁸

I. SEARCHES THE RECORD.—As a general rule a demurrer, whenever and by whomsoever interposed, searches the record, and will be carried back and sustained to the first pleading that is defective in substance,¹⁹ a bad pleading being deemed sufficient if that which it

ordinance is in existence does not, beyond the purposes of that particular case, give the ordinance vitality, if in fact it has been repealed. *Field v. Malster*, 88 Md. 691, 41 Atl. 1087.

"Upon demurrer things are treated as facts that are not, or may not be, facts; and it would be a most singular conclusion if it were held that a court in dealing with such admissions adjudged the things treated as facts to be facts. It is not a judgment by the court that they exist. It is an admission by the party demurring that, for the purposes of that case, they exist. The judgment proceeds upon the hypothesis that they exist, but it is not an adjudication that they do exist. The hypothesis binds no person but the party to the case; otherwise a concession made in one case would preclude the whole world from disputing it." *Field v. Malster*, 88 Md. 691, 41 Atl. 1087.

16. *Daniels v. Town of Saybrook*, 34 Conn. 377; *Lamphear v. Buckingham*, 33 Conn. 237; *Havens v. Hartford & N. H. R. Co.*, 28 Conn. 69.

17. *McAlister v. Clark*, 33 Conn. 253.

18. *Bayliff v. Reilly*, 149 Ill. App. 236.

"The judgment thereupon entered is conclusive of the facts confessed by the demurrer; and no proof of such facts is necessary, other than that appearing upon the record. The facts, alleged in the pleading, are, in such case, admitted of record by the judgment of the court upon the demurrer." *Fish v. McGaun*, 205 Ill. 179, 68 N. E. 761, *affirming*, 107 Ill. App. 538.

19. **U. S.**—*Terry v. Tubman*, 92 U. S. 156, 23 L. ed. 537; *Aurora City v. West*, 7 Wall. 82, 19 L. ed. 42; *United States v. Linn*, 1 How. 104, 11 L. ed. 64; *Cooke v. Graham's Admr.*, 3 Cranch 229, 2 L. ed. 420; *Park Bros.*

& Co. *v. Kelly Axe Mfg. Co.*, 49 Fed. 618, 1 C. C. A. 395. **Ill.**—*Dunlap v. Chicago, M. & St. P. R. Co.*, 151 Ill. 409, 38 N. E. 89. **Me.**—*Poor v. European & N. A. R. Co.*, 59 Me. 270; *Stilphen v. Stilphen*, 58 Me. 508; *Shelden v. Call*, 55 Me. 159; *State v. Sweet-sir*, 53 Me. 438; *City of Calais v. Bradford*, 51 Me. 414. **Md.**—*Gusdorff v. Duncan*, 94 Md. 160, 50 Atl. 574; *Robey v. State*, 94 Md. 61, 50 Atl. 411; *New York, P. & N. R. Co. v. Jones*, 94 Md. 24, 50 Atl. 423; *Eastern Advertising Co. v. McGaw*, 89 Md. 72, 42 Atl. 923; *Osceola Tribe, etc. v. Schmidt*, 57 Md. 98; *Weber v. Fickey*, 47 Md. 196. **Mich.**—*Wales v. Lyon*, 2 Mich. 276. **Minn.**—*Branton v. McLaughlin*, 109 Minn. 244, 123 N. W. 808; *Hanson v. Byrnes*, 96 Minn. 50, 104 N. W. 762; *Dwinnell v. Kramer*, 87 Minn. 392, 92 N. W. 227; *Brown v. Baker*, 65 Minn. 133, 67 N. W. 793; *American Bldg. & Loan Assn. v. Stoneman*, 53 Minn. 212, 54 N. W. 1115; *Bausman v. Woodman*, 33 Minn. 512, 24 N. W. 198; *Lockwood v. Bigelow*, 11 Minn. 113. **Neb.**—*Benedict v. Minton*, 83 Neb. 782, 120 N. W. 429; *Bank of Miller v. Moore*, 81 Neb. 566, 116 N. W. 167; *Barr v. Little*, 54 Neb. 556, 74 N. W. 850; *State v. Moores*, 52 Neb. 770, 73 N. W. 299; *West Point W. P. & L. I. Co. v. State*, 49 Neb. 223, 68 N. W. 507; *Hawthorne v. State*, 45 Neb. 871, 64 N. W. 359; *Hower v. Aultman, Miller & Co.*, 27 Neb. 251, 42 N. W. 1039; *Bennet v. Hargus*, 1 Neb. 419. **N. H.**—*Hunt v. Haven*, 52 N. H. 162; *Claggett v. Simes*, 31 N. H. 22; *Leslie v. Harlow*, 18 N. H. 513. **N. J.**—*Mayer v. Roche*, 76 N. J. L. 433, 69 Atl. 246; *Cunningham v. Stanford*, 68 N. J. L. 7, 52 Atl. 374; *Parisen v. New York & L. B. R. Co.*, 65 N. J. L. 413, 47 Atl. 477; *Brehen v. O'Donnell*, 34 N. J. L. 408. **N. Y.**—*Hygienic Ice & Refrigerating Co. v. Franey*, 142 App. Div. 143, 127 N. Y. Supp. 30; *Ful-*

undertakes to answer is also bad.²⁰ Thus, a demurrer to an answer²¹

ton County Gas & Electric Co. v. Hudson River Telephone Co., 114 N. Y. Supp. 642; Schiefer v. Freygang, 109 N. Y. Supp. 848; Auburn & Owasco Canal Co. v. Leitch, 4 Denio 65; Mathewson v. Weller, 3 Denio 52. **N. D.**—Tribune Printing & Binding Co. v. Barnes, 7 N. D. 591, 75 N. W. 904. **Ohio.** Columbus, S. & C. R. Co. v. Mowatt, 35 Ohio St. 284; Trott v. Sarchett, 10 Ohio St. 241. **Pa.**—Wyoming County v. Bardwell, 84 Pa. 104; Commonwealth v. Pittsburgh & C. R. Co., 58 Pa. 26; Palethorp v. Schmidt, 12 Pa. Super. 214. **S. D.**—Baldwin v. City of Aberdeen, 23 S. D. 636, 123 N. W. 80, 26 L. R. A. (N. S.) 116. **Vt.**—Lee v. Follensby, 83 Vt. 35, 74 Atl. 327; Courier v. King, 81 Vt. 285, 69 Atl. 873; Dunlevy v. Fenton, 80 Vt. 505, 68 Atl. 651; Kent v. Miles, 65 Vt. 582, 27 Atl. 194. **Va.**—Roane's Admr. v. Drummond's Admr., 6 Rand 182; Bennett's Exr. v. Loyd, 6 Leigh 316. **Wis.** State v. Koch, 138 Wis. 27, 119 N. W. 839; State v. Weiss, 76 Wis. 177, 44 N. W. 967, 7 L. R. A. 330; State v. Milwaukee Chamber of Commerce, 47 Wis. 670, 3 N. W. 760; Lawe v. Hyde, 39 Wis. 345; Lawton v. Howe, 14 Wis. 241.

Judgment must be given upon the whole record against that party in whose pleading the first substantial fault has occurred. Will's Gould Pl. 585.

"Because he who does not so plead as to invite an issue cannot compel his adversary to accept it." Baxter v. McDonnell, 154 N. Y. 432, 48 N. E. 816.

Mississippi.—The provision of Code, 1906, §754, that only such defects as are assigned as causes of demurrer can be considered unless something so essential to the action or defense be omitted that judgment according to law and the right of the cause cannot be given, does not abrogate the rule. Shoults v. Kemp, 57 Miss. 218; State v. Bowen, 45 Miss. 347.

On appeal the supreme court cannot consider the sufficiency of the antecedent pleading unless the record shows that the question was presented below. Upton v. McLaughlin, 105 U. S. 640, 26 L. ed. 197.

20. Lee v. Follensby, 83 Vt. 35, 74 Atl. 327.

A bad answer is good enough for a bad complaint. **U. S.**—Metropolitan Trust Co. v. Toledo, St. L. & K. C. R. Co., 107 Fed. 628. **Ind.**—City of Delphi v. Hamling, 172 Ind. 645, 89 N. E. 308; Town of Windfall City v. State, 172 Ind. 302, 88 N. E. 505; Alexander v. Spaulding, 160 Ind. 176, 66 N. E. 694; Sugar Creek Township v. Johnson, 20 Ind. 280; Barrett v. Cleveland, C. C. & St. L. R. Co. (Ind App.), 96 N. E. 490. **Neb.**—Hower v. Aultman, Miller & Co., 27 Neb. 251, 42 N. W. 1039. **N. Y.**—Baxter v. McDonnell, 154 N. Y. 432, 48 N. E. 816.

A bad reply is good enough for a bad answer. Gray v. National Benefit Assn., 111 Ind. 531, 11 N. E. 477; Pittsburgh, C., C. & St. L. R. Co. v. Henderson, 9 Ind. App. 480, 36 N. E. 376; Hower v. Aultman, Miller & Co., 27 Neb. 251, 42 N. W. 1039.

Any replication is good in answer to a plea substantially bad. Frost v. Hammatt, 11 Pick. (Mass.) 70.

21. **U. S.**—Park Bros. & Co. v. Kelly Axe Mfg. Co., 49 Fed. 618, 1 C. C. A. 395; Metropolitan Trust Co. v. Toledo, St. L. & K. C. R. Co., 107 Fed. 628; Boggs v. Wann, 58 Fed. 681; Gause v. Knapp, 1 Fed. 292. **Ark.**—Thompson v. Jacoway, 97 Ark. 508, 134 S. W. 955; Clark v. Gramling, 54 Ark. 525, 16 S. W. 475; Bruce v. Benedict, 31 Ark. 301; Yell v. Snow, 24 Ark. 554; Carlock v. Spencer, 7 Ark. 12. **Ind.** McIntosh v. Zaring, 150 Ind. 301, 49 N. E. 164; Alkire v. Alkire, 134 Ind. 350, 32 N. E. 571; Gould v. Steyer, 75 Ind. 50; Sugar Creek Township v. Johnson, 20 Ind. 280; Ginther v. Rochester Improvement Co., 46 Ind. App. 378, 92 N. E. 698; Federal Life Ins. Co. v. Arnold, 46 Ind. App. 114, 90 N. E. 493, 91 N. E. 357; Neyens v. Flesher, 44 Ind. App. 44, 88 N. E. 626; Hall v. Brownlee, 28 Ind. App. 178, 62 N. E. 457; Board of Comrs. v. Stock, 11 Ind. App. 167, 36 N. E. 928. **Kan.**—Bartholomew v. Guthrie, 71 Kan. 705, 81 Pac. 491; Johnson v. Wynne, 64 Kan. 138, 67 Pac. 549; State v. County of Pawnee, 12 Kan. 426. **Ky.**—Fuson v. Stewart, 137 Ky. 748, 126 S. W. 1097; Hoskins v. Southern Nat. Bank, 24 Ky. L. Rep. 2250, 73 S. W. 786; Pryse v. Three Forks Deposit Bank's Assignee, 20 Ky. L. Rep. 1057, 48 S. W. 415; Bane's Heirs v. M'Meekin, 4 Bibb. 27.

or plea²² tests the sufficiency of the declaration or complaint, while a demurrer to the replication or reply tests the sufficiency of the answer or plea to which it is addressed,²³ and the sufficiency of the

Minn.—Hanson v. Byrnes, 96 Minn. 50, 104 N. W. 762; Dwinell v. Kramer, 87 Minn. 392, 92 N. W. 227; Brown v. Baker, 65 Minn. 133, 67 N. W. 793; First Nat. Bank v. How, 28 Minn. 150, 9 N. W. 626; Lockwood v. Bigelow, 11 Minn. 113. **Mo.**—Paxon v. Talmage, 87 Mo. 13; Marshall v. Platte County, 12 Mo. 88. **Neb.**—Benedict v. Minton, 83 Neb. 782, 120 N. W. 429; Bank of Miller v. Moore, 81 Neb. 366, 116 N. W. 167; Barr v. Little, 54 Neb. 556, 74 N. W. 850; State v. Moores, 52 Neb. 770, 73 N. W. 299; West Point W. P. & L. I. Co. v. State, 49 Neb. 223, 68 N. W. 507; Hawthorne v. State, 45 Neb. 871, 64 N. W. 359; Hower v. Aultman, Miller & Co., 27 Neb. 251, 42 N. W. 1039; Bennet v. Hargus, 1 Neb. 419. **N. M.** Pino v. Beckwith, 1 N. M. 19. **N. Y.** Heath Dry Gas Co. v. Hurd, 193 N. Y. 255, 86 N. E. 18; Lewis v. Cook, 150 N. Y. 163, 44 N. E. 778; Baxter v. McDonnell, 154 N. Y. 432, 48 N. E. 816; People v. Booth, 32 N. Y. 397; Vulcan Iron Works v. Pittsburg-Eastern Coal Co., 129 N. Y. Supp. 676; Davenport v. Walker, 116 N. Y. Supp. 411; Fulton County Gas & Electric Co. v. Hudson River Tel. Co., 114 N. Y. Supp. 642. **N. D.**—Tribune Printing & Binding Co. v. Barnes, 7 N. D. 591, 75 N. W. 904. **Ohio.**—State v. State Board of Dental Examiners, 1 Ohio N. P. (N. S.) 449. **Vt.**—Smith v. Purmort's Admrs., 63 Vt. 378, 20 Atl. 928; Black v. Howard, 50 Vt. 27; Bennett's Exr. v. Loyd, 6 Leigh 316. **Wis.**—State v. City of Milwaukee, 145 Wis. 131, 129 N. W. 1101; Lawton v. Howe, 14 Wis. 241.

A demurrer to a bad answer cannot prevail if the complaint is not good. Schiefer v. Freygang, 109 N. Y. Supp. 848.

A demurrer to the answer should be overruled if the complaint does not state a cause of action. **Ind.**—Alkire v. Alkire, 134 Ind. 350, 32 N. E. 571; Indiana Live Stock Ins. Co. v. Bogleman, 4 Ind. App. 237, 30 N. E. 7. **Minn.**—American Bldg. & Loan Assn. v. Stoneman, 53 Minn. 212, 54 N. W. 1115. **Neb.**—Oakley v. Valley County, 40 Neb. 900, 59 N. W. 368. **Ohio.** Trott v. Sarchett, 10 Ohio St. 241.

Error in overruling a demurrer to a bad answer is not ground for reversal if the complaint is bad. City of Delhi v. Hamling, 172 Ind. 645, 89 N. E. 308; Alexander v. Spaulding, 160 Ind. 176, 66 N. E. 694; Grace v. Cox, 16 Ind. App. 150, 44 N. E. 813.

The rule applies although there may be no actual ruling on the demurrer to the answer. Neyens v. Flesher, 44 Ind. App. 44, 88 N. E. 626.

The sufficiency of a cross-complaint is tested by a demurrer to the answer thereto. Alkire v. Alkire, 134 Ind. 350, 32 N. E. 571.

22. U. S.—United States v. Linn, 1 How. 104, 11 L. ed. 64. **Conn.**—Bishop v. Quintard, 18 Conn. 395. **Fla.**—Capital City Bank v. Hilson, 59 Fla. 215, 51 So. 853; Myrick v. Merritt, 22 Fla. 335; Price v. Drew, 18 Fla. 670; Stokes v. Baars, 18 Fla. 656; Miller v. Kingsbury, 8 Fla. 356. **Ill.**—Stott v. City of Chicago, 205 Ill. 281, 68 N. E. 736; City of Sterling v. Wolf, 163 Ill. 467, 45 N. E. 218, *affirming*, 61 Ill. App. 515; Dunlap v. Chicago, M. & St. P. R. Co., 151 Ill. 409, 38 N. E. 89; Mudge v. Rinkle, 45 Ill. App. 604. **Md.** New York, P. & N. R. Co. v. Jones, 94 Md. 24, 50 Atl. 423; Osceola Tribe, etc., v. Schmidt, 57 Md. 98; Willing v. Bozman, 52 Md. 44; Weber v. Fickey, 47 Md. 196; Eakle v. Smith, 27 Md. 467. **N. H.**—Leslie v. Harlow, 18 N. H. 518. **N. J.**—Watkins v. Kirby, 74 N. J. L. 34, 64 Atl. 979.

If the declaration is defective in substance the overruling of the demurrer to the plea will be held to be correct regardless of the sufficiency of the pleas. Sylvester v. Lichtenstein, 61 Fla. 441, 55 So. 282; Kirton v. Atlantic Coast Line R. Co., 57 Fla. 79, 49 So. 1024; Murphy v. City of Jacksonville, 18 Fla. 318.

23. U. S.—Lafayette Bridge Co. v. City of Streator, 105 Fed. 729. **Ark.** Wood v. Terry, 30 Ark. 385. **Ill.**—Massey v. People, 201 Ill. 409, 66 N. E. 392; Schalucky v. Field, 124 Ill. 617, 16 N. E. 904; Ryan v. May, 14 Ill. 49; Laibe v. Smolikowski, 152 Ill. App. 256; Peoria Star Co. v. Steve W. Floyd Special Agency, 115 Ill. App. 401; Augsberg v. Meredith, 101 Ill. App.

declaration or complaint or equivalent pleading as well.²⁴ So, too, a demurrer to a rejoinder will be carried back and sustained to a bad replication,²⁵ or to a bad declaration,²⁶ and a demurrer to a surrejoinder back to a bad plea.²⁷ The rule is equally applicable though the demurrer is special,²⁸ and applies to pleadings in mandamus,²⁹

629. **Ind.**—Gray *v.* National Benefit Assn., 111 Ind. 531, 11 N. E. 477. **Ky.**—Chesapeake & O. R. Co. *v.* Riddle's Admr., 24 Ky. L. Rep. 1187, 72 S. W. 22; Mackin *v.* Wilson, 20 Ky. L. Rep. 218, 45 S. W. 663. **Md.**—Eastern Advertising Co. *v.* McGaw, 89 Md. 72, 42 Atl. 923. **N. J.**—Mayer *v.* Roche, 76 N. J. L. 433, 69 Atl. 246; Cunningham *v.* Stanford, 68 N. J. L. 7, 52 Atl. 374. **N. H.**—Hunt *v.* Haven, 52 N. H. 162. **Ohio.**—Columbus, S. & C. R. Co. *v.* Mowatt, 35 Ohio St. 284; Headington *v.* Neff, 7 Ohio 229. **Vt.**—Dunlevy *v.* Fenton, 80 Vt. 505, 68 Atl. 651; Kent *v.* Miles, 65 Vt. 582, 27 Atl. 194.

The sufficiency of the replication will not be determined where the plea to which it is addressed is bad. Brehen *v.* O'Donnell, 34 N. J. L. 408.

If the pleas are bad there is no reversible error in overruling it though the replication is also bad. Robey *v.* State, 94 Md. 61, 50 Atl. 411.

Defendant cannot complain that a defective replication was allowed to stand to a defective plea. Louisville, N. A. & C. R. Co. *v.* Carson, 169 Ill. 247, 48 N. E. 402; Peoria Star Co. *v.* Steve W. Floyd Special Agency, 115 Ill. App. 401.

Overruling a demurrer to a bad paragraph of reply addressed to a bad paragraph of answer is not available error. Beckett *v.* Little, 23 Ind. App. 65, 54 N. E. 1069.

If the plea is found to be bad, the result is to eliminate from the record the plea, the replication and the demurrer. Parisen *v.* New York & L. B. R. Co., 65 N. J. L. 413, 47 Atl. 477.

In Dowie *v.* Priddle, 216 Ill. 553, 75 N. E. 243, affirming, 116 Ill. App. 184, it was held that, where the trial judge became satisfied that pleas were insufficient and that an error had been committed in refusing to carry back to them the demurrer to the replications thereto, he should have withdrawn the case temporarily from the jury and set aside the order sustaining the demurrer to the replications and

carried it back to the pleas and entered an order sustaining it to the pleas and then permitted defendant to stand by his pleas or plead over.

On demurrer to a reply to a counterclaim plaintiff may contend that the latter does not state facts sufficient to constitute a counterclaim. Klauck *v.* Federal Ins. Co., 115 N. Y. Supp. 1049.

24. **Md.**—Shertzer *v.* Mutual Fire Ins. Co., 46 Md. 506. **Minn.**—Bausman *v.* Woodman, 33 Minn. 512. **N. J.**—Cunningham *v.* Stanford, 68 N. J. L. 7, 52 Atl. 374. **N. Y.**—Auburn & Owaseo Canal Co. *v.* Leitch, 4 Denio 65.

It is not error to overrule a demurrer to a bad replication where the plea to which it is addressed is also bad. Wilkinson *v.* Cook, 44 Miss. 367.

Equivalent to Motion for Judgment. The demurrer operates as a motion for judgment on the pleadings, and is practically a demurrer to the complaint. Branton *v.* McLaughlin, 109 Minn. 244, 123 N. W. 808.

25. **Aurora City v. West**, 7 Wall. (U. S.) 82, 19 L. ed. 42; Commonwealth *v.* Pittsburg & C. R. Co., 58 Pa. 26.

Defendant will be given judgment if the plea is good. Pearsall *v.* Dwight, 2 Mass. 84.

26. **Cooke v. Graham's Admr.**, 3 Cranch (U. S.) 229, 2 L. ed. 420.

27. **Mercein v. Smith**, 2 Hill (N. Y.) 210; Mathewson *v.* Weller, 3 Denio (N. Y.) 52; Currier *v.* King, 81 Vt. 285, 69 Atl. 873.

28. **N. H.**—Hunt *v.* Haven, 52 N. H. 162; Leslie *v.* Halow, 18 N. H. 518. **Pa.**—Com. *v.* Pittsburg & C. R. Co., 58 Pa. 26. **Vt.**—Dunlevy *v.* Fenton, 80 Vt. 505, 68 Atl. 651 (where the demurrer assigned special causes but was really a general demurrer); Kent *v.* Miles, 65 Vt. 582, 27 Atl. 194.

29. **Meriden Britannia Co. v. Whedon**, 31 Conn. 118; State *v.* Koch, 138 Wis. 27, 119 N. W. 839; State *v.* Weiss, 76 Wis. 177, 44 N. W. 967, 7 L. R. A. 330; State *v.* Milwaukee Chamber of

and *quo warranto*,³⁰ and pleadings in other special proceedings.³¹

The rule only requires the pleadings to be followed back through their course,³² and hence will not be applied so as to carry a demurrer to one pleading back to another to which it does not profess to be an answer and with which it has no connection.³³ Thus, a demurrer to a plea or answer which professes to answer only a part of the declaration or complaint does not test the sufficiency of the latter pleading as a whole,³⁴ nor can a demurrer to a replication to one plea be carried back to another plea,³⁵ or to a count of the declaration to which the plea demurred to is not addressed.³⁶

There is a conflict of authority as to whether a demurrer to a counterclaim may be carried back to the complaint, the holdings in this regard depending upon whether the former is regarded as an answer and as a pleading to the complaint.³⁷

The rule does not apply to demurrers to pleas in abatement, since such pleas go to the writ and not to the declaration or complaint,³⁸

Commerce, 47 Wis. 670, 3 N. W. 760; State v. Supervisors, 34 Wis. 169; State v. Lean, 9 Wis. 279.

30. Hedrick v. People, 221 Ill. 374, 77 N. E. 441; Brackett v. People, 72 Ill. 593.

31. A demurrer to a remonstrance in drainage proceedings will be carried back and sustained to the petition if the latter is bad. *In re Remington Drainage Dist.*, 138 Wis. 621, 120 N. W. 523.

32. Lee v. Follensby, 83 Vt. 35, 74 Atl. 327.

33. Hunter v. Bilyeu, 39 Ill. 367; Ryan v. May, 14 Ill. 49.

The sufficiency of a pleading cannot be raised by an attack upon another pleading not responsive to it. *Callahan v. Louisville Dry Goods Co.*, 140 Ky. 712, 131 S. W. 995.

A demurrer to a cross-petition which does not affect the cause of action set up in the original petition cannot be carried back and sustained to the latter. *May v. Patterson*, 13 Ky. L. Rep. (abstract) 779.

34. Does not raise the question of misjoinder of counts in the declaration. *Lee v. Follensby*, 83 Vt. 35, 74 Atl. 327.

The contrary is true where the plea goes to the whole declaration. *Black v. Howard*, 50 Vt. 27.

Where the complaint is in one paragraph a demurrer to a paragraph of the answer which does not attempt to answer the whole of the complaint cannot be carried back to such complaint.

State v. Halter, 149 Ind. 292, 47 N. E. 665.

35. Hunter v. Bilyeu, 39 Ill. 367.

36. Hooker v. Smith, 19 Vt. 151, 47 Am. Dec. 679.

37. In New York it may not be carried back. *Fulton County Gas & Electric Co. v. Hudson River Tel. Co.*, 200 N. Y. 287, 93 N. E. 1057, *affirming*, 114 N. Y. Supp. 642.

In Wisconsin, a counterclaim under the code is an answer in all cases and a pleading to the complaint, and, hence, a demurrer thereto may be carried back to the complaint. *Lawe v. Hyde*, 39 Wis. 345.

A demurrer to an answer and counterclaim tests the sufficiency of the complaint. *Lyndon Lumber Co. v. Sawyer*, 135 Wis. 525, 116 N. W. 255.

38. Andrews Steph. Pl. (2nd ed.), §140, p. 268; and the following cases: Ala.—*Crawford v. Slade*, 9 Ala. 887. Ark.—*Knott v. Clements*, 13 Ark. 335. Conn.—*State v. Hamlin*, 47 Conn. 95. Ind.—*Darnell v. State*, 174 Ind. 143, 90 N. E. 769; *State v. Roberts*, 166 Ind. 585, 77 N. E. 1093; *Goldsmith v. Chipps*, 154 Ind. 28, 55 N. E. 855; *Indiana, B. & W. R. Co. v. Foster*, 107 Ind. 430, 8 N. E. 264; *Rush v. Foss Mfg. Co.*, 20 Ind. App. 515, 51 N. E. 143; *Price v. Grand Rapids & I. R. Co.*, 18 Ind. 137. Ky.—*Dean v. Boyd*, 9 Dana 69. N. J. *Birch v. King*, 71 N. J. L. 392, 59 Atl. 11. E. I.—*Ellis v. Ellis*, 4 R. I. 110. Vt.—*Bent v. Bent*, 43 Vt. 42.

But see, *Munsell v. Philips*, 5 J. J.

nor to pleas to the jurisdiction,³⁹ nor will a demurrer be carried behind a plea in abatement.⁴⁰

In some states a demurrer to a special plea cannot be carried back to the declaration where there is a plea of the general issue,⁴¹ or of *non est factum*⁴² on file, nor to a pleading to which a general denial has been interposed,⁴³ though there is authority to the contrary as to a demurrer to a replication to a special plea.⁴⁴

In some states the demurrer will not be carried back to a previous pleading to which a demurrer has already been overruled,⁴⁵ while in others a contrary doctrine prevails.⁴⁶

The court will consider the whole record,⁴⁷ and will not adjudge in favor of an apparent right in a party unless he has himself put his action upon that ground,⁴⁸ nor where his own pleadings show that he is not entitled to judgment.⁴⁹

Marsh. (Ky.) 77, where it was held that a demurrer to a plea in abatement was properly carried back to the declaration.

39. *Birch v. King*, 71 N. J. L. 392, 59 Atl. 11.

40. A demurrer to a replication to a plea in abatement will be carried back to such plea, but not beyond it. *Finch v. Galigher*, 181 Ill. 625, 54 N. E. 611; *Phoenix Ins. Co. v. Hedrick*, 178 Ill. 212, 52 N. E. 1034, *affirming*, 73 Ill. App. 601; *Ryan v. May*, 14 Ill. 49.

A demurrer to a reply to a plea in abatement cannot be carried back to the petition. *Callahan v. Louisville Dry Goods Co.*, 140 Ky. 712, 131 S. W. 995.

41. *Supreme Lodge K. of P. v. McLennan*, 171 Ill. 417, 49 N. E. 530, *affirming*, 69 Ill. App. 599; *Compton v. People*, 86 Ill. 176; *Wilson v. Myrick*, 26 Ill. 34; *Wear v. Jacksonville & S. R. Co.*, 24 Ill. 593; *City of Marshall v. Cleveland, C. & St. L. R. Co.*, 80 Ill. App. 531.

42. *Mix v. People*, 86 Ill. 329.

43. A demurrer to a defense cannot be carried back to the complaint, where the answer also contains a general denial, since defendant would thereby admit and deny the same facts. *Baldwin v. City of Aberdeen*, 23 S. D. 636, 123 N. W. 80.

44. It will be carried back to the declaration though the general issue is also pleaded. *Auburn & Owaseo Canal Co. v. Leitch*, 4 Denio (N. Y.) 65.

45. *Heinberger v. Elliott Switch Co.*, 245 Ill. 448, 92 N. E. 297; *City of Chicago v. People*, 210 Ill. 84, 71 N. E. 816; *McGann v. People*, 194 Ill.

526, 62 N. E. 941, *reversing*, 97 Ill. App. 587; *Fish v. Farwell*, 160 Ill. 236, 43 N. E. 367; *Brawner v. Lomax*, 23 Ill. 443; *Commissioners of Highways v. Comrs. of Highways*, 142 Ill. App. 489; *Carlson v. People*, 118 Ill. App. 592.

46. *Fulton County Gas & Elec. Co. v. Hudson River Tel. Co.*, 114 N. Y. Supp. 642.

The demurrer will be carried back though a demurrer to the previous pleading has been overruled by another judge "where practically the decision of each subsequent step in the litigation would be dependent upon a fundamental proposition, in regard to which the court is convinced that the prior ruling was erroneous." *Lafayette Bridge Co. v. City of Streator*, 105 Fed. 729.

Where the former demurrer has been abandoned by pleading over after it was overruled. *Aurora City v. West*, 7 Wall. (U. S.) 82, 19 L. ed. 42.

47. *Will's Gould Pl.* 585; *Andrews Steph. Pl.* (2nd ed.), §140, p. 268; *Dupee v. Blake*, 148 Ill. 453, 35 N. E. 867; *Eakle v. Smith*, 27 Md. 467. "Although on demurrer the court will look for the first fault, if it be matter of substance, yet it is also the duty of the court to look at the whole record." *Keay v. Goodwin*, 16 Mass. 1.

48. *Andrews Steph. Pl.* (2nd ed.), §140, p. 269; *Palethorp v. Schmidt*, 12 Pa. Super. Ct. 214.

49. *Will's Gould Pl.* 586; *Keay v. Goodwin*, 16 Mass. 1.

So, if the surrejoinder shows that plaintiff has no cause of action, judgment should be rendered for defendant on demurrer thereto, though the re-

There seems to be some conflict of authority as to how far the pleading demurred to may be considered in passing on the sufficiency of an antecedent one. Thus, it has been held that on demurrer to an answer, its allegations cannot be considered in determining the sufficiency of the complaint.⁵⁰ Other courts hold that such a demurrer cannot be sustained to the complaint because of defects therein supplied by the answer,⁵¹ or that a failure to carry it back is not ground for reversal where the defects are so supplied.⁵² It has also been held that if the objection is not apparent on the face of the complaint, the right to carry the demurrer back and sustain it to the complaint depends on whether the facts alleged in the answer as an objection to the complaint and admitted by the demurrer, can be considered as a part of the facts on which the complaint rests.⁵³ On review of the ruling on such a demurrer, the complaint cannot be aided by the verdict.⁵⁴

A visitation of a demurrer upon antecedent pleadings can only have the effect of a general demurrer thereto,⁵⁵ particularly in states where special demurrers have been abolished,⁵⁶ and this is equally true though the demurrer as interposed is special.⁵⁷ It reaches only defects of substance,⁵⁸ such as want of jurisdiction,⁵⁹ or failure to state a cause of action.⁶⁰

joinder is a departure from the plea in bar. *Keay v. Goodwin*, 16 Mass. 1.

50. The answer and exhibits filed with it cannot be considered. *Macklin v. Trustees*, 88 Ky. 592, 11 S. W. 657.

A demurrer to an answer does not so far admit its allegations as to make them a part of the petition on carrying the demurrer back to it, and thereby create defects in the petition which did not otherwise exist on the face of the petition itself. *Park Bros. & Co. v. Kelly Axe Mfg. Co.*, 49 Fed. 618, 1 C. C. A. 395.

51. *Thompson v. Jacoway*, 97 Ark. 508, 134 S. W. 955.

52. *Sill v. Sill*, 31 Kan. 248, 1 Pac. 556.

53. *McIntosh v. Zaring*, 150 Ind. 301, 49 N. E. 164; *Hall v. Brownlee*, 28 Ind. App. 178, 62 N. E. 457.

54. *Board of Comrs. v. Stock*, 11 Ind. App. 167, 36 N. E. 928.

55. **U. S.**—*United States v. Linn*, 1 How. 104, 11 Led. 64; *Cooke v. Graham's Admr.*, 3 Cranch 229, 2 L. ed. 420. **Ala.**—*Henley v. Bush*, 33 Ala. 636. **N. M.**—*Pino v. Beckwith*, 1 N. M. 19. **Vt.**—*Black v. Howard*, 50 Vt. 27.

Under Mississippi Code, 1906, §754, providing that only such defects as are assigned as causes of demurrer can be considered unless something so essen-

tial to the action or defense be omitted that judgment according to law and the right of the cause can not be given. *Shoults v. Kemp*, 57 Miss. 218; *State v. Bowen*, 45 Miss. 347.

56. See, *Myrick v. Merritt*, 22 Fla. 335; *Russ v. Mitchell*, 11 Fla. 80; *Chesapeake & P. Tel. Co. v. Mackenzie*, 74 Md. 36, 21 Atl. 690.

57. *Dunlevy v. Fenton*, 80 Vt. 505, 68 Atl. 651.

58. **U. S.**—*Aurora City v. West*, 7 Wall. 82, 19 L. ed. 42; *Park Bros. & Co. v. Kelly Axe Mfg. Co.*, 49 Fed. 618, 1 C. C. A. 395. **Ill.**—*People v. Munroe*, 227 Ill. 604, 81 N. E. 704; *Massey v. People*, 201 Ill. 409, 66 N. E. 392; *People v. Crabb*, 156 Ill. 155, 40 N. E. 319; *Hart v. Otis*, 41 Ill. App. 431. **Mich.**—*Wales v. Lyon*, 2 Mich. 276. **Minn.**—*Hanson v. Byrnes*, 96 Minn. 50. **Mo.**—*Paxon v. Talmage*, 87 Mo. 13. **N. Y.**—*Lee v. Humphrey*, 9 Wend. 204.

The question of misjoinder of counts may be considered on demurrer to a plea professing to answer the whole declaration. *Black v. Howard*, 50 Vt. 27.

59. *Lockwood v. Bigelow*, 11 Minn. 113; *Stratton v. Allen & Chase*, 7 Minn. 502; *Lawe v. Hyde*, 39 Wis. 345.

60. **Minn.**—*Lockwood v. Bigelow*, 11

The sufficiency of the antecedent pleading is to be determined in the same way as though a general demurrer had been interposed to it in the first instance.⁶¹ A demurrer to a plea or answer professing to answer the whole complaint or declaration can operate only as a demurrer to the whole of the latter pleading.⁶² So, too, a demurrer to pleas setting up a defense to a part only of a single indebtedness relied on in the declaration and admitting liability for the balance, cannot be carried back and sustained to the declaration because of defective allegations therein going to the whole indebtedness.⁶³

The rule that a demurrer searches the record is not recognized in some states.⁶⁴

Withdrawing a pleading to which a demurrer has been sustained necessarily withdraws the demurrer also, and in such case it cannot be carried back to a previous one.⁶⁵

If the answer is held good, defendant cannot complain because a demurrer thereto was not carried back to the complaint.⁶⁶

XIII. MUST BE GOOD TO THE FULL EXTENT INTERPOSED.

A. GENERAL STATEMENT OF THE RULE. — A demurrer cannot be good in part and bad in part, but must be sustained or fail to the whole extent to which it is interposed,⁶⁷ and this rule is equally applicable

Minn. 113; *Stratton v. Allen & Chase*, 7 Minn. 502. **N. Y.**—*New York Cent. Iron Works Co. v. Brennan*, 116 N. Y. Supp. 457. **Wis.**—*Lawe v. Hyde*, 39 Wis. 345.

61. *Branton v. McLaughlin*, 109 Minn. 244.

62. It cannot be sustained to a declaration which contains one good count. *Bills v. Stanton*, 69 Ill. 51; *Wear v. Jacksonville & S. R. Co.*, 24 Ill. 593; *Tomlin v. Tonica & P. R. Co.*, 23 Ill. 429; *Black v. Howard*, 50 Vt. 27.

Where the complaint contains two counts, unless both are defective a demurrer to a defense applying to either must be examined upon the merits, but if neither sets forth a cause of action the sufficiency of the pleading demurred to cannot be considered. *Baxter v. McDonnell*, 154 N. Y. 432, 48 N. E. 816.

A demurrer to a paragraph of answer pleaded to the whole complaint when carried back is a demurrer to the whole complaint and cannot be sustained to it where it contains some good paragraphs. The demurrer by passing through the answer cannot become any more specific than if it had been aimed at the whole complaint. *Tracewell v. Peacock*, 55 Ind. 572.

63. *City of Danville v. Danville Water Co.*, 178 Ill. 299, 53 N. E. 118.

64. **Alabama.**—Since general demurrers have been abolished. *Elliott v. Holbrook, Carter & Co.*, 33 Ala. 659; *Henley v. Bush*, 33 Ala. 636.

Georgia.—*Wynn v. Lee*, 5 Ga. 217.

Iowa.—*Gano v. Gilruth*, 4 G. Gr. 453.

Tennessee.—In view of the statute requiring all demurrers to state the objection relied on. *Hobbs v. Memphis & C. R. Co.*, 12 Heisk. 526.

65. *George v. Bischoff*, 68 Ill. 236.

66. *Pritchett v. McGaughey*, 151 Ind. 638, 52 N. E. 397; *Gilbert v. Bakes*, 106 Ind. 558, 7 N. E. 257; *Embree v. Emerson*, 37 Ind. App. 16, 74 N. E. 44-1110; *Minnich v. Swing*, 36 Ind. App. 119, 73 N. E. 271; *Cummings v. Girtton*, 19 Ind. App. 248, 49 N. E. 360.

67. **Fla.**—*Roberts v. Cypress Lake Naval Stores Co.*, 58 Fla. 514, 50 So. 678. **Minn.**—*First Nat. Bank v. How*, 28 Minn. 150, 9 N. W. 626. **Miss.**—*Cummings v. Daugherty*, 73 Miss. 405, 18 So. 657. **N. J.**—*McCarter v. United N. J. R. & C. Co.*, 76 N. J. Eq. 323, 74 Atl. 315, reversing, 75 N. J. Eq. 158, 71 Atl. 291. **N. Y.**—*Holmes v. Seaboard Portland Cement Co.*, 63 Misc. 82, 116 N. Y. Supp. 524; *Peabody v. Washington County Mut. Ins. Co.*, 20 Barb. 339.

"A demurrer is wholly good or wholly bad. *McCarter v. United N. J.*

to demurrers in equity.⁶⁸ A single demurrer may be directed to a pleading in its entirety, or to it in its separate and distinct parts.⁶⁹ If several to each count or paragraph, it will be overruled as to those counts which are good and sustained as to those which are bad.⁷⁰

A single demurrer by several parties may be joint as to all of them, or it may be several as to each.⁷¹

No particular rule can be laid down by which it may be determined whether a demurrer is joint or several or general or separate, but the extent to which each demurrer goes must depend upon its own particular phraseology.⁷² The demurrer is to be taken to mean what it

R. & C. Co., 76 N. J. Eq. 323, 74 Atl. 315, reversing, 75 N. J. Eq. 158, 71 Atl. 291.

If a complaint contains but a single cause of action, a demurrer thereto must be sustained or overruled as a whole and not in parts. Cowand v. Meyers, 99 N. C. 198, 6 S. E. 82.

Cannot sustain a demurrer to a bill on one or more of several grounds, with leave to amend and at the same time overrule it as to other grounds, with leave to answer. Canton Cotton Warehouse Co. v. Potts, 68 Miss. 637, 10 So. 59.

If the demurrer is too large it will be overruled as a whole. Weatherford, M. W. & N. R. Co. v. Granger, 85 Tex. 574, 22 S. W. 959.

68. U. S.—Marshall v. Vicksburg, 15 Wall. 146, 21 L. ed. 121. Miss. Washington v. Soria, 73 Miss. 665, 9 So. 435. N. H.—Craft v. Thompson, 51 N. H. 536; Bay State Iron Co. v. Goodall, 39 N. H. 223. N. J.—Larter v. Canfield, 59 N. J. Eq. 461, 45 Atl. 616. N. Y.—Jarvis v. Palmer, 11 Paige Ch. 650.

Error in sustaining a single demurrer in part is waived, where complainant amends his bill and defendant answers it as amended. Marshall v. Vicksburg, 15 Wall. (U. S.) 146, 21 L. ed. 121.

69. Sanford v. Gaddis, 13 Ill. 329; United Surety Co. v. Summers, 110 Md. 95, 72 Atl. 775.

"When a complaint consists of several paragraphs, and a demurrer is directed to it as a whole, such demurrer is a joint or general demurrer to the complaint, but if a demurrer be directed against its distinct parts, or separate paragraphs, such demurrer is a separate demurrer to each para-

graph." Merrill v. Pepperdine, 9 Ind. App. 416, 36 N. E. 921.

70. Ill.—Sanford v. Gaddis, 13 Ill. 329. Md.—United Surety Co. v. Summers, 110 Md. 95, 72 Atl. 775. Miss. Tittle v. Bonner, 53 Miss. 578.

A demurrer going to the paragraphs separately must be sustained if either paragraph alleged in the alternative is insufficient. Linck's Admr. v. Louisville & N. R. Co., 107 Ky. 370, 54 S. W. 184.

71. "When two or more parties desire to demur separately to the same pleading, on the same ground, the law does not require each to file a separate paper. If they choose, all may act separately in demurring, and yet unite in the same paper, provided it is clearly stated therein that they act severally and not jointly." Whitesell v. Strickler, 167 Ind. 602, 78 N. E. 845.

72. Merrill v. Pepperdine, 9 Ind. App. 416, 36 N. E. 921.

"Where, apparently, several causes of action or defense are stated in a single pleading or count, and it is desired to demur to any one of these several causes, a proper method would be to state as to each cause the pleader desires to reach by demurrer: 'In so far as the pleading or count purports to state the cause of action or defense, viz., . . . the plaintiff or defendant, as the case may be, demurs because' (stating the several grounds). In this way a ruling may be had, either sustaining the cause, or eliminating it from the case." Donovan v. Davis (Conn.), 82 Atl. 1025.

Examples of Demurrers That Have Been Held To Go to the Pleading as a Whole.—"To the second, third and fourth paragraphs" of the reply on

the ground "that neither of said paragraphs of reply states facts," etc. *Maynard v. Waidlich*, 156 Ind. 562, 60 N. E. 348.

That "neither of said paragraphs of answer state facts sufficient to constitute a good defense to either of said cross-complaints." *Rownd v. State*, 152 Ind. 39, 51 N. E. 914, 52 N. E. 395.

Refiling a demurrer "to the complaint as amended" makes it applicable to the amended complaint as a whole, and not to each count thereof. *Philip Carey Mfg. Co. v. Southern Const. Co. (Ala.)*, 56 So. 746.

That plaintiff "demurs to the second and third paragraphs" of the answer, "and says that neither of said paragraphs states facts sufficient to constitute a defense to this action." *Kenny v. Wells*, 23 Ind. App. 490, 55 N. E. 774. See also, *Hollingsworth v. McColly*, 26 Ind. App. 609, 60 N. E. 371.

A demurrer for misjoinder which does not specify any particular cause of action as improperly joined, and fails to specify any particular part of the complaint. *Gaillard v. Cantini*, 76 Fed. 69, 22 C. C. A. 493.

Examples of Demurrers That Have Been Held To Be Directed to Separate Paragraphs or Counts.—"And the said defendant comes and defends the wrong and injury when, etc., and says that the said several counts of the said declaration, and the matters and things therein contained, in manner and form as the same are before pleaded and set forth, are not sufficient in law, nor are either of said counts of said declaration sufficient in law for the said plaintiff to have and maintain his aforesaid action thereof against him, the said defendant, and that he is not bound by the law of the land, etc." *Sanford v. Gaddis*, 13 Ill. 329.

That plaintiff "demurs severally to" certain enumerated paragraphs, "for the reason that neither of said paragraphs contains sufficient facts," etc. *Funk v. Reutcher*, 134 Ind. 68, 33 N. E. 364, 898.

"To each, the first, second, third and fourth paragraphs of the plaintiff's amended complaint separately and severally, for the reason that neither of said paragraphs states facts," etc. *Baltimore & O. S. W. R. Co. v. Little*, 149 Ind. 167, 48 N. E. 862.

That "neither paragraph" states facts sufficient to constitute a cause of action, and that the court has no jurisdiction over the subject of the action alleged in "either paragraph." *Chicago, & S. E. R. Co. v. Spencer*, 23 Ind. App. 605, 55 N. E. 882.

"Come now the defendants and demur severally to each paragraph of the complaint as amended, because the same does not state facts," etc. *Terre Haute & L. R. Co. v. Sherwood*, 132 Ind. 129, 31 N. E. 781, 17 L. R. A. 339.

"To each of the paragraphs of the answer." *Sanford v. Lowenthal*, 5 Ky. L. Rep. 206; *Sanford v. Lowenthal & Co.*, 1 Ky. L. Rep. 357.

"To the plaintiff's declaration and to every count thereof." *United Surety Co. v. Summers*, 110 Md. 95, 72 Atl. 775.

"To the plaintiff's declaration, and the several counts therein contained." *May v. Western Union Tel. Co.*, 112 Mass. 90.

A demurrer which enumerates the counts to which it is addressed is equivalent to a separate demurrer to each of such counts. *Douglass & Varnum v. Village of Morrisville*, 84 Vt. 302, 79 Atl. 391; *State v. Peet*, 80 Vt. 449, 68 Atl. 661, 14 L. R. A. (N. S.) 677; *Darling v. Clement*, 69 Vt. 292, 37 Atl. 779.

A demurrer containing two paragraphs, the first demurring "to defendant's answer," and the second to "the further answer of defendant," was held to attack the second defense singly. *Dobson v. Owens*, 5 Wyo. 325, 40 Pac. 442.

Examples of Demurrers That Have Been Held To Be Several.—A demurrer which, after setting forth names of all the defendants as demurring parties, proceeded, "each separately and severally demurs . . . and for cause of demurrer says," etc. *Whitesell v. Strickler*, 167 Ind. 602, 78 N. E. 845.

A demurrer reading, "The defendants in the above entitled cause demur separately and severally," etc. *Town of Windfall City v. State*, 174 Ind. 311, 92 N. E. 57.

In *Blackmore v. Winders*, 144 N. C. 212, 56 S. E. 874, a demurrer in which all the defendants joined was treated as several as to a cause of action against one of them alone, where the chief ground of demurrer was directed

fairly conveys to a dispassionate reader by a fairly exact use of English speech,⁷³ and its substance rather than its form is controlling.⁷⁴ The assignment of a special cause as ground for demurrer does not necessarily narrow its scope.⁷⁵ It has been held that a demurrer which is ambiguous in this regard is properly overruled.⁷⁶

B. DEMURRER TO PLEADING GOOD IN PART. — 1. In Equity. — A demurrer to a bill in equity as a whole will be overruled where the bill is good in part,⁷⁷ or has equity independent of the point or defect set up in the demurrer,⁷⁸ or shows any ground for equitable relief,⁷⁹ though the complainant is not entitled to all of the relief

to such cause of action alone, though the demurrer contained objections to other parts of the complaint, and the demurrer was sustained as to such cause of action and overruled as to the others.

Examples of Demurrers That Have Been Held To Be Joint. — A demurrer by several defendants reading, "Demurs jointly, as well as separately and severally," etc. *Armstrong v. Dunn*, 143 Ind. 433, 41 N. E. 540.

73. *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. ed. 518.

74. The caption is not controlling. *Central of Georgia R. Co. v. Ashley*, 159 Ala. 145, 48 So. 981.

A so-called demurrer to a part of a bill, which is, in fact, an assignment of causes of demurrer to the whole bill, will be so treated. *Old Dominion Copper Co. v. Bigelow*, 188 Mass. 315, 74 N. E. 653.

75. *Oliver Refining Co. v. Portsmouth Cotton Oil Ref. Corp.*, 109 Va. 513, 64 S. E. 56; *Wright v. Michie*, 6 Gratt. (Va.) 354.

76. *Merrill v. Pepperdine*, 9 Ind. App. 416, 36 N. E. 921.

77. **U. S.** — *Edwards v. Bay State Gas Co.*, 91 Fed. 946. **Md.** — *Miller v. Baltimore County Marble Co.*, 52 Md. 642. **Mass.** — *Robinson v. Guild*, 12 Metc. 323. **Mich.** — *C. H. Little Co. v. Woodward Ave. Cemetery Assn.*, 135 Mich. 248, 97 N. W. 682; *Flynn v. Third Nat. Bank*, 122 Mich. 642, 81 N. W. 572. **N. H.** — *Craft v. Thompson*, 51 N. H. 536; *Currier v. Concord R. Corp.*, 48 N. H. 321. **N. J.** — *Holmes v. Holmes*, 59 N. J. Eq. 449, 45 Atl. 703. **Tenn.** — *Madison v. Ducktown S. C. & I. Co.*, 113 Tenn. 331, 83 S. W. 658. **W. Va.** — *Dudley v. Niswander & Co.*, 65 W. Va. 461, 64 S. E. 745.

Though it points out objections to the insufficient parts. *Leahart v. Deed-meyer*, 158 Ala. 295, 48 So. 371.

"If the bill is good in part and bad in part, the defendant should answer that which is good and demur to that which is bad." *Weston v. Blake*, 61 Me. 452.

If there be sufficient in the whole bill to require defendant to answer although some parts of it may be defective. *Murphy v. Penniman*, 105 Md. 452, 66 Atl. 282.

Where the equity of the bill rests on three grounds, and there may be doubt as to the sufficiency of the averments as to one of the grounds, but not as to all of them. *Jones v. Barker*, 163 Ala. 632, 50 So. 890.

A demurrer for want of proper parties will be overruled, where several distinct contracts are set out in the bill, with respect to some of which there is an apparent want of proper parties and with respect to others no such defect is apparent. *Weston v. Blake*, 61 Me. 452.

A demurrer on the ground of argumentativeness will be overruled where the allegations in the main are sufficient, though some of them are argumentative. *Bliss v. Parks*, 175 Mass. 539, 56 N. E. 566.

78. *Norton v. Randolph* (Ala.), 58 So. 283; *Southern States Fire & Casualty Co. v. Whatley* (Ala.), 55 So. 620.

79. **U. S.** — *Stewart v. Masterson*, 131 U. S. 151, 9 Sup. Ct. 682, 33 L. ed. 114; *St. Louis & S. F. R. Co. v. Allen*, 181 Fed. 710; *Pacific Live Stock Co. v. Hanley*, 98 Fed. 327. **Ala.** — *City of Birmingham v. Coffman*, 55 So. 500; *Nelson v. Wadsworth*, 55 So. 120; *McMahon v. McMahon*, 170 Ala. 338, 54 So. 165. **Fla.** — *La Fayette Land Co. v.*

which he demands.⁸⁰ So, too, on demurrer to a bill as a whole, grounds not going to the whole bill cannot be considered.⁸¹ It is not necessary that all the causes of demurrer specified should hold good, however, but if any of them are valid the demurrer will be sustained.⁸²

Caswell & Knight, 59 Fla. 544, 52 So. 140; City of Miami v. Shutts, 59 Fla. 462, 51 So. 929; Holt v. Hillman-Sutherland Co., 56 Fla. 801, 47 So. 934; El Modelo Cigar Mfg. Co. v. Gato, 25 Fla. 886, 7 So. 23, 6 L. R. A. 823. Ga.—Reese v. Reese, 89 Ga. 645, 15 S. E. 846; Lowe v. Burke, 79 Ga. 164, 3 S. E. 449; Hazelhurst v. Savannah, G. & N. A. R. Co., 43 Ga. 13. Ill. Cox v. Johnson, 242 Ill. 159, 89 N. E. 697; Brown v. Hogle, 30 Ill. 119. Me.—Trask v. Chase, 107 Me. 137, 77 Atl. 698; Cunningham v. Gushee, 73 Me. 417; Laughton v. Harden, 68 Me. 208. Miss.—Grego v. Grego, 78 Miss. 443, 28 So. 817; Board of Supervisors v. Stritzke, 69 Miss. 460, 13 So. 35. N. J.—Cole v. Cole, 69 N. J. Eq. 3, 59 Atl. 895; Junior Order Bldg. & Loan Assn. v. Sharpe, 63 N. J. Eq. 500, 52 Atl. 832.

If there is any part of it which defendant ought to answer. Maeder v. Buffalo Bill's Wild West Co., 132 Fed. 280. Any part that entitles complainant to relief or discovery. Livingston v. Story, 9 Pet. (U. S.) 632, 9 L. ed. 255; Conant v. Warren, 6 Gray (Mass.) 562.

A demurrer to the entire bill on the ground that complainant has an adequate remedy at law, where only a part of the relief sought can be granted in a court of law. Robinson v. Griffin (Ala.), 56 So. 124.

"A demurrer for want of equity cannot be sustained, unless the court is satisfied that no discovery or proof, properly called for by or founded upon the allegations in the bill, can make the subject matter of the suit a proper case for equitable cognizance." Cohen v. Segal, 253 Ill. 34, 97 N. E. 222.

"The safe rule on a general demurrer to a bill in equity is that the demurrer must be overruled unless it appears that on no possible state of the evidence could a decree be made." Failey v. Talbee, 55 Fed. 892.

A general demurrer to a bill of review will be overruled if the bill shows any substantial error in the rec-

ord. Buffington v. Harvey, 95 U. S. 99, 24 L. ed. 381.

To Cross-Bill.—A demurrer containing several grounds addressed to a cross-bill, where one or more of the grounds for equitable relief are sufficient to withstand the demurrer. Spencer v. Spencer, 61 Fla. 777, 55 So. 71.

80. Me.—Cunningham v. Gushee, 73 Me. 417. Md.—Hogan v. McMahon, 115 Md. 195, 80 Atl. 695; Dennison v. Yost, 61 Md. 139. Mich.—Walsh v. King, 74 Mich. 350, 41 N. W. 1080; Eddy v. Township of Lee, 73 Mich. 123, 40 N. W. 792. Miss.—Grego v. Grego, 78 Miss. 443, 28 So. 817. N. J. Junior Order Bldg. & Loan Assn. v. Sharpe, 63 N. J. Eq. 590, 52 Atl. 832.

Any part of the relief sought. Roberts v. Cypress Lake Naval Stores Co., 58 Fla. 514, 50 So. 678.

Either branch of an alternative prayer. Florida Southern R. Co. v. Hill, 40 Fla. 1, 23 So. 566.

If foundation is laid in the bill for some of the discovery and relief. Buerk v. Imhaeuser, 8 Fed. 457.

Relief though not discovery. Parker v. Simpson, 180 Mass. 334, 62 N. E. 401.

Though the specific prayer for damages is improper (South Florida Citrus Land Co. v. Walden, 59 Fla. 606, 51 So. 554), as where it shows a right to reformation of contract (Whitley v. Willingham & Bell [Ala.], 57 So. 816).

The question of the relief to be awarded, if any, upon a final determination of the suit, is to be determined by the final decree, and is not properly raised by demurrer. Hays v. Bowdoin, 159 Ala. 600, 49 So. 122.

81. Fla.—Bratton v. Bratton, 56 So. 411; City of Orlando v. Equitable Bldg. & Loan Assn., 45 Fla. 507, 33 So. 986. Miss.—Jones v. Jones, 55 So. 361; Washington v. Soria, 73 Miss. 665, 19 So. 485. Tenn.—Russell v. State Nat. Bank, 104 Tenn. 614, 58 S. W. 245.

82. McCarter v. United N. J. R. & C. Co., 76 N. J. Eq. 323, 74 Atl. 315, reversing, 75 N. J. Eq. 158, 71 Atl. 291.

A demurrer to a part of a bill will be overruled if it is not good as to the whole of such part.⁸³

A demurrer for want of parties going to the whole bill will be overruled if the plaintiff is entitled to any relief against those made defendants, though, because of the nonjoinder of other parties, the court cannot adjudicate a part of the controversy.⁸⁴

2. At Law and Under the Codes.—A demurrer to a declaration or complaint as a whole,⁸⁵ or to the whole of a count,⁸⁶ or separate cause of action⁸⁷ therein, will be overruled if any part of it is not subject to the demurrer on the grounds assigned, as where a complaint demurred to as a whole contains one good count or paragraph,⁸⁸ or

83. *Burns v. Hobbs*, 29 Me. 273.

84. *Watkins v. Childs*, 80 Vt. 99, 66 Atl. 805.

85. *Leonard v. Woolford*, 91 Md. 626, 46 Atl. 1025.

A demurrer on the ground that the petition "in either or all of the paragraphs therein" does not state a cause of action, if in any part of the petition facts are stated showing a cause of action. *Weed v. United States*, 65 Fed. 399.

To the whole of a complaint in intervention, where some of the counterclaims set up therein are sufficient. *A. E. Johnson Co. v. White*, 78 Minn. 48, 80 N. W. 838.

If a separable portion thereof is good, though other parts are bad. *Gray & Best v. Garrison*, 2 Ky. L. Rep. 218; *Karnuff v. Kelch*, 69 N. J. L. 499, 55 Atl. 163; *Peter v. Middlesex & S. Traction Co.*, 69 N. J. L. 456, 55 Atl. 35; *Hendrickson v. Pennsylvania R. Co.*, 43 N. J. L. 464.

If one of two grounds of recovery alleged in the alternative is sufficiently pleaded. *Texas & G. R. Co. v. Pate* (Tex. Civ. App.), 113 S. W. 994.

Where it is good as to one of several distinct items. *Weatherford, M. W. & N. W. R. Co. v. Granger*, 85 Tex. 574, 22 S. W. 959.

If It States a Cause of Action in Favor of Any of the Plaintiffs.—*Peabody v. Washington County Mut. Ins. Co.*, 20 Barb. (N. Y.) 339.

Grounds going to a part only of the declaration cannot be sustained when the demurrer is to the whole pleading. *Cummings v. Daughety*, 73 Miss. 405, 18 So. 657.

86. *Oliver Refining Co. v. Portsmouth Cotton Oil Ref. Corp.*, 109 Va. 513, 64 S. E. 56; *Wright v. Michie*, 6

Gratt. (Va.) 354; *Henderson v. Stringer*, 6 *Gratt. (Va.)* 130.

Where it sufficiently alleges one ground of recovery. *Hot Springs Lumb. & Mfg. Co. v. Revercomb*, 110 Va. 240, 65 S. E. 557.

If the count contains several breaches and any one of them is well assigned. *Hayes v. Anderson*, 57 Ala. 374; *Oliver Refining Co. v. Portsmouth Cotton Oil Ref. Corp.*, 109 Va. 513, 64 S. E. 56; *Wright v. Michie*, 6 *Gratt. (Va.)* 354; *Henderson v. Stringer*, 6 *Gratt. (Va.)* 130.

A special demurrer on the ground of irrelevancy directed to a paragraph as a whole will be overruled where it contains both relevant and irrelevant allegations. *Southern Ry. Co. v. Phillips*, 136 Ga. 282, 71 S. E. 414.

87. *Jenkins v. Commercial Nat. Bank*, 19 Idaho 290, 113 Pac. 463.

88. **Ala.**—*Philip Carey Mfg. Co. v. Southern Const. Co.*, 56 So. 746; *Weems v. Weems*, 69 Ala. 104. **Ark.**—*Warner v. Capps*, 37 Ark. 32. **Cal.**—*Jensen v. Dorr*, 159 Cal. 742, 116 Pac. 553; *Asevado v. Orr*, 100 Cal. 293, 34 Pac. 777; *Krieger v. Feeny*, 14 Cal. App. 538, 112 Pac. 901. **Fla.**—*Williams v. Phiel*, 60 Fla. 272, 53 So. 638; *Price v. Drew*, 18 Fla. 670; *McKay v. Friebele*, 8 Fla. 21. **Ga.**—*Train v. Emerson*, 74 S. E. 241. **Ill.**—*Knapp, Stout & Co. v. Ross*, 181 Ill. 392, 55 N. E. 127; *Reece v. Smith*, 94 Ill. 362; *Brockmeyer v. Sanitary Dist.*, 118 Ill. App. 49; *Wolf v. City of Alton*, 103 Ill. App. 587. **Ind.**—*Dorsett v. City of Greencastle*, 141 Ind. 38, 40 N. E. 131; *Brake v. Payne*, 137 Ind. 479, 37 N. E. 140; *Redelsheimer v. Miller*, 107 Ind. 485, 8 N. E. 447; *Rout v. Woods*, 67 Ind. 319; *Green v. Eden*, 25 Ind. App. 583, 56 N. E. 240. **Ia.**—*Singer v. Cavers*, 26 Iowa 178. **Ky.**

cause of action,⁸⁰ or one good assignment of a breach of the agreement declared upon.⁹⁰

A demurrer to the whole of a plea,⁹¹ or to the whole of an an-

Overton's Exr. v. Overton's Admr's., 6 J. J. Marsh. 459; *Albin Co. v. Kuttner*, 25 Ky. L. Rep. 1100, 77 S. W. 181. **Me.**—*Anderson v. Eastern Coupling Co.*, 81 Atl. 167; *Thompson v. Lewis*, 83 Me. 223, 22 Atl. 104; *Dexter Sav. Bank v. Copeland*, 72 Me. 220; *National Exchange Bank v. Abell*, 63 Me. 346; *Inhabitants of Concord v. Delaney*, 56 Me. 201; *Patterson v. Wilkinson*, 55 Me. 42; *Blanchard v. Hoxie*, 34 Me. 376. **Md.**—*Mayor, etc., of Havre De Grace v. Fletcher*, 112 Md. 562, 77 Atl. 114; *Junkins v. Sullivan*, 110 Md. 539, 73 Atl. 264; *Gunther v. Dranbauer*, 86 Md. 1, 38 Atl. 33; *Lee v. Strickland*, 62 Md. 158; *Willing v. Bozman*, 52 Md. 44; *Spencer v. Trafford*, 42 Md. 1; *Scott v. Leary*, 34 Md. 389. **Mich.**—*Weston v. County of Luce*, 102 Mich. 528, 61 N. W. 15. **Minn.**—*Gammons v. Johnson*, 69 Minn. 483, 72 N. W. 563. **Miss.**—*Lynn v. Illinois Cent. R. Co.*, 63 Miss. 157. **Mo.**—*Phelps County v. Bishop*, 68 Mo. 250; *Missouri Pac. R. Co. v. McLiney*, 32 Mo. App. 166. **Neb.**—*Alexander v. Thacker*, 30 Neb. 614, 46 N. W. 825. **N. J.**—*Munnings v. Hopkins*, 43 Atl. 670; *Harrison v. Vreeland*, 38 N. J. L. 366. **Okla.**—*Weber v. Dillon*, 7 Okla. 568, 54 Pac. 894. **Vt.**—*Williams Mfg. Co. v. Insurance Co. of N. A.*, 81 Atl. 916; *Mixer v. Herrick*, 78 Vt. 349, 62 Atl. 1019; *Black v. Howard*, 50 Vt. 27. **Va.**—*Saunders v. Baldwin*, 71 S. E. 620; *Henderson v. Stringer*, 6 Gratt. 130.

Where there are common counts in the declaration, even though a special count therein is defective. *Gulf Lumb. Co. v. Walsh*, 49 Fla. 175, 38 So. 831.

89. **U. S.**—*Gaillard v. Cantini*, 76 Fed. 699, 22 C. C. A. 493, **Colo.**—*Sykes v. Kruze*, 49 Colo. 560, 113 Pac. 1013. **Idaho.**—*Jenkins v. Commercial Nat. Bank*, 19 Idaho 290, 113 Pac. 463; *Bonham Nat. Bank v. Grimes Pass Placer Min. Co.*, 18 Idaho 629, 111 Pac. 1078; *Carter v. Wann*, 6 Idaho 556, 57 Pac. 314. **Mont.**—*Collier v. Ervin*, 2 Mont. 335. **N. Y.**—*Wheeler v. Connecticut Mut. Life Ins. Co.*, 82 N. Y. 543, 37 Am. Rep. 594; *Rebadow v. Buffalo Sav. Bank*, 63 Misc. 407, 117 N. Y. Supp. 282. **Okla.**—*Owen v. City*

of Tulsa, 27 Okla. 264, 111 Pac. 320; *Emmerson v. Botkin*, 26 Okla. 218, 109 Pac. 531, 29 L. R. A. (N. S.) 786; *Goldsborough v. Hewitt*, 23 Okla. 66, 99 Pac. 907; *Cockrell v. Schmitt*, 20 Okla. 207, 94 Pac. 521; *Hanenkratt v. Hamil*, 10 Okla. 219, 61 Pac. 1050. **Ore.**—*Waggy v. Scott*, 29 Ore. 386, 45 Pac. 774; *Barbre v. Goodale*, 28 Ore. 465, 38 Pac. 67, 43 Pac. 378. **Tenn.**—*Hester v. Hester*, 88 Tenn. 270, 12 S. W. 446. **Tex.**—*Dorrance & Co. v. International & G. N. R. Co.* (Tex. Civ. App.), 126 S. W. 694. **Wash.**—*Otey v. Bradley*, 63 Wash. 500, 115 Pac. 1045; *Peterson v. Pantheon Lumb. Co.*, 62 Wash. 189, 113 Pac. 562; *Hindle v. Holcombe*, 34 Wash. 336, 75 Pac. 873; *Meals v. De Soto Placer Min. Co.*, 33 Wash. 302, 74 Pac. 470. **Wyo.**—*Summers v. Mutual Life Ins. Co.*, 12 Wyo. 369, 75 Pac. 937, 66 L. R. A. 812; *Kearney Stone Works v. McPherson*, 5 Wyo. 178, 38 Pac. 920; *Ivanson v. Althrop*, 1 Wyo. 71.

If one of several causes of action embodied therein is good as to one or more of those joining in the demurrer. *Conant v. Barnard*, 103 N. C. 315, 9 S. E. 575.

If the matter in a single count is divisible, the demurrer should be confined to those parts which are defective and a general demurrer to an entire complaint setting up two causes of action in a single count will be overruled if one of them is sufficiently pleaded. *Donahue v. Stockton Gas & E. Co.*, 6 Cal. App. 276, 92 Pac. 196.

90. **Ala.**—*Hays v. Anderson*, 57 Ala. 374. **Me.**—*Anderson v. Eastern Coupling Co.*, 81 Atl. 167; *Blanchard v. Hoxie*, 34 Me. 376. **N. J.**—*Mayor, etc., of Carlstadt v. City Trust & Surety Co.*, 69 N. J. L. 44, 54 Atl. 815. **Eng.**—*Slade v. Hawley*, 13 M. & W. 757.

91. *Baer v. Christian*, '83 Ga. 322, 9 S. E. 790; *United Society of Shakers v. Underwood*, 11 Bush (Ky.) 265.

As where the plea is double and one defense set up is good and the other bad, duplicity being permitted under the statute. *Western Union Telegraph Co. v. Saunders*, 164 Ala. 234, 51 So. 176.

As against a general demurrer, a plea

swer,⁹² will be overruled if the pleading contains one good defense, as where an answer contains a good denial of the material allegations of the complaint.⁹³ So too a demurrer to a defense,⁹⁴ or counterclaim,⁹⁵

containing a good defense is not vitiated by setting up other matters and praying for relief which cannot be granted. *King v. Johnson*, 94 Ga. 665, 21 S. E. 895.

"Under the system of special pleading, if a plea contained distinct matters, divisible in their nature, the plaintiff, instead of a general demurrer to the whole plea, should confine his demurrer to the matters illy pleaded, and traverse the residue of the plea." *Montague v. Boston & Fairhaven Iron Works*, 97 Mass. 502.

A demurrer questioning only a part of a plea should be addressed to that part, and not to the plea as a whole. *Fike v. Stratton* (Ala.), 56 So. 929.

A plea addressed "to each and every count of the complaint" is equivalent to a separate plea to each count, and, hence, it is error to sustain a demurrer thereto if the plea is good as to any of the counts. *Barbour v. Shebor* (Ala.), 58 So. 276.

92. **U. S.**—County of Dallas *v. MacKenzie*, 94 U. S. 660, 24 L. ed. 182. **Ark.**—Bruce *v. Benedict*, 31 Ark. 301. **Colo.**—Downing *v. Haas*, 33 Colo. 344, 81 Pac. 33. **Conn.**—Board of Water Comrs. *v. Robbins*, 82 Conn. 623, 74 Atl. 938. **Kan.**—Flint *v. Dunlany*, 37 Kan. 332, 15 Pac. 208; Munn *v. Taulman*, 1 Kan. 254. **Ky.**—Sanford *v. Lowenthal*, 5 Ky. L. Rep. 206. **Minn.**—First Nat. Bank *v. How*, 28 Minn. 150, 9 N. W. 626. **Mo.**—State *v. Rogers*, 79 Mo. 283. **Ohio.**—Mansfield, C. & L. M. R. Co. *v. Hall*, 26 Ohio St. 310; Shroyer *v. Richmond*, 16 Ohio St. 455; Shamokin Bank *v. Zadok Street*, 16 Ohio St. 1. **Okla.**—Harrill *v. Weer*, 26 Okla. 313, 109 Pac. 539; Hurst *v. Sawyer*, 2 Okla. 470, 37 Pac. 817. **Ore.**—Toby *v. Ferguson*, 3 Ore. 27. **Tex.**—Astin *v. Mosteller* (Tex. Civ. App.), 144 S. W. 701. **Utah.**—Groesbeck *v. Bell*, 1 Utah 338.

If any matter pleaded tenders any defense, in whole or in part, to the action. Justice *v. Town of Lancaster*, 20 Mo. App. 559.

If it contains a defense to the action, though one or more paragraphs thereof are vulnerable to a demurrer.

Holbert v. St. Louis, K. C. & N. R. Co., 38 Iowa 315.

In the absence of a motion to require defendant to state separately his several defenses and counterclaims, a demurrer to the entire answer is properly overruled where certain of the allegations constitute a valid defense though they do not constitute a counterclaim. *Redwater Canal & Land Co. v. Reed* (N. D.), 128 N. W. 702.

To an answer in a libel suit, where the allegations as to mitigating circumstances tending to reduce or prevent the recovery of exemplary damages are sufficient, though those pleading justification are not. *Williams v. Black*, 24 S. D. 501, 124 N. W. 728.

The rules does not apply where the second of two paragraphs states facts which show that the allegations of the first cannot, as matter of law, be true, and are but the conclusions of the pleader. *Adams v. Johnson's Exr.*, 11 Ky. L. Rep. 137.

93. **Conn.**—British American Ins. Co. *v. Wilson*, 77 Conn. 559, 60 Atl. 293. **Tex.**—Astin *v. Mosteller* (Tex. Civ. App.), 144 S. W. 701. **Utah.**—Haslam *v. Haslam*, 19 Utah 1, 59 Pac. 243.

Regardless of the sufficiency of special defenses also set up therein. *Sherman v. Goodwin*, 11 Ariz. 141, 89 Pac. 517; *Redwater Canal & Land Co. v. Reed*, 26 S. D. 466, 128 N. W. 702; *Hill v. Walsh*, 6 S. D. 421, 61 N. W. 440.

94. *Strauss v. St. Louis County Bank*, 111 N. Y. Supp. 130; *Ingersoll v. Davis*, 14 Wyo. 120, 82 Pac. 867.

So long as denials of material allegations of the complaint are suffered to remain in a defense, a demurrer will not lie thereto, even though other matter pleaded does not by itself constitute a defense. *Barber v. Davidson*, 115 N. Y. Supp. 819.

A demurrer to matter pleaded as a defense and counterclaim, where it is good as a defense though not as a counterclaim. *Gitler v. Russian Co.*, 55 Misc. 553, 106 N. Y. Supp. 886.

95. Where it reaches only one of two causes of action embodied therein. *Board of Water Comrs. v. Robbins & Potter*, 82 Conn. 623, 74 Atl. 938.

or to a reply,⁹⁶ will be overruled where such pleading is good in part.

So, too, a demurrer addressed to several pleas,⁹⁷ or to several paragraphs of an answer,⁹⁸ will be overruled if one of them is sufficient. It has been held that a demurrer to several replications for duplicity should be sustained though some of them are sufficient in themselves.⁹⁹

It is generally held that a demurrer to a complaint for want of facts will be overruled if the pleading warrants the granting of any relief,¹

Where one of the items of damage claimed therein is a proper subject of counterclaim though the other is not. *Wild Rice Lumb. Co. v. Benson*, 114 Minn. 92, 131 N. W. 1.

"The plea of set-off resembles so much a declaration, that two or more parts of it are considered as so many counts in a declaration, and are to be replied to accordingly; and, hence, if one part is good and another bad, the demurrer should be confined to the part defective; otherwise it will fail." *Mercein v. Smith*, 2 Hill (N. Y.) 210.

96. *Ordway v. Cowles*, 45 Kan. 447, 25 Pac. 862.

97. **U. S.**—*United States v. Girault*, 11 How. 22, 13 L. ed. 587; *Whitenack v. Philadelphia & R. R. Co.*, 57 Fed. 901. **Ala.**—*Alabama Nat. Bank v. Halsey*, 109 Ala. 196, 19 So. 522. **N. J.**—*Carpenter v. Spring Garden Ins. Co.*, 58 Atl. 114; *Hudson v. Inhabitants of Winslow*, 35 N. J. L. 437.

98. **Ark.**—*Cairo & F. R. Co. v. Parks*, 32 Ark. 131. **Ind.**—*City of Connersville v. Connersville Hydraulic Co.*, 86 Ind. 235; *Hollingsworth v. McColly*, 26 Ind. App. 609, 60 N. E. 371; *Kenney v. Wells*, 23 Ind. App. 490, 55 N. E. 774; *Storrs & Harrison Co. v. Fusselman*, 23 Ind. App. 293, 55 N. E. 245; *City of Tell City v. Bielefeld*, 20 Ind. App. 1, 49 N. E. 1090. **Ky.** *Archer v. National Ins. Co.*, 2 Bush 226.

99. In such case the court can select no one of them, but they must all fall together. *Pickering v. Pickering*, 19 N. H. 389.

1. **Ind.**—*City of Indianapolis v. American Const. Co.*, 96 N. E. 608; *Indianapolis Northern Traction Co. v. Brennan*, 174 Ind. 1, 90 N. E. 65, 87 N. E. 215, 30 L. R. A. (N. S.) 85; *Connersville Wagon Co. v. McFarlan Carriage Co.*, 166 Ind. 123, 76 N. E. 294, 3 L. R. A. (N. S.) 709; *Dyer v. Woods*, 166 Ind. 44, 76 N. E. 624;

Armstrong v. Dunn, 143 Ind. 433, 41 N. E. 540; *Halsted v. Stahl* (Ind. App.), 94 N. E. 1056; *Sebienske v. Downey* (Ind. App.), 93 N. E. 1050; *Strauss v. Yeager* (Ind. App.), 93 N. E. 877; *Gilman v. Fultz*, 37 Ind. App. 609, 77 N. E. 746; *Levi v. Hare*, 8 Ind. App. 571, 36 N. E. 369. **Ia.**—*Frazer v. Andrews*, 134 Iowa 621, 112 N. W. 92, 12 L. R. A. (N. S.) 593; *Peters v. Phillips*, 63 Iowa 550, 19 N. W. 662. **Neb.**—*Morgan v. Finley*, 112 Minn. 453, 128 N. W. 828; *Anderson v. W. J. Dyer & Bro.*, 94 Minn. 30, 101 N. W. 1061. **Miss.**—*Cummings v. Daugherty*, 73 Miss. 405, 18 So. 657; *Board of Education v. Mobile & O. R. Co.*, 71 Miss. 500, 14 So. 445. **Mo.**—*Carthage Nat. Bank v. Poole*, 160 Mo. App. 133, 141 S. W. 729. **Mont.**—*Baker v. Butte Water Co.*, 40 Mont. 583, 107 Pac. 819; *Raymond v. Blanegrass*, 36 Mont. 449, 93 Pac. 648, 15 L. R. A. (N. S.) 976; *Donovan v. McDevitt*, 36 Mont. 61, 92 Pac. 49. **Neb.**—*Anderson v. Anderson*, 69 Neb. 565, 96 N. W. 276. **N. Y.** *Pearce v. Knapp*, 127 N. Y. Supp. 1100. **Okl.**—*Whiteacre v. Nichols*, 17 Okla. 387, 87 Pac. 865. **S. D.**—*Aeme Harvesting Mach. Co. v. Guy*, 131 N. W. 508. **Tex.**—*Western Union Tel. Co. v. Harris* (Tex. Civ. App.), 132 S. W. 876. **Wash.**—*Neitzel v. Spokane International R. Co.*, 117 Pac. 864; *Hays v. Peavey*, 43 Wash. 163, 86 Pac. 170. **Wis.**—*Hall v. Bell*, 143 Wis. 296, 127 N. W. 967.

In Wisconsin, the statute provides that if, on a liberal construction of the pleading, plaintiff is entitled to any measure of judicial redress, whether equitable or legal, and whether in harmony with the prayer or not, the complaint shall be sufficient for such redress. *Laws*, 1911, ch. 354, p. 385 (St., §2649a).

The rule applies to each count of the complaint. *Solem v. Connecticut Fire Ins. Co.*, 41 Mont. 351, 109 Pac. 432.

though different from,² or less than,³ that claimed. Such a demurrer goes to the right of recovery and not to the measure of damages,⁴ and

2. U. S.—*Erie City Iron Works v. Thomas*, 139 Fed. 995. **Kan.**—*Updegraff v. Lucas*, 76 Kan. 456, 93 Pac. 630, 94 Pac. 121. **Minn.**—*Freeman v. Paulson*, 107 Minn. 64, 119 N. W. 651; *Lovering v. Webb Pub. Co.*, 106 Minn. 62, 118 N. W. 61; *Leuthold v. Young*, 32 Minn. 122, 19 N. W. 652; *Smith v. Jordan*, 13 Minn. 264. **N. Y.**—*Coatsworth v. Lehigh Valley R. Co.*, 24 App. Div. 273, 48 N. Y. Supp. 511. **Wis.**—*Laws*, 1911, ch. 354, p. 385 (St., §2649a); *Hall v. Bell*, 143 Wis. 296, 127 N. W. 967.

A demurrer on the ground that "the facts stated in the petition do not entitle the plaintiff to the relief demanded" will be overruled where the petition contains a prayer for general relief, and plaintiff is entitled to legal relief though that specifically prayed is equitable. *Thomas v. Farley Mfg. Co.*, 16 Iowa 735, 39 N. W. 874.

But if plaintiff demands equitable relief solely, his cause of action must be tested as one in equity. *Kosovitz v. New York, etc., Benevolent Soc.*, 130 N. Y. Supp. 72.

A complaint "framed as in an equitable action purely," with no demand for legal relief, is demurrable where the "right of action disclosed by the facts pleaded does not justify equitable intervention." *Cozzens v. American General Engr. Co.*, 55 Misc. 393, 106 N. Y. Supp. 548.

3. U. S.—*Abraham v. Levy*, 72 Fed. 124, 18 C. C. A. 469. **Ala.**—*Pryor v. Beck*, 21 Ala. 393. **Ind.**—*Indianapolis Traction Co. v. Brennan*, 174 Ind. 1, 90 N. E. 65, 87 N. E. 215, 30 L. R. A. (N. S.) 85; *Dyer v. Woods*, 166 Ind. 44, 76 N. E. 624; *Sebienske v. Downey* (Ind. App.), 93 N. E. 1050; *Levi v. Hare*, 8 Ind. App. 571, 36 N. E. 369. **Ia.**—*Peters v. Phillips*, 63 Iowa 550, 19 N. W. 662. **Kan.**—*Updegraff v. Lucas*, 76 Kan. 456, 93 Pac. 630, 94 Pac. 121; *Hiatt v. Parker*, 29 Kan. 765. **Minn.**—*Mogren v. Finley*, 112 Minn. 453, 128 N. W. 828; *Disbrow v. Creamery Package Mfg. Co.*, 104 Minn. 17, 115 N. W. 751; *Minneapolis R. L. & M. R. Co. v. Brown*, 99 Minn. 384, 109 N. W. 817. **Mo.**—*Carthage Nat. Bank v. Poole*, 160 Mo. App. 133, 141 S. W. 729. **N. Y.**—*Townsend v. Bogert*,

126 N. Y. 370, 27 N. E. 555, 22 Am. St. Rep. 835; *Coatsworth v. Lehigh Valley R. Co.*, 24 App. Div. 273, 48 N. Y. Supp. 511; *Pierce v. Knapp*, 127 N. Y. Supp. 1100. **S. D.**—*Acme Harvesting Mach. Co. v. Guy*, 131 N. W. 508; *Hudson v. Archer*, 4 S. D. 128, 55 N. W. 1099. **Tex.**—*Western Union Tel. Co. v. Harris* (Tex. Civ. App.), 132 S. W. 876. **Wash.**—*Neitzel v. Spokane International R. Co.*, 117 Pac. 864; *Howard v. Seattle Nat. Bank*, 10 Wash. 280, 38 Pac. 1040. **Wis.**—*Marien v. Evangelical Creed Congregation*, 132 Wis. 650, 113 N. W. 66.

A complaint seeking an injunction is good on demurrer for want of facts if it states facts sufficient to constitute a cause of action, regardless of whether a court of equity, in the exercise of a sound discretion, would be warranted in granting the relief demanded. *Kenaston v. Lorig*, 81 Minn. 454, 84 N. W. 323; *Pape v. Pratt Institute*, 127 App. Div. 147, 111 N. Y. Supp. 354.

"If the facts stated in a complaint are sufficient to constitute a cause of action, whether legal or equitable, the complaint is not demurrable on the ground that it does not state sufficient facts, because the judgment demanded is inconsistent with the cause of action stated, nor because both legal and equitable relief are demanded when plaintiff is entitled to but one." *Mitchell v. Thorne*, 134 N. Y. 536, 32 N. E. 10.

4. U. S.—*Kenny v. Knight*, 119 Fed. 475. **Ala.**—*City of Jasper v. Barton*, 56 So. 42. **Fla.**—*Fidelity & Dep. Co. v. Aultman*, 58 Fla. 228, 50 So. 991; *Borden & Co. v. International Ocean Tel. Co.*, 32 Fla. 400, 13 So. 878; *Borden & Co. v. Western Union Tel. Co.*, 32 Fla. 394, 13 So. 876. **Ill.**—*Beidler v. Sanitary Dist.*, 211 Ill. 628, 71 N. E. 1118, 67 L. R. A. 820. **Minn.**—*Partridge v. Blanchard*, 23 Minn. 69. **N. C.**—*Olive v. Atlantic Coast Line R. Co.*, 152 N. C. 279, 67 S. E. 583. **S. D.**—*Hudson v. Archer*, 4 S. D. 128, 55 N. W. 1099. **Wyo.**—*Summers v. Mutual Life Ins. Co.*, 12 Wyo. 369, 75 Pac. 937, 66 L. R. A. 812.

The proper remedy in case improper elements of damages are alleged is by motion to strike or to amend, or by ob-

will be overruled if, on the facts stated, plaintiff is entitled to even nominal damages.⁵

If The Pleading Is Good on Any Theory.—In many states it is held that a demurrer for want of facts will be overruled if the pleading is good on any theory,⁶ or states any cause of action whatever,⁷ even though it is not the one which the pleader intended.⁸

To a Defense.—Ordinarily a demurrer to a defense for want of facts will be overruled if the facts alleged constitute even a partial defense to the cause of action.⁹ In some jurisdictions, however, matter pleaded as a complete defense is demurrable if it is in fact only a partial defense,¹⁰ and *vice versa*.¹¹ It has been held that a demurrer to a defense seeking affirmative relief will be overruled though such relief cannot be granted, where the facts alleged are available as a bar.¹²

3. Exceptions.—An exception of no cause of action in Louisiana will not be sustained if any cause of action is stated in the petition,¹³

jections to testimony, or by charges. *Fidelity & Deposit Co. v. Aultman*, 58 Fla. 228, 50 So. 991; *Hall v. Western Union Tel. Co.*, 59 Fla. 275, 51 So. 817, 27 L. R. A. (N. S.) 639; *Borden & Co. v. International Ocean Tel. Co.*, 32 Fla. 400, 13 So. 878; *Borden & Co. v. Western Union Tel. Co.*, 32 Fla. 394, 13 So. 876.

5. Fla.—*Hall v. Western Union Tel. Co.*, 59 Fla. 275, 51 So. 817, 27 L. R. A. (N. S.) 639; *Fidelity & Deposit Co. v. Aultman*, 58 Fla. 228, 50 So. 991; *Borden & Co. v. International Ocean Tel. Co.*, 32 Fla. 400, 13 So. 878; *Borden & Co. v. Western Union Tel. Co.*, 32 Fla. 394, 13 So. 876. **Minn.** *Allen v. Eneroth*, 111 Minn. 395, 127 N. W. 426; *Wessel v. Wessel Mfg. Co.*, 106 Minn. 66, 118 N. W. 157. **Mont.** *Plymouth Gold Min. Co. v. United States Fidelity & Guar. Co.*, 35 Mont. 23; *Jacobs Sultan Co. v. Union Mercantile Co.*, 17 Mont. 61, 42 Pac. 109. **Neb.**—*Hallstead v. Perrigo*, 87 Neb. 128, 126 N. W. 1078. **N. C.**—*Olive v. Atlantic C. L. R. Co.*, 152 N. C. 279, 67 S. E. 583. **S. D.**—*Hudson v. Archer*, 4 S. D. 128, 55 N. W. 1099.

6. Ind.—*Dickarson Coal Co. v. Unverferth*, 30 Ind. App. 546, 66 N. E. 759. **Mont.**—*Wahle v. Great Northern R. Co.*, 41 Mont. 326, 109 Pac. 713. **Wis.**—*Hall v. Bell*, 143 Wis. 296, 127 N. W. 967.

7. Vukelis v. Virginia Lumber Co., 107 Minn. 68, 119 N. W. 509.

If by a liberal construction it states any cause of action, though it does not

according to plaintiff's construction. *Loehr v. Dickson*, 141 Wis. 332, 124 N. W. 293.

8. Frechette v. Ravn, 145 Wis. 589, 130 N. W. 453; *Loehr v. Dickson*, 141 Wis. 332, 124 N. W. 293; *Bieri v. Fonger*, 139 Wis. 150, 120 N. W. 862.

If it states a cause of action in contract though plaintiff intended to state one in tort. *Loehr v. Dickson*, 141 Wis. 332, 124 N. W. 293.

It is immaterial whether plaintiff intended to state a cause of action in equity or at law, or whether the prayer is appropriate to the cause of action stated, if the pleading states facts warranting the granting of any relief. *St. Croix Consol. Copper Co. v. Musser-Sauntry Land, Logging & Mfg. Co.*, 145 Wis. 267, 130 N. W. 102.

9. Bartholomew v. Guthrie, 71 Kan. 705, 81 Pac. 491.

10. French v. Busch, 189 Fed. 480.

11. Shattuck v. Guardian Trust Co., 109 N. Y. Supp. 862.

12. Though such relief is barred by limitations. *Hubbard v. Slavens*, 218 Mo. 598, 117 S. W. 1104.

13. Gonsoulard v. Rosomano, 176 Fed. 481, 100 C. C. A. 97; *People's State Bank v. St. Landry State Bank*, 50 La. Ann. 528, 24 So. 14.

Though the petition be of doubtful sufficiency, the court will overrule the exception, where there are allegations of fraud and conspiracy, and under certain phases of the evidence a cause of action might appear. *Hillard v. Taylor*, 114 La. 883, 38 So. 594.

or if, under the facts alleged, the plaintiff is entitled to any relief whatever.¹⁴

C. JOINT DEMURRERS BY SEVERAL PARTIES. — A joint demurrer by several parties will generally be overruled if the pleading is good as against any one of them,¹⁵ though there is authority to the contrary.¹⁶ Only those grounds of demurrer which are available to all of those joining in the demurrer will be considered.¹⁷

14. *Davis v. Arkansas Southern R. Co.*, 117 La. 320, 41 So. 587; *Ramos Lumber & Mfg. Co. v. Labarre*, 116 La. 559, 40 So. 898.

That both specific performance and damages are demanded, when plaintiff is not entitled to both, is not ground for such an exception. *E. Sondheimer Co. v. Richland Lumb. Co.*, 121 La. 786, 46 So. 806.

15. *Cal.*—*Hirshfeld v. Weill*, 121 Cal. 13, 53 Pac. 402; *Rogers v. Schulenburg*, 111 Cal. 281, 43 Pac. 899; *Asevad v. Orr*, 100 Cal. 293, 34 Pac. 777. *Ind.*—*Armstrong v. Dunn*, 143 Ind. 433, 41 N. E. 540; *Miller v. Rapp*, 135 Ind. 614, 34 N. E. 981, 35 N. E. 693; *Wilkinson v. Rust*, 57 Ind. 172; *Bennett v. Preston*, 17 Ind. 291. *Minn.*—*Palmer v. Bank of Zumbrota*, 65 Minn. 90, 67 N. W. 893; *Petsch v. Dispatch Printing Co.*, 40 Minn. 291, 41 N. W. 1034; *Clark v. Lovering*, 37 Minn. 120, 33 N. W. 776. *Mont.*—*Rand v. Butte Electric R. Co.*, 40 Mont. 398, 107 Pac. 87. *Neb.*—*Missouri Valley Land Co. v. Bushnell*, 11 Neb. 192, 8 N. W. 389; *Lausman v. Drahos*, 10 Neb. 172, 4 N. W. 956. *N. J.*—*Swinley v. Force*, 78 N. J. Eq. 52, 78 Atl. 249; *Brown v. Tallman (N. J. Eq.)*, 54 Atl. 457. *N. Y.*—*Holmes v. Seaboard Portland Cement Co.*, 63 Misc. 82, 116 N. Y. Supp. 524. *N. C.*—*Caho v. Norfolk & S. R. Co.*, 147 N. C. 20, 60 S. E. 640; *Conant v. Barnard*, 103 N. C. 315, 9 S. E. 575. *N. D.*—*Dalrymple v. Security Loan & Trust Co.*, 9 N. D. 306, 83 N. W. 245. *Okla.*—*Stiles v. City of Guthrie*, 3 Okla. 26, 41 Pac. 383. *S. C.* *Stahn v. Catawba Mills*, 53 S. C. 519, 31 S. E. 498; *Guy v. McDaniel*, 51 S. C. 436, 29 S. E. 196; *Lowry v. Jackson*, 27 S. C. 318, 3 S. E. 473. *Utah*. *Smith v. Clark*, 37 Utah 116, 106 Pac. 653; *Walker v. Popper*, 2 Utah 96. *Wash.*—*Beyer v. Bullock*, 56 Wash. 110, 105 Pac. 155. *Wis.*—*St. Croix Timber Co. v. Joseph*, 142 Wis. 55, 124 N. W. 1049; *Boyd v. Mutual Fire Assn.*, 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171, 21 L. R. A. 918; *Mark Paine Lum-*

ber Co. v. Douglas County Impl. Co., 94 Wis. 322, 68 N. W. 1013; *Willard v. Reas*, 26 Wis. 540.

“A general joint demurrer to a complaint in an action instituted by several parties jointly must be overruled if the facts alleged are sufficient to constitute a cause of action in favor of either of such parties against any party interposing the demurrer.” *Evans v. Fall River County*, 9 S. D. 130, 63 N. W. 195.

“A failure to state a cause of action against some of the defendants in a complaint, while it states a cause of action against others, would not make the complaint bad as to all, nor be ground for sustaining a demurrer thereto for want of sufficient facts by all the defendants. In such a case the defect can only be taken advantage of by a separate demurrer by the defendants, against whom no cause of action is stated in the complaint.” *Armstrong v. Dunn*, 143 Ind. 433, 41 N. E. 540.

16. A demurrer to a bill in which all of several defendants join may be sustained as to some of them and overruled as to the others. *Lancaster v. Roberts*, 144 Ill. 213, 33 N. E. 27.

In chancery a demurrer to the bill may be good as to some of the defendants and bad as to the others. *Dzialynski v. Bank of Jacksonville*, 23 Fla. 346, 2 So. 696.

It is error to sustain a joint demurrer by two defendants where the petition states a good cause of action against one of them and not against the other, but it should be sustained as to the latter and overruled as to the former. *State Bank v. Young's Admr.*, 35 Mo. 371.

May be sustained as to one and overruled as to another. *Wood v. Olney*, 7 Nev. 109.

17. In equity. *Phillips v. Jacobs*, 145 Mich. 108, 108 N. W. 899; *Burk v. Muskegon Mach. & Foundry Co.*, 98 Mich. 614, 57 N. W. 804; *Sweet v. Converse*, 83 Mich. 1, 49 N. W. 899.

A joint and several demurrer may be sustained as to some of the demurrants and overruled as to the others.¹⁸

XIV. FRIVOLOUS AND IRRELEVANT DEMURRERS.—A frivolous demurrer is one that is clearly without foundation and is interposed merely for delay.¹⁹

A demurrer should not be treated as frivolous unless it is manifest from a mere inspection of the pleading, without argument, that there was no reasonable ground for interposing it,²⁰ or where there is such room for debate as to the sufficiency of the pleading demurred to that an attorney of ordinary intelligence might have interposed it in entire good faith.²¹ A demurrer is never frivolous when it raises a question upon which different minds may reach different conclusions.²²

A frivolous demurrer may be stricken on motion,²³ or overruled,²⁴

18. *Town of Windfall City v. State*, 174 Ind. 311, 97 N. E. 57; *Whitesell v. Strickler*, 167 Ind. 602, 78 N. E. 845; *Blackmore v. Winders*, 144 N. C. 212, 56 S. E. 874.

19. One that raises no serious issue of law. *State v. Richmond*, 3 Mo. App. 572; *Morgan v. Harris*, 141 N. C. 358, 54 S. E. 381; *Hurst v. Addington*, 84 N. C. 143.

The refusal to hold a demurrer frivolous and to render judgment thereon is not appealable. *Parker v. North Carolina R. Co.*, 150 N. C. 433, 64 S. E. 186; *Morgan v. Harris*, 141 N. C. 358, 54 S. E. 381; *Abbott v. Hancock*, 123 N. C. 89, 31 S. E. 271.

Examples of Frivolous Demurrers. Me.—*Mitchell v. Sutherland*, 74 Me. 100. Mich.—*Wyckoff, Seamans & Benedict v. Bishop*, 98 Mich. 352, 57 N. W. 170. Minn.—*Erickson v. Child*, 87 Minn. 487, 92 N. W. 1130. N. Y. *Price v. Walker*, 122 N. Y. Supp. 493; *Taylor v. McLea*, 11 N. Y. Supp. 64. N. C.—*Porter v. Grimsley*, 98 N. C. 550, 4 S. E. 529; *Cowan v. Baird*, 77 N. C. 201.

A demurrer to a general denial which is perfect both in substance and form. *Pidgeon v. United Rys. Co.*, 154 Mo. App. 20, 133 S. W. 130.

Examples of Demurrers Held Not To Be Frivolous.—*Miller v. Ambrose*, 35 App. Cas. (D. C.) 75; *Hood v. Hoffmann*, 116 N. Y. Supp. 892.

Demurrers held not so frivolous that defendants forfeited all their rights in the case by filing them. *Jordan v. McNeil*, 25 Kan. 459.

20. *Olsen v. Cloquet Lumb. Co.*, 61 Minn. 17, 63 N. W. 95; *Hatch & Essendrup Co. v. Schusler*, 46 Minn. 207, 48

N. W. 782; *New Bern Banking & Trust Co. v. Duffy*, 156 N. C. 83, 72 S. E. 96.

It "must be so clearly and palpably bad, assuming the truth of its allegations, as to require no argument to demonstrate its weakness." *Miller v. Ambrose*, 35 App. Cas. (D. C.) 75; *Cook v. Warren*, 88 N. Y. 37; *Youngs v. Kent*, 46 N. Y. 672; *Steel v. Gray*, 117 N. Y. Supp. 936.

An untenable demurrer is not necessarily frivolous. *Wilkins v. McGuire*, 2 App. Cas. (D. C.) 448.

21. *Olsen v. Cloquet Lumber Co.*, 61 Minn. 17, 63 N. W. 95; *Hatch & Essendrup Co. v. Schusler*, 46 Minn. 207, 48 N. W. 782.

22. *Jordan v. McNeil*, 25 Kan. 459.

23. Minn.—*Rev. Laws*, 1905, §4136. Mo.—*Rev. St.*, 1909, §1814. Wis.—*On five days' notice. St.*, 1898, §2681.

In Mississippi the court may refuse to receive a demurrer manifestly frivolous or intended for delay, or may strike out the same if filed, and proceed as if such demurrer had not been offered. Code, 1906, §757.

A court of equity has inherent power to strike out a demurrer clearly frivolous, or clearly intended for the sole purpose of delay. *Stanbery v. Baker*, 55 N. J. Eq. 270, 37 Atl. 351.

Chancery rule 213 allowing objections to any pleading to be made upon motion does not authorize a motion to strike a demurrer. *Stanbery v. Baker*, 55 N. J. Eq. 270, 37 Atl. 351.

Motion denied where the demurrer was accompanied by the statutory affidavit and certificate and had been set down for hearing. *Stanbery v. Baker*, 55 N. J. Eq. 270, 37 Atl. 351.

24. In Florida where a demurrer is

or judgment may be rendered for the adverse party,²⁵ and leave to plead over refused,²⁶ or terms may be imposed,²⁷ the remedy varying in the different jurisdictions.

delivered with a frivolous statement of the matters intended to be argued thereunder, it may be set aside by the court. Gen. St., 1906, §1444.

Kansas.—See *Whittenhall v. Korber*, 12 Kan. 618.

New Jersey.—In equity. Comp. St., 1910, p. 418, §21.

25. Me. Rev. St., 1903, c. 84, §35; N. C. Rev., 1905, §472; *Parker v. North Carolina R. Co.*, 150 N. C. 433, 64 S. E. 186.

When the demurrer to the complaint is frivolous, plaintiff is entitled to judgment, unless the court, in the exercise of a sound discretion, permits the defendant to answer over. *Parker v. North Carolina R. Co.*, 150 N. C. 433, 64 S. E. 186; *Morgan v. Harris*, 141 N. C. 358, 54 S. E. 381; *Abbott v. Hancock*, 123 N. C. 89, 31 S. E. 271.

On motion on five days' notice to the adverse party. **Mont.**—Rev. Codes, 1907, §6567. **N. Y.**—Code Civ. Proc., §537. **N. D.**—Rev. Code, 1905, §7002. **S. C.**—Code Civ. Proc., §238. **S. D.**—Code Civ. Proc., §238.

In Wisconsin the demurrer may be stricken out on motion and five days' notice, and the court or the presiding judge may then order judgment in favor of the adverse party, or, in his discretion, allow the demurrant to plead over, within a limited time, on such terms as may be just. St., 1898, §2681.

In Massachusetts it is provided that, where a demurrer is overruled because frivolous or immaterial, the case shall proceed to judgment as if no demurrer had been filed, and execution may be awarded or stayed upon terms. Rev. Laws, 1902, ch. 173, §75, p. 1562.

In North Carolina the supreme court will not direct judgment by default and inquiry to be entered on a demurrer as frivolous, where the adverse party did not move for such judgment below or except to the order permitting demurrant to answer. *Parker v. North Carolina R. Co.*, 150 N. C. 433, 64 S. E. 186.

Where the supreme court holds that defendant's demurrer is frivolous, on the going down of the case plaintiff is entitled to judgment by default un-

less the court below is of the opinion that in the exercise of a sound discretion the facts justify permission to answer over. *Morgan v. Harris*, 141 N. C. 358, 54 S. E. 381.

In equity, if the court or judge is satisfied that a demurrer was interposed by defendant for vexation or delay merely, and is frivolous or unfounded, on overruling it "the bill shall be taken, as against him, *pro confesso*, and the matter thereof proceeded in and decreed accordingly." Md. Pub. Gen. Laws, art. 16, §153, p. 425.

Where the case is set down for a hearing and the demurrer is found frivolous, the bill may be taken as confessed at once and proper decree entered unless time to answer is given. *Stanbery v. Baker*, 55 N. J. Eq. 270, 37 Atl. 351.

26. Me. St., 1903, c. 84, §35.

The entry of judgment after a demurrer has been stricken off as frivolous is upon the theory that there really was no demurrer, and hence in such case the statute giving a right to plead over after demurrer overruled does not apply. *Miller v. Ambrose*, 35 App. Cas. (D. C.) 75.

It is not error, on overruling a frivolous demurrer, to require the demurrant to answer instantler, if he desires to do so at all. *Whittenhall v. Korber*, 12 Kan. 618.

Denying leave to plead after the overruling of defendant's demurrer as frivolous held error. *Price v. Walker*, 122 N. Y. Supp. 493.

See also *infra*, XVIII.

27. **In Alabama** terms may be imposed, not exceeding the costs of the action, or a continuance of the cause. Code, 1907, §5341.

In Nebraska no leave to answer or reply shall be given, unless upon payment of all costs then accrued in the action. Comp. St., 1911, §6877.

In Oklahoma no leave to answer or reply shall be given, unless upon payment of all costs then accrued in the action. Comp. Laws, 1909, §5832.

In Tennessee terms may be imposed,

Joinder in demurrer is not a waiver of the objection that the demurrer is frivolous and is no bar to a subsequent motion for judgment on that ground.²⁸

Harmless Error.—Erroneously holding a demurrer to be frivolous may be harmless, where the demurrer is untenable.²⁹

Irrelevant Demurrers.—A demurrer is not irrelevant where it states only one or more of the grounds of demurrer enumerated in the code.³⁰ In some states a demurrer which is irrelevant may be stricken out.³¹

XV. HEARING ON DEMURRER.—*The time when demurrers must be heard is determined by the statutes and rules of court of the various jurisdictions.*³² Statutes in some states provide that they shall

not exceeding the costs of the action. Shannon's Code, §4659.

28. Wyckoff, Seamans & Benedict v. Bishop, 98 Mich. 352, 57 N. W. 170.

29. Sentinel Co. v. Thomson, 38 Wis. 489.

Where leave to plead over is given. Friesenhahn v. Merrill, 52 Minn. 55, 53 N. W. 1024.

An untenable demurrer is not necessarily frivolous, but every frivolous demurrer is necessarily untenable. Hence in reviewing a judgment entered on motion to set aside a demurrer as frivolous and for judgment as for want of a plea, where the demurrer is untenable and no leave was asked to plead over, the question of frivolousness will not be determined. Wilkins v. McGuire, 2 App. Cas. (D. C.) 448.

30. Such a demurrer cannot be stricken as being irrelevant or as containing irrelevant or redundant matter. Davis v. Honey Lake Water Co., 98 Cal. 415, 33 Pac. 270.

31. Minn. Rev. Laws, 1905, §4136.

A demurrer is a pleading within the meaning of Code Civ. Proc., §453, authorizing the striking out of irrelevant pleadings, or irrelevant or redundant matter in pleadings. Davis v. Honey Lake Water Co., 98 Cal. 415, 33 Pac. 270.

32. Iowa.—Demurrer must be argued and submitted on the morning of the day succeeding the filing thereof, or at such other time as is ordered by the court, unless the cause is sooner reached for trial. Code, §3555.

The court may designate particular times for hearing them. Iowa Code, §3659.

Maine.—In equity when a demurrer

to the bill is filed, the court upon motion of either party, may set the cause for hearing upon bill and demurrer at any time. Rev. St., 1903, ch. 79, §19; Ricker & Sons v. Portland & R. F. R. Co., 90 Me. 395, 38 Atl. 338.

Minnesota.—May be heard at the regular or special term of the court held in any county in the district, or at any time and place within the district which a judge thereof shall fix. Rev. Laws, 1905, §4124, as amended by Laws, 1909, ch. 433, §1; Johnson v. Velve, 86 Minn. 46, 90 N. W. 126.

Mississippi.—At law demurrers must be tried at the return term. Code, 1906, §783.

"In equity the party demurring must set the demurrer down on the docket for hearing at once if it be filed in term time, and at the next term if it be filed in vacation. If the party do not see that his demurrer is set for hearing, it shall be overruled of course." Code, 1906, §583. Memphis & V. R. Co. v. Owens, 60 Miss. 227.

In New Jersey demurrers in equity cases must be noticed and set down for argument within ten days. Comp. St., 1910, p. 417, §20.

Demurrers in quo warranto. N. J. Comp. St., 1910, p. 4214, §8.

Ohio.—The court may hear demurrers at any time, and may by rule prescribe the time of hearing them. Code, 1910, §11,386.

Tennessee.—Shannon's Code, §§4680, 6081. In equity Id., §§6203, 6204.

Wisconsin.—"The issue raised by a written demurrer to any pleading or to part thereof in any civil action pending or hereafter brought in any court of record may be brought on for argument and determination before such court,

be heard and determined without delay,³³ or at the first term,³⁴ or during the term at which they are filed,³⁵ or at the next succeeding term,³⁶ unless continued by the court or by consent of parties.³⁷

By statute in many states demurrers may be heard in vacation,³⁸ or at chambers.³⁹

A demurrer should not be ruled on until after the decision of a pending motion for a change of venue.⁴⁰

Must Be Heard in Advance of Issues of Fact. — The hearing of the issues raised by demurrer is ordinarily had in advance of the trial of issues of fact,⁴¹ though in many states the matter is discretionary with the court.⁴² In most jurisdictions the rule is equally applicable to a demurrer incorporated in the answer in an equity case.⁴³ In

or the presiding judge thereof, at any time upon five days' notice." Laws, 1911, ch. 118, p. 123 (St., §2845b).

33. Mo. Rev. St., 1909, §1819.

34. Georgia.—Code, 1895, §5659; *Sonders v. Carolina Portland Cement Co.*, 3 Ga. App. 99, 59 S. E. 467.

Kentucky.—Failure to so present it is a waiver of any defect stated in the demurrer, except that to the jurisdiction of the court of the subject of the action. Code Civ. Pr., §109.

35. Missouri.—When filed in vacation, at the next term. Rev. St., 1909, §1805.

36. N. C. Rev., 1905, §484.

37. Ga. Civ. Code, 1895, §5047; *Sonders v. Carolina Portland Cement Co.*, 3 Ga. App. 99, 59 S. E. 467.

38. Florida.—Upon five days' notice. Gen. St., 1906, §1445.

Georgia.—Ten days' notice. Code, 1895, §4321, subd. 5.

New Jersey.—Comp. St., 1910, p. 4094, §130.

39. Idaho.—Five days' notice. Rev. Codes, §3892.

Kansas.—Reasonable notice not less than three days. Gen. St., 1909, §5700.

Nebraska.—Comp. St., 1911, §2750.

40. *Griffin & Skelly Co. v. Magnolia & H. F. C. Co.*, 107 Cal. 378, 40 Pac. 495.

41. Cal.—*Brooks v. Douglass*, 32 Cal. 208. Ga.—Code, 1895, §5054. Idaho.

Guthrie v. Phelan, 2 Idaho 89, 6 Pac. 107. Ill.—*Ditch v. People*, 31 Ill. App.

368. Kan.—Gen. St., 1909, §5872. Mo. *Sheridan v. Forsee*, 106 Mo. App. 495,

81 S. W. 494. N. J.—Comp. St., 1910, p. 4094, §129. Utah.—Comp. Laws,

1907, §3128. Va.—*Roane's Admr. v. Drummond's Admr.*, 6 Rand. 182.

Where the issues of fact are tried

and judgment rendered, it will be presumed on appeal that the demurrer was first overruled. *Guthrie v. Phelan*, 2 Idaho 89, 6 Pac. 107.

In Arkansas, where a party files a demurrer with his answer or reply, the demurrer must be presented for the consideration of the court at or before the first calling of the cause for trial after the filing of the same, or the demurrer will be regarded as waived as to all points except the jurisdiction of the court, and that the pleading does not state facts sufficient to constitute a cause of action or defense or counterclaim. *Kirby's Dig.*, §6119.

Though embodied in the answer, the demurrer is a separate pleading, and must be taken up and considered separately before the case is called for trial on the issues of fact. *Greenfield v. Carlton*, 30 Ark. 547.

In equity matters of demurrer must be set down for argument and disposed of before the hearing, or they will be treated as abandoned. *Rogers v. Betterton & Co.*, 93 Tenn. 630, 27 S. W. 1017.

42. *Townsend v. Jemison*, 7 How. (U. S.) 706, 12 L. ed. 880; Fla. Gen. St., 1906, §1442.

Where defendant files both a general demurrer and a plea in abatement, the trial judge may consider either first, as he deems proper. *McLaurin v. Fields*, 4 Ga. App. 688, 62 S. E. 114.

South Dakota.—Unless the court otherwise directs. Code Civ. Proc., §242.

At common law it was discretionary. *Will's Gould Pl.* 583.

43. *McRaine v. Jarrell*, 59 Fla. 587, 52 So. 304; *Congregational Church v. Cutler*, 76 Vt. 338, 57 Atl. 387; *Dyer*

Michigan, however, in equity cases the issues of law and fact are required to be heard at the same time.⁴⁴

In Louisiana it is held that an exception of no cause of action should be disposed of separately from other exceptions.⁴⁵

Before Evidence Is Heard.—Ordinarily a demurrer should be ruled on before the evidence is heard.⁴⁶ In some states, however, decision on a demurrer *ore tenus* may be reserved until after the close of the evidence.⁴⁷

Procedure.—In equity every demurrer must be set down for argument on a day certain, when the respective parties may be heard thereon.⁴⁸ As a rule, in equity cases, either party may set down the demurrer for argument.⁴⁹

v. Dean, 69 Vt. 370, 37 Atl. 1113; *Town of Westminster v. Willard*, 65 Vt. 266, 26 Atl. 952; *Holt v. Daniels*, 61 Vt. 89, 17 Atl. 786; *Wade v. Pulsifer*, 54 Vt. 45.

By failing to seasonably insist upon the demurrer defendant does not, however, waive the right to insist that the orator make out his case at the trial. *Bartlett v. Walker Bros.*, 65 Vt. 594, 27 Atl. 496.

Tennessee.—A demurrer in an answer, or filed with an answer, is waived unless brought to the attention of the court at the first term. *Caruthers v. Caruthers*, 2 Lea 71.

When leave has been given to rely on a demurrer in the answer, the advantage of it will be lost, and the demurrer treated as waived, unless it is disposed of before the cause is heard on the merits. *Rogers v. Betterton & Co.*, 93 Tenn. 630, 27 S. W. 1017; *Boyd v. Sims*, 87 Tenn. 771, 11 S. W. 948.

The rule is equally applicable when there has been a preliminary hearing on the demurrer, and the same is overruled with leave to rely on it in the answer. *Rogers v. Betterton & Co.*, 93 Tenn. 630, 27 S. W. 1017.

In New Jersey it is provided by statute that in equity if defendant files a demurrer and answer, complainant shall not proceed on the answer until the demurrer has been argued or disposed of. *Comp. St.*, 1910, p. 419, §24.

44. *Brassington v. Waldron*, 143 Mich. 364, 107 N. W. 100.

45. *Sligo Iron Store Co. v. Blanks*, 105 La. 663, 30 So. 115.

46. *Western Union Telegraph Co. v. Ashley* (Tex. Civ. App.), 137 S. W. 1165.

47. If he then sustains the demurrer,

any error in admitting evidence in support of the pleading may be cured by excluding it and directing the jury to disregard it. *Bedsole v. Atlantic C. L. R. Co.*, 151 N. C. 152, 65 S. E. 925.

48. This rule cannot be summarily dispensed with, and even if the court has power to order that a pending motion to strike a pleading from the files shall stand as a demurrer, he has no right to thereupon sustain such demurrer instantan. *Robinson v. Chicago Rys. Co.*, 174 Fed. 40, 98 C. C. A. 26.

49. **Florida.**—Gen. St., 1906, §1872.

Maine.—Where the answer contains a demurrer, either party may set the cause for hearing on the demurrer alone. If complainant in such case, files a replication, he can thereafter only set the cause for hearing before the lapse of sixty days, within which time testimony may be taken. *Ricker & Sons v. Portland & R. F. R. Co.*, 90 Me. 395, 38 Atl. 338.

In the absence of agreement of parties, complainant alone may set the cause down for hearing generally, and not specifically on the demurrer, after replication filed, and before the expiration of sixty days after issue joined. The effect of so doing is to waive the replication, and set the cause for hearing on bill, answer and demurrer, the answer to be taken as true. Upon such hearing, the bill, answer, and demurrer are all to be passed on by the court. *Ricker & Sons v. Portland & R. F. R. Co.*, 90 Me. 395, 38 Atl. 338.

Maryland.—Plaintiff may set down defendant's demurrer to be argued. If he does not do so within ten days

In Georgia a demurrer by part of the defendants may be heard and determined before the others are served.⁵⁰

In New York the issues made may be determined on motion for judgment on the pleadings,⁵¹ or may be brought on and tried as a contested motion.⁵²

The necessity of serving notice of trial and filing a note of issue depends upon the statutes and rules of court of the various states.⁵³

Effect of Nonappearance.—It has been held that the proper practice on the nonappearance of the plaintiff on the appearance day is to dismiss for want of prosecution rather than to render judgment for defendant on his demurrer to the complaint.⁵⁴ It has also been held that the failure of demurrant to appear does not preclude him from objecting on appeal to an order overruling the demurrer.⁵⁵

Hearing Is a Trial.—The determination of the issues raised by a demurrer has been held to be a trial.⁵⁶

XVI. WHAT MAY BE CONSIDERED ON DEMURRER.—As a general rule, only the pleading demurred to may be considered in passing on the demurrer.⁵⁷ The court must assume that the facts

after it is filed, defendant may set it down for argument on five days' notice. Pub. Gen. Laws, art. 16, §§150, 151, p. 425.

New Jersey.—Either party may give notice of argument of a demurrer. Service required. Comp. St., 1910, p. 4094, §130.

Virginia.—Plaintiff may have a demurrer set down to be argued. Code, §3273.

West Virginia.—Plaintiff may have a demurrer set down to be argued. Code, §3850.

50. *Thomas v. Winter*, 21 Ga. 358.

51. Where the question of law raised goes to the whole cause of action. Code Civ. Proc., §547; *National Park Bank v. Billings*, 129 N. Y. Supp. 846.

Where defendant demurs to the complaint for want of facts, a subsequent motion by plaintiff, under Code Civ. Proc., §547, for judgment on the pleadings should be granted if the complaint states a cause of action, unless defendant is given permission to answer, on terms. *Theiling v. Marshall*, 124 N. Y. Supp. 1066.

52. Under Code Civ. Proc., §976, as amended by Laws, 1909, c. 493. *National Park Bank v. Billings*, 129 N. Y. Supp. 846.

Where the issue is tried as a contested motion, the appropriate paper to express the decision is an order, which may contain both the statement of the

decision and the pronouncement of the judgment and thus take the place of both the decision and the interlocutory judgment under the former practice. *National Park Bank v. Billings*, 129 N. Y. Supp. 846.

The proper practice in such case on determining the issue raised is to enter an order in the same manner as on the disposition of a motion for judgment on the pleadings, instead of signing findings and directing the entry of an interlocutory judgment. *People v. Bleecker St. & F. R. R. Co.*, 67 Misc. 582, 124 N. Y. Supp. 786.

The word "tried" is to be deemed synonymous with "disposed of." *People v. Bleecker St. & F. R. R. Co.*, 67 Misc. 582, 124 N. Y. Supp. 786.

53. *Ventriniglia v. Eichner*, 122 N. Y. Supp. 966.

54. *Robinson v. Collier*, 53 Tex. Civ. App. 285, 115 S. W. 915.

55. *Hall v. Williams*, 13 Minn. 260.

56. *Hume v. Woodruff*, 26 Ore. 373, 38 Pac. 191.

57. **U. S.**—*Pacific R. Co. v. Missouri Pac. R. Co.*, 111 U. S. 505, 4 Sup. Ct. 583, 28 L. ed. 498; *Bacon v. Rives*, 106 U. S. 99, 1 Sup. Ct. 3, 27 L. ed. 69; *National Casket Co. v. Stoltz*, 174 Fed. 413, 98 C. C. A. 617; *Richardson v. Loree*, 94 Fed. 375, 36 C. C. A. 301; *Darrow v. Horne Produce Co.*, 57 Fed. 463. **Ill.**—*Smith v. Alexander*, 123 Ill. App. 507. **Ind.**—*Friedersdorf v. Lacy*,

are as alleged,⁵⁸ and cannot assume the existence of any facts not alleged,⁵⁹ nor find facts in aid of the pleading,⁶⁰ nor hear evidence on the questions involved,⁶¹ nor consider what evidence may be introduced at the trial.⁶²

173 Ind. 429, 90 N. E. 766; *Cleveland, C., C. & St. L. R. Co. v. Parker*, 154 Ind. 153, 56 N. E. 86; *Pennsylvania Co. v. Poor*, 103 Ind. 553, 3 N. E. 253; *Lake Erie & W. R. Co. v. Hoff*, 25 Ind. App. 239, 56 N. E. 925; *Elwood Natural Gas & Oil Co. v. Baker*, 13 Ind. App. 576, 41 N. E. 1063. **Ia.** *Miller v. Miller*, 63 Iowa 387; *Johns v. Bailey*, 45 Iowa 241. **La.**—*Yarborough v. Blankes*, Man. Unrep. Cas. 144. **Me.**—*State v. Corson*, 10 Me. 473. **Mass.** *Hancock Nat. Bank v. Ellis*, 166 Mass. 414, 44 N. E. 349. **Mich.**—*Steele v. Culver*, 157 Mich. 344, 122 N. W. 95, 23 L. R. A. (N. S.) 564. **Neb.**—*Bresee v. Preston*, 135 N. W. 544; *City Savings Bank v. Carlson*, 87 Neb. 266, 127 N. W. 161. **N. J.**—*Brooks v. Metropolitan Life Ins. Co.*, 70 N. J. L. 36, 56 Atl. 168; *Dringer v. Jewett*, 43 N. J. Eq. 701, 13 Atl. 664. **N. Y.**—*Hirsch v. New England Nav. Co.*, 200 N. Y. 263, 93 N. E. 524, reversing 113 N. Y. Supp. 395. **N. C.**—*Dalrymple v. Cole*, 156 N. C. 363, 72 S. E. 451. **Pa.**—*Heller v. Royal Ins. Co.*, 151 Pa. 101, 25 Atl. 83. **S. C.**—*Mobley v. Cureton*, 6 S. C. 49. **Tenn.**—*Lindsay v. Allen*, 112 Tenn. 637, 82 S. W. 171; *Johnson v. Brice*, 112 Tenn. 59, 83 S. W. 791; *Jones v. Ducktown S. C. & I. Co.*, 109 Tenn. 375, 71 S. W. 821; *Russell v. Bank*, 104 Tenn. 614, 58 S. W. 245; *Trust Co. v. Weaver*, 102 Tenn. 66, 50 S. W. 763; *Insurance Co. v. Thornton*, 97 Tenn. 1, 40 S. W. 136. **Tex.**—*Kruegel v. Porter* (Tex. Civ. App.), 136 S. W. 801; *Porter v. Pecos & N. T. R. Co.* (Tex. Civ. App.), 121 S. W. 897; *Coons v. Green* (Tex. Civ. App.), 120 S. W. 1108; *Newsom & Johnston v. Sharman* (Tex. Civ. App.), 119 S. W. 912; *Herf & Frerichs Chemical Co. v. Brewster* (Tex. Civ. App.), 117 S. W. 880. **Vt.**—*Columbia Granite Co. v. Townsend & Co.*, 74 Vt. 183, 52 Atl. 432; *Hartland v. Windsor*, 29 Vt. 354. **Va.** *Bragg's Admr. v. Norfolk & W. R. Co.*, 110 Va. 867, 67 S. E. 593. **Wyo.** *Columbia Sav. & Loan Assn. v. Clause*, 13 Wyo. 166, 78 Pac. 708.

The pleading must be judged by its own averments (*Cleveland, C., C. & St.*

L. R. Co. v. Griswold [Ind. App.], 97 N. E. 1030), and not be strengthened or weakened by other parts of the record (*Chicago & E. R. Co. v. Chaney* [Ind. App.], 97 N. E. 181).

"The demurrer admits the facts averred, and no others; and there is no way known to the law whereby other facts may be imported into the issue tendered by the demurrer, or whereby that issue can become any other than one as to the sufficiency of the allegations of the complaint as they are made." *Ryan v. Knights of Columbus*, 82 Conn. 91, 72 Atl. 574.

On demurrer to a bill in equity, the original and supplemental bills should be treated as one pleading. *Aust v. Rosenbaum*, 74 Miss. 893, 21 So. 555.

58. *Dawiski v. Natick Mills*, 32 R. I. 1, 78 Atl. 263; *Newell v. Franklin*, 30 R. I. 258, 74 Atl. 1009.

59. *Campbell County Bank v. Schmitt*, 142 Ky. 601, 135 S. W. 274, rehearing denied, 143 Ky. 421, 136 S. W. 625; *Bay State Iron Co. v. Goodall*, 39 N. H. 223.

The court cannot assume that a contract as to the manner in which notes in suit were to be paid is verbal, where that fact does not appear from the answer, or decide the question of pleading raised by the demurrer upon the parol evidence rule, which may be waived at the trial. *Hatzel v. Moore*, 125 Fed. 828.

60. *Dalrymple v. Cole*, 156 N. C. 353, 72 S. E. 451.

61. **Ia.**—*Miller v. Miller*, 63 Iowa 387, 19 N. W. 251. **La.**—*Yarborough v. Blankes*, Man. Unrep. Cas. 144. **N. H.** *Wells v. Jackson Iron Mfg. Co.*, 44 N. H. 61. **Tex.**—*Coons v. Green*, 55 Tex. Civ. App. 612, 120 S. W. 1108. 62. *Rehlow v. Schmitt*, 63 Wash. 666, 116 Pac. 267.

Whether certain evidence upon which other counts are based is admissible in evidence under the common counts is a question to be determined at the trial when such evidence is offered, and not on demurrer to such counts. *Oliver Refining Co. v. Portsmouth Cotton Oil Ref. Corp.*, 109 Va. 513, 64 S. E. 56.

The pleading demurred to must be taken as it stands when the demurrer is interposed,⁶³ rather than as subsequently modified by motion,⁶⁴ or amendment.⁶⁵

Copy Served.—It has been held that the copy served on demurrant is to be considered, rather than the original pleading.⁶⁶

Affidavits, Other Pleadings or Documents.—The court cannot consider affidavits,⁶⁷ nor documents not made a part of the pleading,⁶⁸ nor the summons,⁶⁹ nor interrogatories attached to the pleading nor the answers thereto,⁷⁰ nor indorsements on the pleading,⁷¹ nor the other pleadings in the case,⁷² nor pleadings that have been abandoned or

“The possibility that at the trial proof may be introduced of an injury other than that alleged in the declaration is not a good reason for overruling the demurrer.” *Ames v. American Tel. & Tel. Co.*, 166 Fed. 820.

63. *Gooding v. Doyle*, 134 Wis. 623, 115 N. W. 114; *City of Columbus v. Town of Fountain Prairie*, 134 Wis. 593, 115 N. W. 111.

64. *Gooding v. Doyle*, 134 Wis. 623, 115 N. W. 114.

65. On appeal it cannot be considered as directed against the complaint as amended by order of court at the time of, and as part of, the order overruling the demurrer. *City of Columbus v. Town of Fountain Prairie*, 134 Wis. 593, 115 N. W. 111.

66. *Hunt v. Miller*, 101 Wis. 583, 77 N. W. 874.

67. *Globe & Rutgers Fire Ins. Co. v. Firemen's Fund Fire Ins. Co.*, 97 Miss. 148, 52 So. 454; *State v. Wedge*, 27 Nev. 61, 72 Pac. 817.

Affidavits accompanying the petition. *Strawhacker v. Ives*, 114 Iowa 661, 87 N. W. 669.

An affidavit presented on the hearing of an application for an injunction. *Platt v. City & County of San Francisco*, 158 Cal. 74, 110 Pac. 304.

It is error to take proof by affidavit of a matter not appearing on the face of the complaint. *White & Co. v. Oakes*, 117 N. Y. Supp. 938.

68. *John V. Farwell Co. v. Jackson Stores (Ga.)*, 73 S. E. 13.

69. *Huss v. Central R. & B. Co.*, 66 Ala. 472; *Steamboat Farmer v. McCraw*, 31 Ala. 659; *Dodge & McKay v. McKay & McDonald*, 4 Ala. 346; *Brooks v. Metropolitan Life Ins. Co.*, 70 N. J. L. 36, 56 Atl. 168.

The officer's return on the summons, in passing on a demurrer on the ground that the action was not brought within

the time limited by the statute. *Smith v. Day*, 39 Ore. 531, 64 Pac. 812, 65 Pac. 1055.

To determine when the action was commenced. *Columbia Sav. & Loan Assn. v. Clause*, 13 Wyo. 166, 78 Pac. 708.

Contra.—The date of the writ may be read in connection with the allegations in the declaration on a time note, to ascertain if the note appears to have become due before the action was begun, and, if it so appears, the want of a direct averment to that effect is not fatal. *Friend v. Pitman*, 92 Me. 121, 42 Atl. 317.

70. *Lane v. Krekle*, 22 Iowa 399.

71. An admission of service indorsed on the back of the summons and complaint. *Anderson v. Douglas County*, 98 Wis. 393, 74 N. W. 109.

72. **Ga.**—*Tommey & Stewart v. Ellis*, 41 Ga. 260. **Ind.**—*Midland Steel Co. v. Citizens Nat. Bank*, 26 Ind. App. 71, 59 N. E. 211; *Elwood Natural Gas & Oil Co. v. Baker*, 13 Ind. App. 576, 41 N. E. 1063. **Ia.**—*Johns v. Bailey*, 45 Iowa 241. **La.**—*Yarborough v. Blanks*, Man. Unrep. Cas. 144. **Tex.**—*Porter v. Pecos & N. T. R. Co.*, 56 Tex. Civ. App. 479, 121 S. W. 897 (answer).

Neither affidavits filed as exhibits to the answer nor the answer itself can be considered on demurrer to the bill. *Sinclair v. Auxiliary Realty Co.*, 99 Md. 223, 57 Atl. 664.

Cannot consider the cross-bill on demurrer to the original bill. *Foss v. People's Gas Light & Coke Co.*, 241 Ill. 238, 89 N. E. 351.

Answers of other defendants. *Kessler & Co. v. Ensley Co.*, 129 Fed. 397.

Contra.—The petition should be read in connection with the answer in passing on a general demurrer to the petition. *Martin Co. v. Cottrell (Tex. Civ. App.)*, 142 S. W. 48.

superseded,⁷³ nor a bill of particulars,⁷⁴ nor extrinsic facts admitted by the parties or counsel,⁷⁵ or set out in the demurrer itself,⁷⁶ nor an exhibit filed with the demurrer,⁷⁷ nor an agreed statement of facts,⁷⁸ nor the records in another case,⁷⁹ nor the character of the parties.⁸⁰

In passing on a demurrer to a plea in abatement or to the jurisdiction, the writ or the declaration cannot be considered in support of the plea unless referred to in the plea in such a way as to make

73. The original pleading, on demurrer to an amended one. Ia.—*Williams v. Williams*, 115 Iowa 520, 88 N. W. 1057; *State v. Simpkins*, 77 Iowa 676, 42 N. W. 516. **Mo.**—*Johnson v. United Rys. Co.*, 227 Mo. 423, 127 S. W. 63; *City of Farmington v. Farmington Tel. Co.*, 135 Mo. App. 697, 116 S. W. 485. **Neb.**—*Robert v. Hefner*, 81 Neb. 460, 116 N. W. 36; *Sanborn & Follett v. Hale*, 12 Neb. 318, 11 N. W. 302; *Null v. Jones*, 5 Neb. 500. **Nev.**—*McFadden v. Ellsworth Mill & Min. Co.*, 8 Nev. 57.

“A substituted pleading supersedes previous pleadings by the same party, and a demurrer to such pleading must be determined on the sufficiency of its averments alone.” *Williams v. Williams*, 115 Iowa 520, 88 N. W. 1057.

74. Weston v. County of Luce, 102 Mich. 528, 61 N. W. 15; *Cicotte v. Wayne County*, 44 Mich. 173, 6 N. W. 236.

A bill of particulars is not a pleading or a part of the complaint. Hence a demurrer to the complaint on the ground that, as amplified by the bill of particulars, there is a misjoinder of causes of action, must be overruled. *Dudley v. Duval*, 29 Wash. 528, 70 Pac. 68.

It cannot be considered in reviewing a ruling on demurrer, where the record shows that it was not filed until after the ruling was made. *Anne Arundel County v. Watts*, 112 Md. 353, 76 Atl. 82.

75. Conn.—*Ryan v. Knights of Columbus*, 82 Conn. 91, 72 Atl. 574. **Ga.** *Hicks v. Beacham*, 131 Ga. 89, 62 S. E. 45; *Pattillo v. Jones*, 113 Ga. 330, 38 S. E. 745; *Sasser v. Adkins*, 108 Ga. 228, 33 S. E. 881. **Vt.**—*Douglass & Varnum v. Village of Morrisville*, 84 Vt. 302, 79 Atl. 391; *Columbia Granite Co. v. Townsend & Co.*, 74 Vt. 183, 52 Atl. 432; *Hartland v. Windsor*, 29 Vt. 354.

Admission by counsel of his inability to prove certain facts. *Blanks v. Missouri, K. & T. R. Co.* (Tex. Civ. App.), 116 S. W. 377.

But see *Willingham v. Western Union Telegraph Co.*, 91 Ga. 449, 18 S. E. 298, holding that there was no error in dismissing the action on demurrer, taken in connection with the facts orally admitted by counsel at the hearing.

76. U. S.—*Star Ball Retainer Co. v. Klahn*, 145 Fed. 834; *Mybladh v. Herterius*, 41 Fed. 120. **Ia.**—*Jefferies v. Fraternal Bankers' Reserve Society*, 135 Iowa 284, 112 N. W. 786. **Mass.** *Fay v. Boston & W. St. R. Co.*, 196 Mass. 329, 82 N. E. 7. **N. C.**—*Wood v. Kincaid*, 144 N. C. 393, 57 S. E. 4.

While complainant is not bound by statements of fact in a demurrer to the bill, defendant cannot complain if the court assumes that they are true. *Belden v. Blackman*, 118 Mich. 448, 76 N. W. 979.

77. Ruddick v. Marshall, 23 Iowa 243.

78. Augusta & S. R. Co. v. Lark, 97 Ga. 800, 25 S. E. 175; *Constitutional Pub. Co. v. Stegall*, 97 Ga. 405, 24 S. E. 33.

79. Pacific R. Co. v. Missouri Pac. R. Co., 111 U. S. 505, 4 Sup. Ct. 583, 28 L. ed. 498; *Richardson v. Loree*, 94 Fed. 375, 36 C. C. A. 301.

Copy of a decree in a former suit which is filed but not made a part of the bill. *Lindsay v. Allen*, 112 Tenn. 637, 82 S. W. 171.

On demurrer to the declaration in an action for malicious prosecution and false imprisonment, the record in the criminal prosecution cannot be considered unless oyer thereof is prayed and obtained. *Nybladh v. Herterius*, 41 Fed. 120.

80. Kessler & Co. v. Ensley Co., 129 Fed. 397.

them a part thereof, but they may be considered against the plea and in support of the proceedings.⁸¹

It has been held that, on demurrer to a bill of review, the original decree and pleadings in the case in which it was pronounced may be considered.⁸²

On demurrer to a single count or paragraph, other counts or paragraphs cannot be considered.⁸³

Matters within the personal knowledge of the court cannot be considered.⁸⁴

Matters Judicially Noticed. — It is generally held that matters of which the court will take judicial notice may be considered,⁸⁵ though there is authority to the contrary.⁸⁶ It has been held that a demurrer will not be aided by facts judicially noticed to the extent of requiring the court to find the fact against a direct admitted averment of the pleading.⁸⁷

An instrument recited on oyer stands the same as if incorporated in the previous pleading, and, hence, may be considered in passing on a demurrer thereto.⁸⁸

81. *United States v. United States Fidelity & Guaranty Co.*, 80 Vt. 84, 66 Atl. 809. See also *Slayton v. Inhabitants of Chester*, 4 Mass. 478; *Leonard v. McArthur*, 52 Vt. 439; *Barnet v. Emery*, 43 Vt. 178; *Hill v. Powers*, 16 Vt. 516.

82. *Hurt v. Long*, 90 Tenn. 445, 16 S. W. 968.

83. *Leavenworth, N. & S. R. Co. v. Wilkins*, 45 Kan. 674, 26 Pac. 16; *Hurt's Admr. v. Smith*, 4 Ky. L. Rep. 367.

Every count or cause of action must stand or fall upon its own averments. *Riverside Township v. Bailey*, 82 Kan. 429, 108 Pac. 796.

84. *May v. Patterson*, 13 Ky. L. Rep. 779 (abstract).

Within its personal, but not its judicial, knowledge. *Ryan v. Knights of Columbus*, 82 Conn. 91, 72 Atl. 574.

85. **U. S.**—*National Casket Co. v. Stoltz*, 174 Fed. 413, 98 C. C. A. 617. **Cal.**—*Mullan v. State*, 114 Cal. 573, 46 Pac. 670, 34 L. R. A. 262. **Ga.**—*Southern R. Co. v. Covenia*, 100 Ga. 46, 29 S. E. 219, 40 L. R. A. 253.

In passing on a demurrer to a petition on the ground that the note sued on is void because executed on Sunday, the court may take judicial notice of the fact that the date of the execution as alleged in the petition fell on Sunday. *Clough v. Goggins*, 40 Iowa 325.

86. *Miller v. Miller*, 63 Iowa 387.

On demurrer the court cannot call upon either its personal or judicial knowledge in aid of or against the pleading, and hence cannot inspect the record of another suit in the same court for the purpose of determining whether it involves the same matters. *May v. Patterson*, 13 Ky. L. Rep. 779 (abstract).

87. *People v. Michigan Cent. R. Co.*, 145 Mich. 140, 108 N. W. 772, citing *Griffing v. Gibb*, 2 Black (U. S.) 519, 17 L. ed. 353.

88. *Lee v. Follensby*, 80 Vt. 182, 67 Atl. 197. See *Cooke v. Graham's Admr.*, 3 Cranch (U. S.) 229, 2 L. ed. 420; *Nybladh v. Herterius*, 41 Fed. 120; *Bennett's Exr. v. Loyd*, 6 Leigh (Va.) 316.

If an action on a written contract made with two persons jointly is brought by one of them alone, or if two persons sue on a written contract made with one of them only, defendant may take advantage of the mistake by praying oyer of the instrument, setting it out *verbatim* upon the record, and demurring to the declaration. *Will's Gould Pl.* 452.

Profert alone does not make an instrument a part of the pleading; but before it may be looked to on demurrer oyer must be demanded and granted. *Insurance Co. v. Thornton*, 97 Tenn.

Exhibits. — Ordinarily an exhibit which is not the foundation of the action or defense cannot be considered.⁸⁹ In many states this is equally true of an exhibit which is the foundation of the action or defense,⁹⁰ and even though the statute requires it to be filed.⁹¹ Other courts hold that an exhibit which is the foundation of the action may be considered,⁹² or that it may be if it is made a part of the pleading by reference.⁹³ It is sometimes held that exhibits may be considered against the pleader.⁹⁴

1, 40 S. W. 136. And see *Lee v. Folsensby*, 80 Vt. 182, 67 Atl. 197.

See the title "Profert."

89. *Newton v. Askew*, 53 Ark. 476, 114 S. W. 670; *Lackawanna Coal & Iron Co. v. Long*, 231 Mo. 605, 133 S. W. 35; *Hubbard v. Slavens*, 218 Mo. 598, 117 S. W. 1104; *Garnett & Allen Paper Co. v. Midland Pub. Co.*, 156 Mo. App. 187, 136 S. W. 736.

Where the complaint is not predicated on the exhibit. *Gunn Elastic Roofing Co. v. Mexico Pub. Co.*, 140 Ind. 158, 39 N. E. 443, 30 L. R. A. 700; *State v. Helms*, 136 Ind. 122, 35 N. E. 893; *Marley v. National Bldg. & Loan Assn.*, 28 Ind. App. 369, 62 N. E. 1023.

For example, a chattel mortgage in replevin by the mortgagee to recover the mortgaged property (*Chamblee v. Stokes*, 33 Ark. 543), an affidavit for a mechanic's lien, in an action to foreclose such lien (*McFadden v. Stark*, 58 Ark. 7, 22 S. W. 884), a deed in an action of ejectment (*Walker v. Taylor*, 43 Ark. 543).

A lease, in a suit to cancel the lease and to quiet title to real estate. *Beatty-Nickle Oil Co. v. Smethers* (Ind. App.), 96 N. E. 19.

90. A copy of the note in suit attached to the declaration, but forming no part thereof. *Cornwell v. Broom*, 34 Ill. App. 391.

91. *Reed v. Metropolitan Casualty Ins. Co.*, 9 Ohio N. P. (N. S.) 81.

92. When an exhibit attached to a pleading is the foundation of the cause of action or defense, its validity or sufficiency as a matter of law to constitute or establish such cause of action or defense may be determined on demurrer to such pleading. *Union Sewer Pipe Co. v. Olson*, 82 Minn. 187, 84 N. W. 756.

93. Ill.—*Goodyear, etc., Co. v. Selz, Schwab & Co.*, 157 Ill. 186, 41 N. E.

625. Ky.—*Collins v. Blackburn*, 4 B. Mon. 252. Okla.—*Whiteacre v. Nichols*, 17 Okla. 387, 87 Pac. 865; *Grimes v. Cullison*, 3 Okla. 268, 41 Pac. 355.

Under Mo. Rev. St., 1909, §1832, an account attached to a pleading and referred to therein is a part of the record on appeal. *Garnett & Allen Paper Co. v. Midland Pub. Co.*, 156 Mo. App. 187, 136 S. W. 736.

Notice of lien attached to the complaint and made a part thereof in a suit to foreclose a mechanic's lien may be considered. *Krauss v. Brunett*, 130 N. Y. Supp. 1086.

A contract which is the basis of the action and is attached to the complaint may be considered, and controls rather than the pleader's conclusion as to its effect. *Brinker v. Joshua Aldham & Sons* (Wash.), 116 Pac. 263.

If not made a part of the pleading by reference, it cannot be considered. *Hoopes Bro. & Darlington v. Crane & MacMahon*, 56 Fla. 395, 47 So. 992; *Royal Phosphate Co. v. Van Ness*, 53 Fla. 135, 43 So. 916; *Metzger v. Canadian & European Credit System Co.*, 59 N. J. L. 340, 36 Atl. 661; *Harrison v. Vreeland*, 38 N. J. L. 366.

94. *Com. v. Licking Valley Bldg. Assn.*, 118 Ky. 791, 82 S. W. 435.

If the contract sued on shows no cause of action. *Gardner v. Continental Ins. Co.*, 25 Ky. L. Rep. 426, 75 S. W. 283.

An exhibit filed with and made a part of the petition must be considered, and will control where it contradicts or fails to support the allegations of the pleading. *Blue Grass Canning Co.'s Assignee v. Illinois Cent. R. Co.* (Ky.), 119 S. W. 769; *Gardner v. Continental Ins. Co.*, 25 Ky. L. Rep. 436, 75 S. W. 283; *Union Boiler & Tube Cleaning Co. v. Louisville R. Co.*, 25 Ky. L. Rep. 122, 74 S. W. 1056; *Bush v. Madeira's Heirs*, 14 B. Mon. (Ky.) 212.

In equity exhibits may ordinarily be considered.⁹⁵ The court is not, however, required to accept as true the allegations of a bill as to what is proved by an exhibit thereto, or as to its effect in law.⁹⁶ It has been held that where a bill alleges a particular fact and states that it will be shown by an exhibit, such fact will be taken as true though the exhibit does not show it, provided it does not contradict it.⁹⁷

On appeal the correctness of rulings on demurrer must be determined, so far as practicable, from the standpoint of the trial court, without the aid of subsequent events or facts outside of the pleading demurred to,⁹⁸ and the court cannot consider the evidence heard at the trial on the merits,⁹⁹ nor the evidence adduced in other litigation,¹ nor facts set out in the brief of counsel.²

XVII. DECISION AND JUDGMENT.—A. DUTY TO RULE ON DEMURRER.—Ordinarily, it is the duty of the court to decide the questions raised by a demurrer;³ but it is not always necessary to decide all the questions raised.⁴

Where a demurrer is not disposed of, the pleading demurred to stands as a pleading in the case.⁵

B. FORMAL REQUISITES.—A formal order is not always necessary.⁶ The necessity for a written ruling depends on the statutes

95. **U. S.**—Continental Securities Co. v. Interborough R. T. Co., 165 Fed. 945. **Ark.**—Newton v. Askew, 53 Ark. 476, 114 S. W. 670. **W. Va.**—Elswick v. Deskins, 68 W. Va. 396, 69 S. E. 894.

Where the statute makes an exhibit a part of the bill, it will control in case it conflicts with the allegations of the bill. McNeill v. Lee, 79 Miss. 455, 30 So. 821.

96. Lockhead v. Berkeley Springs W. & I. Co., 40 W. Va. 553, 21 S. E. 1031.

97. Elswick v. Deskins, 68 W. Va. 396, 69 S. E. 894.

See generally the title "**Exhibits.**"

98. Friedersdorf v. Lacy, 173 Ind. 429, 90 N. E. 766.

Matters admitted on the trial cannot be considered. Hartland v. Windsor, 29 Vt. 354.

99. **Ind.**—Pennsylvania Co. v. Poor, 103 Ind. 553, 3 N. E. 253; Cleveland, C. & St. L. R. Co. v. Griswold (Ind. App.), 97 N. E. 1030; Elwood Natural Gas & Oil Co. v. Baker, 13 Ind. App. 576, 41 N. E. 1063. **Kan.**—Riverside Township v. Bailey, 82 Kan. 429, 108 Pac. 796. **Tex.**—Uvalde Electric Light Co. v. Parsons (Tex. Civ. App.), 138 S. W. 163.

1. Not a part of the record. Na-

tional Casket Co. v. Stolls, 174 Fed. 413, 98 C. C. A. 617.

2. **Ia.**—L. J. Barnett & Co. v. D. Weeks & Co., 146 Iowa 598, 125 N. W. 221. **Mich.**—Steele v. Culver, 157 Mich. 344, 122 N. W. 95, 23 L. R. A. (N. S.) 564. **Neb.**—Breese v. Preston, 135 N. W. 544. **Tenn.**—Jones v. Ducktown S., C. & I. Co., 109 Tenn. 375, 71 S. W. 821.

3. "Unless the demurrer is waived or gotten rid of in some lawful mode, the court must decide the questions raised" thereby and has no right to overrule it *pro forma* because the demurrant fails to appear and present it. Philip v. Durkee, 108 Cal. 300, 41 Pac. 407.

4. Where a ground of demurrer going to the very foundation of complainant's case is sustained, it is not necessary for the court to pass on other grounds. Armentrout v. Armentrout's Exrs. (Va.), 72 S. E. 721.

5. Reichart v. Missouri & Ill. Coal Co., 155 Ill. App. 244.

6. Proceeding to a decree on a bill without in terms ruling on a demurrer thereto is to be regarded as overruling the demurrer. McGraw v. Traders Nat. Bank, 64 W. Va. 509, 63 S. E. 398; Fluharty v. Mills, 49 W. Va. 446, 38 S. E. 521.

of the various states.⁷ Statutes in some states require the judge to specify in writing the grounds on which his decision is based,⁸ or which grounds of the demurrer are sustained.⁹ A failure to state what grounds are overruled is harmless, where each ground is necessarily overruled.¹⁰ Failure to designate the grounds sustained may be harmless where any of the grounds are well taken.¹¹

In the federal courts in equity cases where a demurrer is sustained on a ground not going to the merits, the decree of dismissal must state the reason or provide that it is without prejudice.¹²

C. CONSTRUCTION OF RULING OR JUDGMENT.—A judgment sustaining a demurrer should be construed as going no further than the demurrer itself.¹³ An order sustaining a demurrer generally means that the court resolves every legal issue tendered by the demurrer in favor of the demurrant, and holds the pleading bad for all the legal reasons assigned.¹⁴ Hence, if any one ground of the demurrer is well taken, the order sustaining it will be affirmed.¹⁵ A similar rule prevails as to a judgment rendered against a party on his refusal to amend so as to make his pleading good after the sustaining of a demurrer thereto on several grounds, some of which are well taken and some not.¹⁶

D. EFFECT OF RULING.—1. **Sustaining Demurrer.**—Sustaining a demurrer eliminates the pleading,¹⁷ or that part of it to which the

Where a demurrer on the ground that equity had no jurisdiction and a cross-motion to transfer the proceeding to the common law docket were argued together, and the motion was granted, and after the cause had been entered on the common law docket defendant presented a plea in abatement, it was held that a failure to enter a formal order overruling the demurrer was not prejudicial. *Quartier v. Dowiat*, 219 Ill. 326, 76 N. E. 371.

7. In **Kansas** the code provides that rulings shall be stated in writing. Gen. St., 1909, §5872.

8. **Connecticut.**—Where there is more than one ground of demurrer. Gen. St., 1902, §607.

A failure to observe this section constitutes no cause of appeal, the remedy being by application to the appellate court for process to compel its observance. *McNamara v. McDonald*, 69 Conn. 487, 38 Atl. 54.

9. Florida Acts, 1909, c. 5912.

10. *Spencer v. Spencer*, 61 Fla. 777, 55 So. 71.

11. *Tice v. Dickerson*, 60 Fla. 380, 53 So. 645.

12. *Fowler v. Osgood*, 141 Fed. 20, 72 C. C. A. 276, and cases cited.

13. *Blewitt v. Greene* (Tex. Civ. App.), 122 S. W. 914.

14. *City of Goldfield v. McDonald* (Colo.), 119 Pac. 1069.

Where all the grounds, both general and special, are contained in a single demurrer, an order sustaining "the demurrer" will be construed as sustaining the entire demurrer, on all the grounds thereof. *McClaren v. Williams*, 132 Ga. 352, 64 S. E. 65; *Buchan v. Williams*, 131 Ga. 501, 62 S. E. 815; *Gunn v. James*, 120 Ga. 482, 48 S. E. 148.

15. See *infra*, XXI.

16. In such case he should amend or offer to amend so as to meet the objections raised by the grounds of demurrer properly assigned. *Baker v. Atlanta, B. & A. R. Co.*, 163 Ala. 101, 49 So. 751; *Montgomery Iron Works v. Dorman*, 78 Ala. 218; *Guilford & Co. v. Kendall*, 42 Ala. 651.

17. *Keerl v. Keerl*, 28 Md. 157.

Facts alleged therein are out of the case. *Doolittle v. Selectmen*, 59 Conn. 402, 22 Atl. 336.

A new trial will not be granted for newly discovered evidence merely tending to support the allegations of a pleading that has been stricken out on demurrer. *Callaway v. Martin*, 7 Ga. App. 357, 66 S. E. 1101.

demurrer is directed,¹⁸ from the case, and evidence to prove its allegations should thereafter be excluded.¹⁹

Right To Enter Judgment.—Sustaining a demurrer does not alone amount to final judgment,²⁰ but final judgment follows,²¹ except in the case of dilatory pleas and pleas in abatement,²² or where provision is made for amendment.²³ In equity a decree on demurrer is interlocutory and not final.²⁴

Where a demurrer going to the whole of a pleading is sustained without leave to amend,²⁵ or the pleader fails or refuses to amend,²⁶

Interveners have no interest in the subsequent proceedings where a demurrer to their complaint in intervention is properly sustained. *Moran v. Bonynge*, 157 Cal. 295, 107 Pac. 312.

18. *State v. Portland Gen. Elec. Co.*, 52 Ore. 502, 95 Pac. 722, 98 Pac. 160.

Where a demurrer to a paragraph of answer is sustained, a reply to such paragraph goes out of the record with it. *Brunswick & W. R. Co. v. Hart Lumb. Co.*, 6 Ga. App. 583, 65 S. E. 299; *Stevens v. Overturf*, 62 Ind. 331.

If a special demurrer goes only to some particular part of the pleading, without which a cause of action would still be stated, the result of finally sustaining it is not to dismiss the action, but to strike the defective portion, and the same is true where the demurrer attacks some particular portion of the pleading for irrelevancy or impertinence. *McSwain v. Edge*, 6 Ga. App. 9, 64 S. E. 116.

But a plea to which a demurrer is sustained still remains of record, and it is error to enter a default for want of a plea. *Hays v. Weeks*, 57 Fla. 73, 48 So. 997.

Facts alleged in a defense to which a demurrer has been sustained may be considered in connection with other defenses where they are realleged in and made a part of the latter. *Whalen v. Union Bag & Paper Co.*, 130 App. Div. 313, 114 N. Y. Supp. 220.

19. **U. S.**—*Southern R. Co. v. King*, 217 U. S. 524, 30 Sup. Ct. 594, 54 L. ed. 868, *affirming* 160 Fed. 332. **Ala.**—*Merchants' Bank v. Acme Lumb. Co.*, 160 Ala. 435, 49 So. 782. **Ga.**—*McKenzie v. Miller & Co.*, 6 Ga. App. 828, 65 S. E. 1071. **S. D.**—*Tilden v. Smith*, 24 S. D. 576, 124 N. W. 841. **Wash.**—*State v. Superior Court*, 62 Wash. 556, 114 Pac. 427.

20. *Martin v. Sherwood*, 74 Conn. 202, 50 Atl. 564.

21. On sustaining a demurrer to a replication there should be judgment final, and not of respondeat ouster. *Memphis & C. R. Co. v. Orr*, 52 Miss. 541.

22. The sustaining of a demurrer to a plea in abatement never ends the case, but rather orders a plea to the merits. *Copeland v. Hewett*, 93 Me. 557, 45 Atl. 824.

On demurrer to a plea to the jurisdiction the judgment is either that the writ abate or respondeat ouster. *Birch v. King*, 71 N. J. L. 392, 59 Atl. 11.

23. *Martin v. Sherwood*, 74 Conn. 202, 50 Atl. 564; *Littlefield v. Maine Cent. R. Co.*, 104 Me. 126, 71 Atl. 657.

See XVIII, *infra*.

24. **Ala.**—*Turner v. Durr*, 55 So. 230. **Ill.**—*Livingston County Bldg. & Loan Assn. v. Keach*, 213 Ill. 59, 72 N. E. 769; *Williams v. Chicago Exhibition Co.*, 188 Ill. 19, 58 N. E. 611. **Mass.**—*Parker v. Flagg*, 127 Mass. 28.

25. *Hardsall v. Case*, 15 Cal. App. 541, 115 Pac. 330.

26. *Montgomery Iron Works v. Dorman*, 78 Ala. 218; *Continental Life Ins. & Inv. Co. v. Jones*, 31 Utah 403, 88 Pac. 229.

A petition in equity may be dismissed. *Kentucky Electric Co. v. Barrett*, 132 Ky. 353, 116 S. W. 1186.

On sustaining a demurrer to the reply and plaintiff's refusal to make further reply, it is proper to render final judgment for defendant. *Hibberd v. Trask*, 160 Ind. 498, 67 N. E. 179; *Wilson v. Ray*, 13 Ind. 1.

In Iowa the code provides that the same consequences shall ensue as though a verdict had passed against the plaintiff, or the defendant had made default, as the case may be. Code, §3565; *Wapello State Sav. Bank v. Colton*, 143 Iowa 359, 122 N. W. 149.

or to comply with any of the directions given or terms imposed,²⁷ it is proper to render judgment against him. If the demurrer goes to some of the counts only, judgment may be rendered as to them.²⁸ Failure or refusal to amend after the sustaining of a special demurrer may result in final judgment,²⁹ or merely in striking out the allegations demurred to.³⁰ It has been held that where general and special demurrers to a pleading are both sustained, it is not incumbent on the pleader to amend so as to meet the ruling on the latter.³¹

On sustaining a demurrer to a plea the proper practice is to render final judgment on the demurrer rather than a default judgment for

Though in the federal courts the petition in an action at law on a contract cannot be amended so as to seek reformation of the contract and recovery be had thereon as amended, as might be done in the state court, permission may be granted to file a bill in equity for that purpose and the proceedings at law may be stayed until such suit is determined. Iowa Code, §2654, providing that if plaintiff fails to amend after demurrer sustained the same consequence shall ensue as though a verdict had passed against him does not prevent such a course, since it does not prescribe any particular time within which the amendment must be made. *Rosenbaum v. Council Bluffs Ins. Co.*, 37 Fed. 7.

Where No Leave To Amend Is Asked.

U. S.—Walker *v. Powers*, 104 U. S. 245, 26 L. ed. 729. **Cal.**—Kinley *v. Thelen*, 158 Cal. 175, 110 Pac. 513. **Ia.**—Bridge, Beach & Co. *v. Livingston*, 11 Iowa 57. **Md.**—Riddell *v. Douglas*, 60 Md. 337.

On failure to amend within the time specified when leave is granted. Underwood *v. Underwood*, 162 Ala. 553, 50 So. 305.

In Maine the statute provides that at the next term of the court in the county in which the action is pending after a decision on the demurrer has been certified by the clerk of the district to the clerk of such county, and not before, judgment shall be entered on the demurrer unless the costs are paid and the amendment filed on the second day of the term. Rev. St., 1903, c. 84, §35; *Furbish v. Robertson*, 67 Me. 35.

Judgment may be rendered on the pleadings and it is unnecessary to call the case for a hearing and to permit

the introduction of the pleadings demurred to. *Yates v. People*, 207 Ill. 316, 69 N. E. 775.

Plaintiff cannot be forced to take a nonsuit in such case. *Spears v. Bond*, 79 Mo. 467; *Comstock v. Davis*, 51 Mo. 569.

27. N. Y. Code Civ. Proc., §1021.

28. If a demurrer directed to some of the counts only is sustained, "the plaintiff may amend the declaration by the addition of other counts, or he may stand on the counts admitted to be good. Strictly speaking, the defendant is entitled to judgment on the demurrer, but the usual practice is, merely to strike out the bad counts, unless the defendant insists on judgment as to such counts." *Riddell v. Douglas*, 60 Md. 337.

29. *News Pub. Co. v. Lowe*, 8 Ga. App. 333, 69 S. E. 128.

The sustaining of a special demurrer to the petition does not *ipso facto* work a dismissal where the order does not require an amendment on penalty of dismissal. In such case plaintiff may offer to amend of his own motion, and if the court permits him to do so defendant cannot complain that a dismissal is refused. *News Pub. Co. v. Lowe*, 8 Ga. App. 333, 69 S. E. 128.

Where special exceptions to a bill are sustained, and there is no request for leave to amend, it is not error to sustain a general exception to the whole bill and to dismiss it. *Stringer v. Robertson* (Tex. Civ. App.), 140 S. W. 502.

30. *Courson v. Hamilton*, 8 Ga. App. 709, 70 S. E. 143.

31. *Hammons v. Clwer* (Tex. Civ. App.), 127 S. W. 889.

want of a plea,³² or a judgment of dismissal for want of a declaration.³³ It has, however, been held that if plaintiff declines to take any further steps under such circumstances, the case may be dismissed for want of prosecution.³⁴

Under the civil law sustaining a declinatory exception,³⁵ or an exception of no cause of action,³⁶ results in a dismissal of the action, and sustaining an exception going to defects of form only, in an order requiring an amendment.³⁷

2. Overruling Demurrer.—On demurrer overruled, the demurrant's case stands as upon default,³⁸ and judgment in chief is properly rendered against him,³⁹ unless no further pleading on his part is required,⁴⁰ or he is permitted to plead over and does so.⁴¹ Even where the right to plead over exists, final judgment is properly rendered against a demurrant who elects to stand on his demurrer,⁴²

32. *Hays v. Weeks*, 57 Fla. 73, 48 So. 997; *Pettys v. Marsh*, 24 Fla. 44, 3 So. 577; *L' Engle v. L' Engle*, 19 Fla. 714; *Garlington v. Priest*, 13 Fla. 559.

33. *Hower v. Lewton*, 18 Fla. 328.

34. *Ellis & Co. v. Brannon*, 161 Ala. 573, 49 So. 1034.

35. La. Code Pr., art. 335.

36. *Goldsmith v. Virgin*, 122 La. 831, 48 So. 279.

Effect On Demand of Intervener. When an exception of no cause of action is maintained, it has the effect of dismissing the demand of the intervener as well as that of the plaintiff. However, when an exception goes to the merits of the action, even where the demand of the plaintiff is rejected, the court must pass upon the demand of the intervener. *Labarre v. Burton-Swartz Cypress Co.*, 126 La. 982, 53 So. 113.

37. *Goldsmith v. Virgin*, 122 La. 831, 48 So. 279.

38. *Daniels v. Town of Saybrook*, 34 Conn. 377; *Lamphear v. Buckingham*, 33 Conn. 237.

Where there is no application for leave to plead. *Bates v. Williams*, 43 Ill. 494.

39. *O'Donnell v. Sargent & Co.*, 69 Conn. 476, 38 Atl. 216.

On overruling a demurrer to a replication going to the full merits of the case. *State v. Peck*, 60 Me. 498.

If a demurrer to a plea in abatement is overruled and the plea sustained, the action abates. *Copeland v. Hewett*, 93 Me. 554, 45 Atl. 824.

Whether the Demurrer Is General or Special.—*State v. Peck*, 60 Me. 498.

40. It is not proper to dismiss the complaint on overruling demurrers to defenses, but such allegations are deemed denied in the same manner as if no demurrer had been interposed. *Mobley v. Cureton*, 6 S. C. 49.

In Idaho, where a demurrer to an answer is overruled, the facts alleged in the answer are to be taken as denied to the same extent as if no demurrer had been filed. Rev. Codes, §4228.

In justice court, in such case, the action must proceed as if no demurrer had been interposed. Rev. Codes, §4673.

41. See XVIII, *infra*.

42. *Neb.*—*Spalding v. Douglas County*, 85 Neb. 265, 122 N. W. 889. *Okl.*—*Board of County Comrs. v. Harvey*, 6 Okla. 629, 52 Pac. 402. *Utah.*—*Gammon v. Bunnell*, 22 Utah 421, 64 Pac. 958.

On overruling a demurrer to a plea which is a bar to the action. *State Board of Education v. Mobile & O. R. Co.*, 72 Miss. 236, 16 So. 489.

Where plaintiff, on the overruling of his demurrer to a plea answering the whole declaration, abides by the demurrer, it is proper to enter final judgment upon the plea in bar of the action and for costs. *Adams v. Bruner*, 152 Ill. App. 123.

In Indiana the statute provides that judgment shall be rendered against him as upon a default. *Burns' Ann. St.*, 1908, §350; *Miller v. Royce*, 60 Ind. 189.

In Iowa the code provides that "the same consequences shall ensue as

as by failing to ask for leave to plead over,⁴³ or failing to so plead within the time prescribed,⁴⁴ or to comply with any of the directions given or terms imposed.⁴⁵ It has been held that amendments may be allowed after the overruling of a demurrer based on the omission of allegations so supplied.⁴⁶

3. Ruling on Demurrer for Misjoinder of Causes of Action. Ordinarily on sustaining a demurrer for misjoinder of causes of action the complaint or equivalent pleading is completely overthrown and plaintiff can only proceed by filing an amended pleading containing the cause of action he elects to pursue.⁴⁷ In some jurisdictions, however, the court may order the case to be divided into as many separate actions as there are causes of action stated.⁴⁸ A similar rule prevails

though a verdict had passed against the plaintiff or the defendant had made default, as the case may be." Code, §3565. See *Jeffries v. Fraternal Bankers' Reserve Society*, 135 Iowa 284, 112 N. W. 786; *Dunlap & Co. v. Cody*, 31 Iowa 260; *Brown v. Mallory*, 26 Iowa 469.

In *Tennessee* writ of inquiry may be awarded, or judgment rendered, at the same term. *Shannon's Code*, §§4681, 4658, 6082.

43. *Wilkins v. McGuire*, 2 App. Cas. (D. C.) 448; *Marshall v. Platt County*, 12 Mo. 88.

Where a demurrer to a defense going to the entire cause of action is overruled, and plaintiff does not withdraw it or ask to do so, but proceeds to trial with the demurrer still standing, it is proper to dismiss the complaint. *Mills Power Co. v. Mohawk Hydro-Electric Co.*, 143 App. Div. 890, 128 N. Y. Supp. 810.

44. On expiration of the time within which leave is granted to answer without any answer being filed, the clerk is authorized to enter defendant's default and a judgment against him for the amount specified in the summons. *Wall v. Heald*, 95 Cal. 364, 30 Pac. 551; *Bailey v. Sloan*, 65 Cal. 337, 4 Pac. 349.

In *Maine* the statute provides that at the next term of the court in the county in which the action is pending, after a decision on the demurrer has been certified by the clerk of the district to the clerk of such county, and not before, judgment shall be entered on the demurrer, unless the costs are paid, and the new pleadings filed on the second day of the term. *Rev. St.*, 1903, c. 84, §35. See *Roberts v. Niles*, 95 Me. 244, 49 Atl. 1043.

If the new pleadings are not filed on the second day of the term, or the costs are not paid, judgment must be entered. *State v. Peck*, 60 Me. 498.

The statute applies where the demurrer is special. *State v. Peck*, 60 Me. 498.

45. *N. Y. Code Civ. Proc.*, §1021.

46. *Dickenson v. Columbus State Bank*, 71 Neb. 260, 98 N. W. 813.

47. *State v. Williams*, 45 Ore. 314, 77 Pac. 965, 67 L. R. A. 166; *Cohen v. Ottenheimer*, 13 Ore. 220, 10 Pac. 20.

If plaintiff declines to amend, judgment is properly rendered for defendant. *Johnson v. Seattle Electric Co.*, 39 Wash. 211, 81 Pac. 705.

The court cannot elect for him. *Cohen v. Ottenheimer*, 13 Ore. 220, 10 Pac. 20.

48. *Md.*—*Burns' Ann. St.*, 1908, §345; *Giller v. West*, 162 Ind. 17, 69 N. E. 548. See also *Bennett v. Preston*, 17 Ind. 291. *Mont.*—*Rev. Codes*, 1907, §6591. *Neb.*—*Comp. St.*, 1911, §6671. Plaintiff should be required to elect on which petition he will proceed, or to file a separate petition for each cause of action, and, when filed, an action should be docketed for each petition. *Alexander v. Thacker*, 30 Neb. 614, 46 N. W. 825. *N. J.*—On sustaining a demurrer for misjoinder of causes of action and parties. *Davis v. Public Service Corporation*, 77 N. J. L. 275, 72 Atl. 82. *N. Y.*—*Code Civ. Proc.*, §497; *Neun v. B. H. Bacon Co.*, 137 App. Div. 397, 121 N. Y. Supp. 718. *N. C.*—*Rev.*, 1905, §476. *N. D.*—*Rev. Codes*, 1905, §6882. *Ohio.*—*Code*, 1910, §11,312. *Okla.*—*Comp. Laws*, 1909, §5632. The court has no right to summarily dismiss the action without giving the plaintiff an opportunity

in some states in equity on sustaining a demurrer for multifariousness.⁴⁹

In Indiana it is provided by statute that no judgment shall ever be reversed for any error committed in ruling on a demurrer for misjoinder.⁵⁰

4. Effect of Ruling Where Other Issues Remain.—As a general rule final judgment cannot properly be entered on sustaining⁵¹ or overruling⁵² a demurrer to part of a pleading where issues joined on other parts have not been disposed of. The contrary is true, however, where a demurrer is sustained to affirmative defenses which show plaintiff's right to recover,⁵³ or to replications to a plea presenting a complete defense to the entire cause of action,⁵⁴ or on overruling a demurrer to a plea or defense which answers the whole declaration or complaint and is a defense to the entire cause of action.⁵⁵ So, too, final judgment may be rendered for defendant on overruling a demurrer to a plea which constitutes a complete defense to the action, though issue is joined on another plea and the facts are found in favor of the plaintiff.⁵⁶ But this rule applies only where there are

to proceed under this section. *Goldsborough v. Hewitt*, 23 Okla. 66, 99 Pac. 907. **S. C.**—Code Civ. Proc., §193. **S. D.**—Code Civ. Proc., §149. **Wis. St.**, 1898, §2686. **Wyo.**—Comp. St., 1910, §4384.

Where a demurrer is sustained on this ground, it is the duty of the court to so state in order to afford plaintiff an opportunity to take advantage of this statute. Failing to do so, the supreme court will presume that the demurrer was sustained on some other ground. *Whitley v. St. Louis, E. R. & W. R. Co.*, 29 Okla. 63, 116 Pac. 165; *Owen v. City of Tulsa*, 27 Okla. 264, 111 Pac. 320.

49. *Miss. Code*, 1906, §598; *Tenn. Shannon's Code*, §6136.

50. *Burns' Ann. St.*, 1908, §346; *Booneville Nat. Bank v. Blakey*, 166 Ind. 427, 76 N. E. 529; *Coddington v. Canaday*, 157 Ind. 243, 61 N. E. 567; *Kinsley v. Kinsley*, 150 Ind. 67, 49 N. E. 819; *Armstrong v. Dunn*, 143 Ind. 433, 41 N. E. 540; *Cargar v. Fee*, 140 Ind. 572, 39 N. E. 93; *Board of Comrs. v. Redifer*, 32 Ind. App. 93, 69 N. E. 305.

51. **U. S.**—*Giant Powder Co. v. California Powder Works*, 98 U. S. 126, 25 L. ed. 77. **Ill.**—*Bissell v. City of Kankakee*, 64 Ill. 249; *Merker v. Belleville Distillery Co.*, 122 Ill. App. 326. **Md.**—*Barber v. State*, 24 Md. 383.

On sustaining a demurrer to affirmative defenses, where an issue of fact

raised by a denial remains. *Mael v. Stutsman (Ore.)*, 117 Pac. 1093; *Levy v. City of Seattle*, 61 Wash. 540, 112 Pac. 639.

It is error to render final judgment for plaintiff on sustaining a demurrer to one of defendant's pleas while demurrers to other pleas remain undisposed of, and this is true although the latter pleas might have been treated as nullities, since by demurring thereto plaintiff treats them as defective merely. *Mayfield v. Barnard*, 43 Miss. 270.

52. *Walter v. County Comrs.*, 35 Md. 385.

53. Where defendant refuses to plead further, though there are denials in the answer. *Seattle Cedar Lumb. Mfg. Co. v. City of Ballard*, 50 Wash. 123, 96 Pac. 956.

54. *Clearwater v. Meredith*, 1 Wall. (U. S.) 25, 17 L. ed. 604; *Lowenstein v. Fairmont Life Ins. Co.*, 122 Ill. App. 632; *Weiss v. Binnian*, 78 Ill. App. 292.

55. **Ill.**—*Bissell v. City of Kankakee*, 64 Ill. 249. **Ind.**—*Kern v. Saul*, 14 Ind. App. 72, 42 N. E. 496. **Ia.**—*Wallace v. Council Bluffs Ins. Co.*, 66 Iowa 139, 23 N. W. 302. **Md.**—Where the declaration contains but one count. *Williams v. Walters*, 97 Md. 113, 54 Atl. 767; *Boehm v. Mayor, etc., of Baltimore*, 61 Md. 259. **Mo.**—*Henley v. Henley*, 93 Mo. 95, 5 S. W. 701.

56. *Clark v. Mutual Reserve Life Ins. Co.*, 23 App. Cas. (D. C.) 546.

two distinct pleas, and not the same plea under different forms.■

5. Right To Again Raise the Same Questions. — Except in a few jurisdictions,⁵⁸ after demurrer overruled, the same objection cannot again be taken by answer,⁵⁹ or objection to evidence,⁶⁰ or by motion for nonsuit,⁶¹ or in arrest of judgment,⁶² unless the pleading is insufficient to support a judgment.⁶³ It has been held, however, that the court is not thereby precluded from directing a verdict in favor of the demurrant on the ground that the pleadings, the evidence, and

57. Not where there is a plea of the general issue and one which merely amounts to the general issue. *Clark v. Mutual Reserve Life Ins. Co.*, 23 App. Cas. (D. C.) 546.

58. In Connecticut, in an equity case, overruling a demurrer on the ground of laches was held not to prevent demurrant from again raising the question upon the trial when all the facts could be brought before the court. *Snelling & Potter v. Merritt* (Conn.), 81 Atl. 1039.

In Iowa the code provides that "when a demurrer shall be overruled and the party demurring shall answer or reply, the ruling on the demurrer shall not be considered as an adjudication of any question raised by the demurrer; and in such case the sufficiency of the pleading thus attacked shall be determined as if no demurrer had been filed." Code, §3564; *Ware v. Leffert*, 151 Iowa 17, 130 N. W. 793.

The ruling on the demurrer does not become the law of the case, and the same questions may be raised at subsequent stages of the procedure as though no such ruling had been made. Pleading over does not waive the right to again raise the question in some other manner. *Back v. Back*, 148 Iowa 223, 125 N. W. 1009; *Marshall Ice Co. v. La Plant*, 136 Iowa 621, 111 N. W. 1016, 12 L. R. A. (N. S.) 1073; *Frum v. Keeney*, 109 Iowa 393, 80 N. W. 507.

If the petition does not state a cause of action the objection may again be taken by motion in arrest. *Decatur v. Simpson*, 115 Iowa 348, 88 N. W. 839.

The overruling of a demurrer, to the petition by one judge does not preclude another judge from holding it insufficient on a motion for judgment at the close of the plaintiff's evidence. *McClain v. Capper*, 98 Iowa 145, 67 N. W. 102.

Kansas.—"Though the court has overruled a demurrer, a party defendant may, in the same trial, object to the reception of evidence under the petition, and thus again secure the attention of the court to and challenge its judgment upon the same question raised by the demurrer; and if the court overrules its objection, it may still raise the question, before final judgment against it, by a motion for a new trial." *Goodrich v. Board of Comrs.*, 47 Kan. 355, 27 Pac. 1006, 18 L. R. A. 113.

The court may again consider the sufficiency of the pleading on a motion for judgment on the pleadings. *Sherburne v. Strawn*, 52 Kan. 39, 34 Pac. 405.

59. *Sams Automatic Car Coupler Co. v. League*, 25 Colo. 129, 54 Pac. 642.

60. Excluding evidence to support an allegation to which a demurrer has previously been overruled is error where the pleader is not first given an opportunity to amend. *Creek v. McManus*, 13 Mont. 152, 32 Pac. 675.

Where a general demurrer is overruled by one judge another before whom the trial is had cannot properly sustain an objection to the introduction of any evidence on the ground that the petition does not state a cause of action. *Marvin v. Weider*, 31 Neb. 774, 48 N. W. 825.

61. Even where pleading over does not prevent him from questioning the ruling on appeal. *Cook v. Morris*, 66 Conn. 196, 33 Atl. 994.

62. *Reavely v. Harris*, 239 Ill. 526, 88 N. E. 238; *Langan v. Enos Fire Escape Co.*, 233 Ill. 308, 84 N. E. 267; *Quincy Coal Co. v. Hood*, 77 Ill. 68; *Leathe v. Thomas*, 109 Ill. App. 434, affirmed 218 Ill. 246, 75 N. E. 810.

63. *McGann v. People*, 194 Ill. 526, 62 N. E. 941, reversing 97 Ill. App. 587; *Stearns v. Cope*, 109 Ill. 340.

the law will not sustain a verdict against him.⁶⁴ It has been held that the overruling of a general demurrer precludes the demurrant from thereafter taking advantage of defects of form by motion to make more definite and certain.⁶⁵

In equity a decree overruling a demurrer tests and determines the sufficiency of the pleading as determined by the demurrer.⁶⁶ It is generally held, however, that the court may overrule the demurrer and reserve to defendant the benefit thereof until final hearing.⁶⁷

E. RIGHT TO SET ASIDE OR MODIFY RULING.—As a general rule a mere order sustaining or overruling a demurrer may be set aside at any time before judgment,⁶⁸ or may be disregarded in entering judgment.⁶⁹ It has, however, been held that, where a demurrer in an equity case is overruled without leave to rely on it in the answer, the chancellor cannot reverse his ruling on the hearing on the merits.⁷⁰

F. ASCERTAINMENT OF DAMAGES.—Where final judgment is rendered on demurrer in favor of a party claiming affirmative relief, he may ordinarily proceed by inquest of damages as on default.⁷¹ A reference may be ordered as in other cases if necessary.⁷²

64. *Kleckner v. Turk*, 45 Neb. 176, 63 N. W. 469.

65. *Caldwell v. Brown*, 6 Ohio C. C. 794.

66. *Turner v. Durr* (Ala.), 55 So. 230.

67. *Snyder v. De Forest Wireless Tel. Co.*, 154 Fed. 142.

In such case it is better practice to make a special order to that effect, but when the court does not take the bill as confessed, and appoints a master to hear the case on the merits, he will be held to have intended to reserve the benefit of the demurrer. *Town of Westminster v. Willard*, 65 Vt. 266, 26 Atl. 952.

Whether or not this shall be done is discretionary with the chancellor. *State v. Massey*, 72 Vt. 210, 47 Atl. 834.

Where the questions are reserved, going to trial on the merits after demurrer overruled is not a waiver. *Town of Westminster v. Willard*, 65 Vt. 266, 26 Atl. 952.

68. Ill.—*Dowie v. Priddle*, 216 Ill. 553, 75 N. E. 243, affirming 116 Ill. App. 184; *Fort Dearborn Lodge v. Klein*, 115 Ill. 177, 3 N. E. 272. Ind.—*First Nat. Bank v. Williams*, 126 Ind. 423, 26 N. E. 75. Ia.—*Blackett v. Ziegler*, 147 Iowa 167, 125 N. W. 874. Ky.—*Miller v. Rice*, 9 Ky. L. Rep. (abstract) 620; *Baker & Rubel v. Whips*, 6 Ky. L. Rep. 307.

A ruling sustaining a demurrer is not the law of the case so as to preclude the court from overruling a sec-

ond one after an amendment which adds no material averment to the pleading, but if there is any inconsistency in the two rulings, the last prevails. "Parties to a litigation have no vested right in the court's mistakes to prevent their correction at any time before final judgment is entered." *Darling v. Blazek*, 142 Iowa 355, 120 N. W. 961.

Though the erroneous order was made by another judge. *Fort Dearborn Lodge v. Klein*, 115 Ill. 177, 3 N. E. 272.

69. The court may subsequently disregard an erroneous ruling sustaining a demurrer. *Stevenson v. Flournoy*, 89 Ky. 561, 13 S. W. 210; *Alexander v. De Kermel*, 81 Ky. 345.

Where the court merely files an opinion to the effect that the bill will be dismissed in part, but makes no order to that effect, he may ignore it and overrule the demurrer. *Shipley v. Jacob Tome Institute*, 99 Md. 520, 58 Atl. 200.

70. *Boyd v. Sims*, 87 Tenn. 771, 11 S. W. 948.

71. Idaho.—Rev. Codes, §4409. Ind.—*Burns' Ann. St.*, 1908, §350; *Miller v. Royce*, 60 Ind. 189. Ia.—Code, §3565. Me.—*Hanley v. Sutherland*, 74 Me. 212. Miss.—See Code, 1906, §811. Tenn.—*Shannon's Code*, §§4681, 4658, 6082. Utah.—Comp. Laws, 1907, §3171.

72. Idaho Rev. Codes, §4409. See the title "References."

G. EFFECT OF FINAL JUDGMENT. — A dismissal of a bill in equity carries with it a cross-bill.⁷³ The effect of a judgment on demurrer as *res adjudicata* is fully treated in a separate article.⁷⁴

XVIII. RIGHT TO AMEND OR PLEAD OVER. — A. RIGHT TO AMEND AFTER DEMURRER SUSTAINED. — 1. In Equity. — In equity, leave may be granted to amend where the defect can be remedied in that manner and substantial justice requires it, the matter being largely discretionary.⁷⁵ Leave may be denied where the pleader has been guilty of laches.⁷⁶ As a rule terms will not be imposed where the demurrer is sustained on a ground assigned *ore tenus*.⁷⁷ A party cannot complain that leave to amend was not granted where he did not ask for it.⁷⁸

2. At Law and Under the Codes. — In jurisdictions where the common-law system of pleading prevails the matter of allowing an amendment is discretionary with the court.⁷⁹

Under the codes and practice acts of the various states on sustaining a

73. In equity, where defendants demur and also file an answer in the nature of a cross-bill, sustaining the demurrer and dismissing the bill carries with it the cross-bill, and it is error to retain the latter for trial. *Johansen v. Traver, Cashin & Co.*, 74 Ga. 402.

See generally the titles "Cross-Bills;" "Dismissal and Nonsuit."

74. See the title "Judgment."

75. U. S.—*National Bank v. Carpenter*, 101 U. S. 567, 25 L. ed. 815; *McKemy v. Supreme Lodge, A. O. U. W.*, 180 Fed. 961, 104 C. C. A. 117. Md.—On motion, on such terms as may be deemed reasonable. Pub. Gen. Laws, art. 16, §152, p. 425. See *Keerl v. Keerl*, 28 Md. 157. Mass.—*Phoenix Ins. Co. v. Abbott*, 127 Mass. 558; *Merchants Bank v. Stevenson*, 7 Allen 489. Pa.—Equity rule 35; *Darlington v. Clemson*, 41 Pa. Super. Ct. 309. Va. *Tidball v. Shenandoah Nat. Bank*, 93 Va. 768, 37 S. E. 318.

Joining an improper party plaintiff is curable by amendment. *Hubbard v. Manhattan Trust Co.*, 87 Fed. 51, 30 C. C. A. 520.

The chancellor's ruling will not be reversed except for an abuse of discretion. *Foss v. People's Gas Light & Coke Co.*, 241 Ill. 238, 89 N. E. 351, affirming 145 Ill. App. 215.

The bill should not be dismissed unless the defects cannot be cured by amendment, or the complainant declines to amend. *Brassington v. Wal-*

dron, 143 Mich. 364, 107 N. W. 100; *Lamb v. Jeffrey*, 41 Mich. 719, 3 N. W. 204.

The proper order is demurrer sustained, with leave to amend, and upon failure to amend, bill dismissed. *Fooks v. Purnell*, 101 Md. 321, 61 Atl. 582.

In *Foss v. People's Gas Light & Coke Co.*, 241 Ill. 238, 89 N. E. 351, affirming 145 Ill. App. 215, refusal of leave to amend a bill after a second demurrer had been sustained was held not to be an abuse of discretion.

Where a decree sustaining a demurrer is affirmed, leave will not be granted to withdraw the demurrer and defend on the merits. *Bailey v. Holden*, 50 Vt. 14.

76. *Merchants Bank v. Stevenson*, 7 Allen (Mass.) 489.

77. *Taylor v. Holmes*, 14 Fed. 498; *Pearson v. Tower*, 55 N. H. 215.

78. Mich.—*Aldine Mfg. Co. v. Phillips*, 118 Mich. 162, 76 N. W. 371, 42 L. R. A. 531. Pa.—*Darlington v. Clemson*, 41 Pa. Super. Ct. 309. W. Va. *Pickens' Exrs. v. Kniseley*, 36 W. Va. 794, 15 S. E. 997.

79. Such discretion will not be interfered with unless plainly abused. *McKemy v. Supreme Lodge, A. O. U. W.*, 180 Fed. 961, 104 C. C. A. 117.

The usual course is to permit plaintiff to withdraw his joinder in a demurrer to the whole declaration and to amend, if the defect can be cured by amendment. *Hart v. Baltimore & O. R. Co.*, 6 W. Va. 336.

demurrer leave may be granted to the unsuccessful party to amend,⁸⁰

80. Alabama.—Code, 1907, §5370; *Ellis & Co. v. Brannon*, 161 Ala. 573, 49 So. 1034.

Arkansas.—Kirby's Dig., §6095; *Adams v. Primmer* (Ark.), 144 S. W. 522.

An amendment should be permitted almost as a matter of course. *Dickerson v. Hamby*, 96 Ark. 163, 131 S. W. 674.

California.—Code Civ. Proc., §472.

Plaintiff has not an absolute right to amend, but the matter is one of grace. *Billesbach v. Larkey* (Cal.), 120 Pac. 31; *Buckley v. Howe*, 86 Cal. 596, 25 Pac. 132.

The matter is discretionary, and the court's action will not be interfered with on appeal unless a clear abuse of discretion is shown. *Billesbach v. Larkey* (Cal.), 120 Pac. 31; *Stewart v. Douglass*, 148 Cal. 511, 83 Pac. 699; *Loeffler v. Wright*, 13 Cal. App. 224, 109 Pac. 269.

Refusal of leave cannot be held to be an abuse of discretion where there is nothing in the record to show that plaintiff asked leave to amend in any designated particular, or in any way specified the nature of any proposed amendment. *Marsh v. Lott*, 156 Cal. 643, 105 Pac. 968; *Bell v. Bank of California*, 153 Cal. 234, 94 Pac. 889; *Kleinclaus v. Dutard*, 147 Cal. 245, 81 Pac. 516.

If the complaint states a cause of action, it is an abuse of discretion apparent on the face of the record to sustain a demurrer on any ground without leave to amend. *Schaaake v. Eagle Automatic Can Co.*, 135 Cal. 472, 63 Pac. 1025, 67 Pac. 759.

Connecticut.—Gen. St., 1902, §611; *Hunter's Appeal*, 71 Conn. 189, 41 Atl. 557; *Village of Chester v. Leonard*, 68 Conn. 495, 37 Atl. 397.

Idaho.—In justice court, if a demurrer to the complaint or answer is sustained, plaintiff or defendant may amend within such time, not exceeding two days, as the court allows. Rev. Code, §4673.

Indiana.—Ann. St., 1908, §347.

Iowa.—Code, §3565; *Rosenbaum v. Council Bluffs Ins. Co.*, 37 Fed. 7.

Kansas.—Gen. St., 1909, §5735.

Where an answer had been held good when attacked at two previous

trials, it was held error to refuse leave to amend on sustaining a demurrer thereto. *Leitz v. Rayner & Co.*, 37 Kan. 470, 15 Pac. 571.

Kentucky.—Code Civ. Pr., §94; *Lucile Mining Co. v. Fairbanks, Morse & Co.*, 27 Ky. L. Rep. 1100, 87 S. W. 1121.

Maine.—Rev. St., 1903, c. 84, §35; *Bradbury v. Tarbox*, 95 Me. 519, 50 Atl. 710; *Goodhue v. Luce*, 82 Me. 222, 19 Atl. 440; *Plaisted v. Walker*, 77 Me. 459; *Maine Central Institute v. Haskell*, 71 Me. 487; *Wakefield v. Littlefield*, 52 Me. 21.

On sustaining a demurrer filed at the second term to a plea in bar, the judge at *nisi prius* has discretionary power to permit defendant, in furtherance of justice, to plead anew. *Mayberry v. Brackett*, 72 Me. 102.

The motion for leave to plead anew in such case must be made at the term when the demurrer is passed upon, and before exceptions. *Mayberry v. Brackett*, 72 Me. 102.

On sustaining a demurrer to a plea *puis darrein continuance*, the court has discretionary power to award a repleader on proper terms where justice seems to require it. *Augusta v. Moulton*, 75 Me. 551.

Massachusetts.—The statute provides that "the court shall make an order relative to the filing of an answer or replication or a trial of the facts." Rev. Laws, 1902, c. 173, §17, p. 1553.

May allow the declaration to be amended. *Moran v. Dunphy*, 177 Mass. 485, 59 N. E. 125.

If an answer in abatement is overruled on demurrer, "the defendant, within such time as the court orders, shall in a personal action answer, and in a real or mixed action plead, to the merits." Rev. Laws, 1902, c. 173, §19, p. 1553.

Refusal to allow an amendment is discretionary. *Pay v. Boston & W. St. R. Co.*, 196 Mass. 329, 82 N. E. 7.

Minnesota.—Rev. Laws, 1905, §4156. Though, on reversing an order overruling a demurrer, the supreme court has power to grant leave to amend, it will rarely do so, but will leave the matter of amendment to be decided by the trial court. *Haven v. Place*, 28 Minn. 551, 11 N. W. 117; *Farley v.*

on proper terms,⁸¹ and this is particularly true in the case of special demurrers going to defects of form.⁸² That several demurrers have

Kittson, 27 Minn. 102, 6 N. W. 450, 7 N. W. 267.

Mississippi.—Scharff v. Lisso, 63 Miss. 213; Metcalf v. Grover, 55 Miss. 145.

Where plaintiff's demurrer to a plea is sustained, "the judgment shall be that defendant do answer over to the declaration; but he shall be compelled to plead to the merits, and the plaintiff shall not be delayed of his trial." Miss. Code, 1906, §756; Tittle v. Bonner, 53 Miss. 578.

Respondent ouster is the proper judgment in such case, though issue has been joined on other pleas on file. Drane v. Board of Police, 42 Miss. 264.

Missouri.—Rev. St., 1909, §§1803, 1824; Munford v. Keet, 154 Mo. 36, 55 S. W. 271; Comstock v. Davis, 51 Mo. 569.

Montana.—Rev. Codes, 1907, §6591. In justice court. Mont. Rev. Codes, 1907, §7012.

Nebraska.—Comp. St., 1911, §6717; Merrill v. Wright, 54 Neb. 517, 74 N. W. 955.

In the county court. Naracong v. Graves, 8 Neb. 443.

On sustaining a demurrer for non-joinder of parties, the suit should not be dismissed without giving plaintiff an opportunity to bring them in. Alexander v. Thacker, 30 Neb. 614, 46 N. W. 825.

New York.—Code Civ. Proc., §497. In justice court. N. Y. Code Civ. Proc., §2939.

North Carolina.—Rev., 1905, §505.

North Dakota.—Rev. Codes, 1905, §6882.

Ohio.—Code, 1910, §11,365.

Oklahoma.—Comp. Laws, 1909, §5681.

Oregon.—L. O. L., §101; Sears v. Dunbar, 50 Ore. 36, 91 Pac. 145.

After remand on affirming a decree sustaining a demurrer, the trial court has discretionary power to allow an amendment. Fowle v. House, 30 Ore. 305, 47 Pac. 787.

South Carolina.—Code Civ. Proc., §193.

South Dakota.—Code Civ. Proc., §149.

Tennessee.—Shannon's Code, §4656.

Washington.—In State v. Superior Court, 62 Wash. 556, 114 Pac. 427, it was held not error to refuse leave to amend where application was not made until nearly two years after the demurrer was sustained.

Wisconsin.—St., 1898, §2686.

The order should not provide for judgment absolutely, but should be with leave to plead over, and should grant a reasonable time therefor. Schmidt v. Joint School Dist., 146 Wis. 635, 132 N. W. 583.

Wyoming.—Comp. St., 1910, §4439.

Is discretionary. Bonnifield v. Price, 1 Wyo. 172.

81. Minn. Rev. Laws, 1905, §4156; Ore., L. O. L., §101.

Upon Terms.—Mass. Rev. Laws, 1902, c. 173, §49, p. 1558; Wakefield v. Littlefield, 52 Me. 21.

Upon Such Terms as May Be Just. Mont.—Rev. Codes, 1907, §6591. N. Y. Code Civ. Proc., §497. N. C.—Rev., 1905, §506. N. D.—Rev. Codes, 1905, §6882. S. C.—Code Civ. Proc., §193. Wis.—St., 1898, §2686.

With or without costs, as the court may order. Ark.—Kirby's Dig., §6095. Kan.—Gen. St., 1909, §5735. Neb. Comp. St., 1911, §6717. Ohio.—Code, 1910, §11,365. Okla.—Comp. Laws, 1909, §5681. Wyo.—Comp. St., 1910, §4439.

On Payment of Costs.—Ind.—Upon such terms as the court may direct, and on payment of costs occasioned by the demurrer. Burns' Ann. St., 1908, §347. Ky.—Must in all cases pay the costs resulting from the demurrer. Civ. Code Pr., §94. Me.—Upon payment of costs from the time when the demurrer was filed. Rev. St., 1903, c. 84, §35. Bradbury v. Tarbox, 95 Me. 519, 50 Atl. 710. Mo.—Must pay double costs where a second pleading is held insufficient. Rev. St., 1909, §1825.

Costs should not be granted absolutely on sustaining a demurrer, but only as a condition of pleading over. Schmidt v. Joint School Dist., 146 Wis. 635, 132 N. W. 583.

82. Brunswick & W. R. Co. v. Hart Lumb. Co., 6 Ga. App. 583, 65 S. E. 299.

"Demurrers for ambiguity and un-

been previously filed and sustained does not necessarily preclude the allowance of further amendments in the absence of a statutory provision to the contrary.⁸³

By statute in some states no further amendment may be allowed after a second⁸⁴ or third⁸⁵ pleading has been held insufficient on demurrer.

certainly are in aid of the pleading, and contemplate an amendment in the particulars specified in them." *Schaafe v. Eagle Automatic Can Co.*, 135 Cal. 472, 63 Pac. 1025, 67 Pac. 759.

Plaintiff to meet a special demurrer may amend as a matter of course, or may be compelled to do so on pain of dismissal. *Wrightsville & T. R. Co. v. Vaughan*, 9 Ga. App. 371, 71 S. E. 691.

On the hearing the court may give opportunity to amend to avoid a dismissal. *Sonders v. Carolina Cement Co.*, 3 Ga. App. 99, 59 S. E. 467.

"The proper judgment on a special demurrer going only to the meagerness of the allegations is not a peremptory judgment of dismissal of the action, but a judgment requiring plaintiff to amend and to make his petition more certain in the particulars wherein he has been delinquent, and then if he refuses to amend, the petition may be dismissed, if the delinquency relates to the entire cause of action." *McSwain v. Edge*, 6 Ga. App. 9, 64 S. E. 116.

In *Buchan v. Williamson*, 131 Ga. 501, 62 S. E. 815, it was held error to refuse a request that if special demurrers were sustained, a time within which amendments could be made should be designated in the order, and to sustain a demurrer containing both general and special grounds generally in the absence of counsel and dismiss the case without giving any opportunity to amend.

After a special demurrer for misjoinder of counts has been sustained plaintiff may be permitted to amend. *Hudson v. McNear*, 99 Me. 406, 59 Atl. 546.

83. May allow an amendment after two special demurrers sustained on terms. *Wilbur v. Abbot*, 6 Fed. 817.

In Missouri, the statute provides that where the second pleading is held insufficient, the party filing it shall pay double costs and file a like pleading instant, or in default thereof the court shall proceed as if no second

pleading had been filed. Rev. St., 1909, §1825.

84. On sustaining a demurrer to a plea filed after sustaining a demurrer to a former one, "further leave to plead shall not be granted." Miss Code, 1906, §756.

Respondent ouster is not the proper judgment in such case. *Tittle v. Bonner*, 53 Miss. 578.

This provision applies only where the first demurrer is sustained by the court and not where defendant confesses it and pleads over. *State v. Morgan*, 59 Miss. 349.

85. In Missouri, the statute provides that if a third pleading is held insufficient on demurrer or motion to strike out, the party filing it shall pay treble costs, and no further pleading shall be filed, but judgment shall be rendered. Rev. St., 1909, §1826; *Tapana v. Shaffray*, 97 Mo. App. 337, 71 S. W. 119.

The statute is mandatory and leaves no discretion to the court. *Beardslee v. Morgner*, 73 Mo. 22.

It is penal, and the judgment given thereunder must not exceed its express provisions. It should be the usual judgment on demurrer, with treble costs, and dismissing the petition, thus leaving plaintiff free to institute a new suit. Rendering a final judgment on the merits is error. *Gordon v. Burris*, 125 Mo. 39, 28 S. W. 191; *Swing v. Karges Furniture Co.*, 150 Mo. App. 574, 131 S. W. 153; *Bennett v. Southern Bank*, 61 Mo. App. 297.

It is equally applicable where previous petitions have been adjudged insufficient on appeal from rulings holding them sufficient. *Sidway v. Missouri Land & Livestock Co.*, 197 Mo. 359, 94 S. W. 855.

It applies only when the pleading has been adjudged insufficient on demurrer or motion to strike out, and not where its sufficiency has been tested by objections to evidence. *Spurlock v. Missouri Pac. R. Co.*, 93 Mo. 13, 5 S. W. 15.

It does not cover voluntary amend-

Where leave is required, a party desiring to amend must apply therefor, and if he does not do so he cannot complain that leave was not granted.⁸⁶ It has been held that where a demurrer is sustained to a separate cause of action or defense, leave to amend relates only to the part so attacked.⁸⁷

The pleader is not required to amend, but may stand on his pleading and suffer judgment,⁸⁸ and by so doing he does not lose the right to claim error in the ruling.⁸⁹

Time. — In some states where time to amend is given, it runs from the service of notice of the decision or order,⁹⁰ or, if the party against whom the decision is made is in court, from the making of the decision or order.⁹¹ Until the expiration of the time allowed, the case is deemed pending in the court that sustained the demurrer, though no amended pleading has in fact been filed.⁹²

Sufficiency of Amendment. — An amended pleading substantially the same as the original one,⁹³ or which does not obviate the defects reached by the demurrer,⁹⁴ may be stricken out.

ments. *Barton Bros. v. Martin*, 54 Mo. App. 134.

It does not apply where the third amended petition states a cause of action after defendant's motion to strike out a portion of it has been sustained. *Roth Tool Co. v. Champ Spring Co.*, 122 Mo. App. 603, 84 S. W. 183.

Demurrant does not waive his rights by answering, particularly where he moves to strike the pleading and in arrest of judgment and saves exceptions to such rulings. *Beardslee v. Morgan*, 73 Mo. 22. See also, *Roth Tool Co. v. Champ Spring Co.*, 108 Mo. App. 618, 84 S. W. 183; *Dyer v. Hughes*, 89 Mo. App. 484.

As to costs in such case see, *Sidway v. Missouri Land & Livestock Co.*, 197 Mo. 359, 94 S. W. 855.

86. *Wilson v. Com.*, 99 Ky. 167, 35 S. W. 274; *Devoss v. Gray*, 22 Ohio St. 159.

87. Though it is proper to serve an entirely new pleading, the other parts must be realleged as they originally stood. *Genung v. Hawkes*, 132 N. Y. Supp. 274.

88. *Ellis & Co. v. Brannen*, 161 Ala. 573, 49 So. 1034; *Comstock v. Davis*, 51 Mo. 569.

See also, XVII, *supra*.

89. *O'Donnell v. Sargent*, 69 Conn. 476, 38 Atl. 216.

Plaintiff is not precluded from complaining of the sustaining of a demurrer to the declaration because he declines to amend and asks for a dis-

missal for the reason that he considers his pleading sufficient. *Davis v. Woods*, 95 Miss. 432, 48 So. 961.

90. Cal.—Code Civ. Proc., §476. Mont.—Rev. Codes, 1907, §6594. Utah. Comp. Laws, 1907, §3009.

91. Mont. Rev. Codes, 1907, §6594; Utah Comp. Laws, 1907, §3009.

92. *Ex parte Joutsen*, 154 Cal. 540, 98 Pac. 391; *Ex parte Barry*, 85 Cal. 603, 25 Pac. 256, 20 Am. St. Rep. 248; *Leavenworth, N. & S. R. Co. v. Wilkins*, 45 Kan. 674, 26 Pac. 16.

93. Ark.—*McWhorter v. Andrews*, 53 Ark. 307, 13 S. W. 1099; *Goodwin v. Robinson*, 30 Ark. 535. Colo.—*Enright v. Midland Sampling & Ore Co.*, 33 Colo. 341, 80 Pac. 1041; *Heaton v. Myers*, 4 Colo. 59. Fla.—*Hays v. Weeks*, 57 Fla. 73, 48 So. 997. Ia. *Town of Waukon v. Strouse*, 74 Iowa 547, 38 N. W. 408. Neb.—*Reed v. Reed*, 70 Neb. 779, 98 N. W. 73.

It is error to strike an amended complaint which states a cause of action. *Hays v. Peavey*, 43 Wash. 163, 86 Pac. 170.

If the amended petition differs in any material respect from the original, it is error to strike it from the files, but such error is not prejudicial unless the amended petition states a cause of action. *Wheeler v. Barker*, 51 Neb. 846, 71 N. W. 750.

94. *Blackett v. Ziegler*, 147 Iowa 167, 125 N. W. 874.

By answering the amended petition defendant accepts the amendment as

After amendment the original pleading and the demurrer thereto cease to be a part of the record for the purposes of the trial, and the cause stands for hearing or trial on the amended pleading the same as if no other had ever been filed.⁹⁵

B. RIGHT TO PLEAD OVER AFTER DEMURRER OVERRULED. — 1. In Equity. — In equity, on the overruling of a demurrer, the respondent is ordinarily permitted to answer over to the merits,⁹⁶ on proper terms,⁹⁷ and if he fails to do so, the bill is taken as confessed.⁹⁸ Where

curing any defect in the original petition and elects to submit the issues on the merits. *Marshall Ice Co. v. La Plant* (Iowa), 111 N. W. 1016.

95. *Hume v. Woodruff*, 26 Ore. 373, 38 Pac. 191.

96. **U. S.**—Under equity rule 34 defendant has an absolute right to answer, and the court has no right to impose arbitrary conditions. *Jackson Skirt & Novelty Co. v. Rosenbaum*, 190 Fed. 197.

Connecticut.—*Lamphear v. Buckingham*, 33 Conn. 237.

Florida.—He is required to answer. *Gen. St.*, 1906, §1873.

Maine.—On good cause shown. *Portland, S. & P. R. Co. v. Boston & M. R. Co.*, 65 Me. 122.

In Maryland, unless the court is satisfied that the demurrer was intended for vexation and delay, "the defendant shall be required to answer the bill, or so much thereof as may be covered by the . . . demurrer, at such time as, consistently with justice and the rights of the defendant, the same can be reasonably done." *Pub. Gen. Laws*, art. 16, §153, p. 425.

An order overruling the demurrer and directing the demurrants to pay the costs of the demurrer and to answer within twenty days is in proper form. *Collateral Security Bank v. Fowler*, 42 Md. 393.

An unsuccessful appeal from the order will not deprive defendants of the privilege. *Trego v. Skinner*, 42 Md. 426.

Michigan.—Chancery rule 9, subd. c.; *Fitschen v. Olson*, 155 Mich. 320, 119 N. W. 3.

In Tennessee, the statute provides that defendant shall answer. *Code*, §6205.

In Mississippi, the statute provides that defendant shall answer within such reasonable time as the court may re-

quire, but an answer may be required to be filed at the same term, and should be where the demurrer is merely for delay. *Code*, 1906, §601; *Memphis & V. R. Co. v. Owens*, 60 Miss. 227.

In Virginia, defendant may, in the discretion of the court, be required to answer forthwith. *Code*, §3273.

In West Virginia, the statute provides that there shall be a rule upon defendant to answer forthwith. *Code*, §3850.

In Vermont.—On sustaining a decree overruling a demurrer it is discretionary with the supreme court to remand the case for trial or for final decree, but it will not remand for final decree without exceptional circumstances. *State v. Massey*, 72 Vt. 210, 47 Atl. 834; *Stewart v. Flint*, 57 Vt. 216. Leave denied. *Bailey v. Holden*, 50 Vt. 14.

97. On just and reasonable terms. *Portland, S. & P. R. Co. v. Boston & M. R. Co.*, 65 Me. 122.

In Maryland, the statute provides that demurrant "shall pay to the opposite party the sum of ten dollars, and the costs thereof, and be in contempt until the said sum of money and costs are fully paid, unless the court shall otherwise specially order." *Pub. Gen. Laws*, art. 16, §154, p. 425; *Collateral Security Bank v. Fowler*, 42 Md. 393.

The costs in such case are to be confined to those accruing on the demurrer. *Dennison v. Yost*, 61 Md. 139.

Terms may be imposed where the demurrer is frivolous. *Merrimac Mat-tress Co. v. Schlesinger*, 124 Fed. 237.

98. **Fla.**—*Gen. St.*, 1906, §1873. **Ill.** *Gage v. Griffin*, 103 Ill. 41. **Md.**—*Pub. Gen. Laws*, art. 16, §153, p. 425. **Tenn.** *Shannon's Code*, §6205.

Does not waive the objection that there is an adequate remedy at law. *Gage v. Griffin*, 103 Ill. 41.

an answer is filed with the demurrer, no order to answer over is necessary.⁹⁹

2. At Law and Under the Codes.—Under the common-law system of pleading, on the overruling of a demurrer the demurrant has no right to plead further.¹

Under the codes and practice acts of the various states where a demurrer is overruled the demurring party may generally plead over,²

99. *O'Hare v. Downing*, 130 Mass. 16.

1. *Lamphear v. Buckingham*, 33 Conn. 237.

2. **Ark.**—Kirby's Dig., §6144. **Cal.** Code Civ. Proc., §472. **Conn.**—Gen. St., 1902, §611; *Rogers v. Hendrick*, 82 Atl. 590; *Hunter's Appeal*, 71 Conn. 189, 41 Atl. 557. **Del.**—Laws, Vol. 17, c. 219.

In **Colorado**, the court is only authorized to proceed to final judgment in case the unsuccessful party declines or fails to plead over. *Green v. Underwood*, 86 Fed. 427, 30 C. C. A. 162.

If a demurrer is permitted to be filed out of time and is overruled, leave to plead over must be obtained, and the granting of such leave is discretionary. *Florence Oil & Refining Co. v. Interstate Nat. Bank*, 76 Fed. 888, 22 C. C. A. 604.

District of Columbia.—Code, §1533.

"The entry of judgment after a demurrer has been stricken off on the ground that it is frivolous is upon the theory that there really was no demurrer; hence, in such a situation §1533 does not apply." *Miller v. Ambrose*, 35 App. Cas. (D. C.) 75.

Idaho.—When a demurrer to the complaint is overruled and no answer is filed, the court may, upon such terms as may be just, allow one to be filed. Rev. Codes, §4228.

In justice court defendant may answer forthwith. *Idaho Rev. Codes*, §4673.

Illinois.—Granting or refusal of leave to withdraw the demurrer and plead is discretionary with the court where the application is made at the same term. *Herrington v. Stevens*, 26 Ill. 298; *Lowy v. Andreas*, 20 Ill. App. 521.

Where a party elects to abide by his demurrer, whether he shall afterwards be permitted to plead is discretionary. *Herrington v. Stevens*, 26 Ill. 298; *People v. O'Hair*, 29 Ill. App. 239.

Indiana.—May plead over. *Burns' Ann. St.*, 1908, §347. The judgment shall be that the party shall plead over. *Burns' Ann. St.*, 1908, §350.

On overruling defendant's demurrer it is error to enter final judgment without entering a rule to answer or ordering him to plead over, and without any refusal on his part to plead over. *Chicago & S. E. R. Co. v. Adams*, 12 Ind. App. 317, 39 N. E. 877.

Iowa.—Code, §3565; *Wapello State Sav. Bank v. Colton*, 143 Iowa 359, 122 N. W. 149.

"In general, judgment goes against the party whose pleading is held insufficient on demurrer only when he elects to stand on his pleading, or when, having asked leave to amend, he is in default for not doing so." *Williams v. Williams*, 115 Iowa 520, 88 N. W. 1057.

Kansas.—If the court is satisfied that he has a meritorious claim or defense and did not demur for delay. *Gen. St.*, 1909, §5732.

Kentucky.—Code Civ. Pr., §113.

The time to be given him within which to plead further is discretionary with the trial court, and its decision will not be revised unless there has been an abuse of discretion. *Cumberland & O. R. Co. v. Cumberland & O. R. Co.*, 4 Ky. L. Rep. 910.

Maine.—In the superior court, defendant, though he excepts, may plead anew within such time as the justice orders. *Rev. St.*, 1903, c. 79, §85.

If a demurrer to the declaration "is filed at the first term and is overruled, the defendant may plead anew on payment of costs from the time when it was filed, unless it is adjudged frivolous and intended for delay, in which case judgment shall be entered." *Rev. St.*, 1903, c. 84, §35; *Maine Central Institute v. Haskell*, 71 Me. 487.

Where the demurrer is not filed at the first term, leave to plead anew is not a matter of right, but the mat-

ter is discretionary with the trial justice, to whose ruling exceptions will not lie. *Winthrop Sav. Bank v. Blake*, 66 Me. 285.

Can only do so by leave of court and the opposite party. *Fryeburg v. Brownfield*, 68 Me. 145.

Maryland.—Pub. Gen. Laws, art. 75, §8, p. 1633.

Demurrer for want of jurisdiction. *Jordan v. Downey*, 40 Md. 401.

In **Massachusetts**, the court is required to make an order relative to the filing of an answer or replication, or a trial of the facts. Rev. Laws, 1902, c. 173, §§17, 1553.

Michigan.—*Tefft v. McNoah*, 9 Mich. 201.

Defendant is not entitled to plead over as a matter of right, particularly where his demurrer is held to be frivolous. Failure to permit him to do so will not be held an abuse of discretion where it does not appear that he asked leave, or made any showing of merits. *Wyckoff, Seamans & Benedict v. Bishop*, 98 Mich. 352, 57 N. W. 170.

Minnesota.—Rev. Laws, 1905, §4156.

It is not a matter of right. *Flaherty v. Minneapolis & St. L. R. Co.*, 39 Minn. 328, 40 N. W. 160, 1 L. R. A. 680.

In *Potter v. Holmes*, 74 Minn. 508, 77 N. W. 416, refusal of leave was held not to be an abuse of discretion.

Mississippi.—On overruling a demurrer to a replication final judgment as to that issue should be rendered unless plaintiff pleads over on leave. *Tittle v. Bonner*, 53 Miss. 578.

Missouri.—Defendant may withdraw his demurrer and answer. Rev. St., 1909, §1803.

Montana.—Rev. Codes, 1907, §6591. In justice court. Rev. Codes, 1907, §7012.

Nebraska.—If the court is satisfied that he has a meritorious claim or defense, and did not demur for delay. Comp. St., 1911, §6714.

Nevada.—If there is no answer filed, the court may permit one to be filed. Comp. Laws, §3162, as amended by St., 1907, c. 188, p. 412.

Defendant is not entitled to answer as a matter of absolute right. *Winter v. Winter*, 8 Nev. 129. Ordinarily he should be given an opportunity to

do so. *Easterbrook v. Upton*, 1 Nev. 398.

New York.—Code Civ. Proc., §497; *Alley v. Nott*, 111 U. S. 472, 4 Sup. Ct. 495, 28 L. ed. 491.

In justice court. Code Civ. Proc., §2939. In municipal court. *Weiner v. Yale Knitting Mills*, 138 App. Div. 533, 123 N. Y. Supp. 327.

North Carolina.—If it appears that the demurrer was interposed in good faith, the judge shall allow the party to plead over. Rev., 1905, §506.

Where defendant's demurrer is overruled, it is the duty of the court to permit him to answer unless the demurrer is frivolous. *Hurst v. Ad-dington*, 84 N. C. 143.

Leave is not necessary unless the demurrer is held to be frivolous. *Parker v. North Carolina R. Co.*, 150 N. C. 433, 64 S. E. 186; *Morgan v. Harris*, 141 N. C. 358, 54 S. E. 381.

The judgment should be that he answer over. *Olive v. Atlantic C. L. R. Co.*, 152 N. C. 279, 67 S. E. 583.

North Dakota.—If it appears that the demurrer was interposed in good faith. Rev. Codes, 1905, §6882.

Ohio.—If the court is satisfied that he has a meritorious claim or defense and did not demur for delay. Code, 1910, §11,362.

Oklahoma.—May reply or answer if the court be satisfied that he has a meritorious claim or defense, and did not demur for delay. Comp. Laws, 1909, §5678.

Oregon.—Is discretionary with the court if it appears that it was interposed in good faith. L. O. L., §101.

The discretion is a judicial discretion, not arbitrary and is always to be exercised in furtherance of justice. *Powell v. Dayton S. & G. R. Co.*, 14 Ore. 23, 12 Pac. 83.

South Carolina.—The court shall, unless it appears that the demurrer was interposed in bad faith, or for purposes of delay, allow the party to plead over on such terms as may be just. Code Civ. Proc., §193.

Whether leave shall be granted is discretionary with the court. *Cheraw & C. R. Co. v. White*, 14 S. C. 51.

Leave should ordinarily be granted. *Sprunt v. Gordon* (S. C.), 71 S. E. 1033.

South Dakota.—Discretionary if it

on such terms as may be just,³ such as the payment of costs,⁴ or requiring the case to proceed to trial at the pending term.⁵ An affidavit or showing of merits is sometimes required.⁶

In some jurisdictions it is held that leave to plead over will not be granted where a party stands on his demurrer and the ruling sustaining it is affirmed on appeal.⁷ In others a contrary rule prevails.⁸

appears that demurrer was interposed in good faith. Code Civ. Proc., §149.

Tennessee.—May plead over as a matter of right. Shannon's Code, §4657.

Utah.—If no answer is filed, the court may require one to be filed. Comp. Laws, 1907, §3004.

West Virginia.—On overruling a demurrer to a plea, leave to withdraw the demurrer and plead to the merits will be allowed as of course. *Chesapeake & O. R. Co. v. American Exchange Bank*, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449; *Camden Clay Co. v. Town of New Martinsville*, 67 W. Va. 525, 68 S. E. 118.

Wyoming.—Comp. St., 1910, §4436.

3. Cal.—Code Civ. Proc., §472. **Me.** *Portland, S. & P. R. Co. v. Boston & M. R. Co.*, 65 Me. 122. **Minn.**—Rev. Laws, 1905, §4156. **Nev.**—Comp. Laws, §3162, as amended by St., 1907, c. 188, p. 412. **Mont.**—Rev. Codes, 1907, §6591. **N. Y.**—Code Civ. Proc., §497. **N. C.**—Rev., 1905, §506. **N. D.**—Rev. Codes, 1905, §6882. **Ore.**—L. O. L., §101. **S. C.**—Code Civ. Proc., §193. **S. D.**—Code Civ. Proc., §149. **Utah.** Comp. Laws, 1907, §3004.

The court may attach such conditions to the order as the circumstances of the case and justice may require, and his action is discretionary and cannot be reviewed. *Tefft v. McNoah*, 9 Mich. 201.

The power to impose terms is neither arbitrary nor absolute. *Green v. Underwood*, 86 Fed. 427, 30 C. C. A. 162.

4. Ind.—On such terms as the court may direct, and on payment of costs occasioned by the demurrer. *Burns' Ann. St.*, 1908, §347. **Me.**—On payment of costs from the time when it is filed. *Rev. St.*, 1903, c. 84, §35. **N. J.** Costs of the demurrer. *Comp. St.*, 1910, p. 4126, §241. **S. C.**—*Lowry v. Jackson*, 27 S. C. 318, 3 S. C. 473; *Cheraw & C. R. Co. v. White*, 14 S. C. 51.

Wisconsin.—Imposition of \$10 costs as a condition precedent to answering held not an abuse of discretion. *Steele*

v. Korn, 137 Wis. 51, 118 N. W. 207, 120 N. W. 261.

It is error to require the payment of \$10 costs absolutely instead of as terms of answering over. *Case v. Fuldner*, 110 Wis. 568, 86 N. W. 163; *Schroeder v. Richardson*, 101 Wis. 529, 78 N. W. 178.

New York.—Where defendant is given leave to plead over on payment of costs, it is error for another justice to permit him to file an answer without paying such costs. *State Board of Pharmacy v. Lurie*, 112 N. Y. Supp. 1092.

5. Flaherty v. Minneapolis & St. L. R. Co., 39 Minn. 328, 40 N. W. 160, 1 L. R. A. 680.

Limiting the time for answering to ten days and directing that the case be on the trial calendar for the then current term. *Hunt v. Miller*, 101 Wis. 583, 77 N. W. 874.

6. "When a demurrer is overruled as frivolous, the demurrant as a defendant should not be permitted to answer in course, but only upon a showing to the reasonable satisfaction of the court that the demurrer was interposed in good faith, and that he has a valid defense." *McNeil v. Board of Suprs.*, 131 App. Div. 126, 115 N. Y. Supp. 215.

In Mississippi defendant will not be permitted to plead over unless he makes oath that he has a good and substantial defense, setting forth fully the nature thereof. Code, 1906, §755.

This provision is mandatory, and applies to all actions, whether on contract or in tort. *Feazell v. Staltzfus*, 98 Miss. 886, 54 So. 444.

See the title "Affidavits of Merits and Defense."

7. Boyer v. Sowles, 109 Mich. 481, 67 N. W. 530; *Estabrook v. Hughes*, 8 Neb. 496.

8. Will not render final judgment, but will remand the case with leave to apply to the lower court for leave to answer. *State v. Metschan*, 32 Ore.

Usually leave will not be granted by the appellate court in such case, but the case will be remanded with leave to apply to the court below.⁹

Except as the rule has been changed by statute, the demurrer must first be withdrawn before a pleading may be filed.¹⁰ Whether a demurrer shall be withdrawn is discretionary with the party filing it, and the court cannot compel him to withdraw it.¹¹

Where leave is required, a party desiring to plead over must ask for it or he cannot complain that it was not granted.¹²

Time to plead generally runs from the service of notice of the decision or order, or from the date thereof if the demurrant is in court.¹³

XIX. WAIVER OF DEMURRER AND OF RULING THEREON.

A. BY PLEADING OVER AFTER DEMURRER OVERRULED.—In the absence of a statutory provision to the contrary,¹⁴ pleading over after

372, 46 Pac. 791, 53 Pac. 1071, 41 L. R. A. 692.

9. Such application should be made to the court below after remand. *State v. Metschan*, 32 Ore. 372, 46 Pac. 791, 53 Pac. 1071, 41 L. R. A. 692; *Powell v. Dayton, S. & G. R. Co.*, 14 Ore. 22, 12 Pac. 83.

Where a demurrer which has been sustained in justice's court is overruled on appeal to the circuit court, the latter cannot permit demurrant to answer. *Waggy v. Scott*, 29 Ore. 386, 45 Pac. 774; *Forbis v. Inman*, 23 Ore. 68, 31 Pac. 204; *Currie v. Southern Pacific Co.*, 21 Ore. 566, 28 Pac. 884.

10. See, XII, D, *supra*.

11. *Lowy v. Andreas*, 20 Ill. App. 521; *Gammon v. Bunnell*, 22 Utah 421, 64 Pac. 958.

12. *Potter v. Holmes*, 72 Minn. 153, 75 N. W. 591.

It is not the duty of the court to offer the pleader leave to amend. If he desires it he must ask for it, and if leave is not obtained during the term, the judgment is final. *Jacobs v. New York Life Ins. Co.*, 71 Miss. 656, 15 So. 639.

On affirming a judgment entered on overruling a demurrer to the complaint, the supreme court has discretionary power, if the demurrer is withdrawn, to remand the case with directions to permit defendant to answer on proper terms, though no such request was made below. *Gammon v. Bunnell*, 22 Utah 421, 64 Pac. 958.

13. *Mont. Rev. Codes*, 1907, §6594; *Pearce v. Butte Electric R. Co.*, 40

Mont. 321, 106 Pac. 563; *Utah Comp. Laws*, 1907, §3009.

In California the code provides that the time shall run from the service of notice of the decision or order. *Cal. Code Civ. Proc.*, §476; *Chamberlain v. County of Del Norte*, 77 Cal. 150.

No written notice is necessary where defendant is present in court by his attorney when the demurrer is overruled. *Wall v. Heald*, 95 Cal. 364, 30 Pac. 551; *Barron v. Deleval*, 58 Cal. 95.

14. **In Alabama.**—Under Code, 1907, §5370, the party against whom a judgment on demurrer is rendered may plead over as a matter of right without waiving his privilege of assigning such judgment as error in an appellate court, unless he has subsequently had the benefit sought by the demurrer upon the trial of other equivalent issues. *Ellis & Co. v. Brannon*, 161 Ala. 573, 49 So. 1034.

In California, it is held that a demurrer to the complaint is not waived by filing an answer after it is overruled, in view of the code provision allowing a demurrer and answer to be filed at the same time. *Hurley v. Ryan*, 119 Cal. 71, 51 Pac. 20; *Curtis v. Bachman*, 84 Cal. 216, 24 Pac. 379.

In Connecticut, it is held that, under Gen. St., 1902, §611, giving an absolute right to plead over, no waiver results. *Scott v. Scott*, 83 Conn. 634, 78 Atl. 314; *Mechanics Bank v. Woodward*, 74 Conn. 689, 51 Atl. 1084; *Hunter's Appeal*, 71 Conn. 189, 41 Atl. 557.

Though the right of review is not

demurrer overruled is, in general, a waiver of the right to assign error on such ruling,¹⁵ particularly where the parties proceed to a trial on

waived, "it does not follow that a reason of appeal of that nature is to be decided without reference to the proceedings following the answer. If these, without the imposition of any new and improper burden upon the defendant, result in a judicial finding by which the facts alleged are supported, and their legal effect broadened by other facts not specifically alleged, but within the issue, this court is not to shut its eyes to the finding and consider the demurrer as if it had been the termination of the pleadings. Having now all the facts before us, we are not required to rule upon what would be the result of some of them standing alone." *Scott v. Scott*, 83 Conn. 634, 78 Atl. 314; *Mechanics Bank v. Woodward*, 74 Conn. 689, 51 Atl. 1084.

In Delaware, under Laws, Vol. 17, c. 219, the party pleading over after demurrer overruled is entitled to have the questions arising on the demurrer decided on appeal or error as fully to every intent as though he had not pleaded over, provided that at the time of filing the demurrer it shall be accompanied by a certificate of the counsel filing it that, in his opinion, it is good in law and is not filed for purposes of delay.

In Florida, pleading over or amending after judgment on demurrer is not a waiver of the right to review. Gen. St., 1906, §1693; *Franklin Phosphate Co. v. International Harvester Co. (Fla.)*, 57 So. 206; *Jones, Varnum & Co. v. Townsend's Admx.*, 21 Fla. 431.

In Indiana, the statute provides that "the answer or reply shall not be deemed to overrule the objection taken by demurrer. But no objection taken by demurrer and overruled shall be sufficient to reverse the judgment, if it appear from the whole record that the merits of the cause have been fairly determined." *Burns' Ann. St.*, 1908, §350.

Filing a reply is not a waiver of the right to question the overruling of a demurrer to the answer. *Bowen v. Woodfield*, 33 Ind. App. 687, 72 N. E. 162.

Kansas.—"A party who seeks to

have the ruling of the district court on a demurrer to the petition reviewed in this court, must elect to stand on the demurrer and at once bring the case to this court; or, an answer may be filed, and when the case is finally tried, if it is tried on the original petition, and then brought to this court by the party demurring, the ruling on the demurrer will be passed on here. If, after an adverse ruling on a demurrer to the petition, the defendant files an answer, he cannot be permitted to file a petition in error in this court to reverse the adverse ruling; he must await the result of the final trial." *Union Pac. R. Co. v. Estes*, 37 Kan. 229, 15 Pac. 157.

In Maryland, demurrant may plead over without withdrawing the demurrer, "and upon appeal or writ of error shall have the questions of law arising upon the demurrer decided and determined as fully to every intent as if the party demurring had not pleaded over." Pub. Gen. Laws, art 75, §8, p. 1633.

But pleading over and a trial on the merits may render the erroneous overruling of a demurrer harmless. *Edger v. Burke*, 96 Md. 715, 54 Atl. 986.

In Tennessee, no waiver results unless demurrant has subsequently had the benefit secured by the demurrer upon the trial of other equivalent issues. *Shannon's Code*, §4657.

In Utah, no waiver results. Comp. Laws, 1907, §2965; *Thomas v. Glendinning*, 13 Utah 47, 44 Pac. 652.

15. U. S.—*Malony v. Adsit*, 175 U. S. 281, 20 Sup. Ct. 115, 44 L. ed. 163; *Stanton v. Embry*, 93 U. S. 548, 23 L. ed. 983; *Campbell v. Wilcox*, 10 Wall. 421, 19 L. ed. 973; *Young v. Martin*, 8 Wall. 354, 19 L. ed. 418; *Aurora City v. West*, 7 Wall. 82, 19 L. ed. 42. See also, *Mexican Cent. R. v. Pinkney*, 149 U. S. 194, 13 Sup. Ct. 859, 37 L. ed. 699; *Oregon R. & N. Co. v. Dumas*, 181 Fed. 781, 104 C. C. A. 641; *Gulf, C. & S. F. R. Co. v. Washington*, 49 Fed. 347, 1 C. C. A. 286. Ark.—*Stoneman Zearing Lumb. Co. v. McComb*, 92 Ark. 297, 122 S. W. 648; *State v. Caldwell*, 70 Ark. 74, 66 S. W. 150; *Thompson v. Brazile*, 65 Ark. 495, 47 S. W. 299; *Tabor v.*

the merits,¹⁶ or where demurrant thereby supplies omissions in the pleading of his adversary to which the demurrer was directed.¹⁷ Going

Merchant's Nat. Bank, 48 Ark. 454, 3 S. W. 805; Jones v. Terry, 43 Ark. 230. **Colo.**—Sam's Automatic Car Coupler Co. v. League, 25 Colo. 129, 54 Pac. 642; Filmore v. Wells, 10 Colo. 228, 15 Pac. 343; Freas v. Engelbrecht, 3 Colo. 377. **Ill.**—Arnold v. Kiel, 252 Ill. 340, 96 N. E. 869; People v. Walker, Opera House Co., 249 Ill. 106, 94 N. E. 159; Finch & Co. v. Zenith Furnace Co., 245 Ill. 586, 92 N. E. 521; Mayer v. McCracken, 245 Ill. 551, 92 N. E. 355; Heimberger v. Elliott Frog & Switch Co., 245 Ill. 448, 92 N. E. 297; Nordhaus v. Vandalia R. Co., 242 Ill. 166, 89 N. E. 974, *affirming*, 147 Ill. App. 274; Deel v. Heiligenstein, 147 Ill. App. 307; Comrs. of Highways v. Comrs. of Highways, 142 Ill. App. 489; Leathe v. Thomas, 109 Ill. App. 434, *affirmed*, 218 Ill. 246, 75 N. E. 810. **Ia.**—Iowa-Minnesota Land Co. v. Conner, 136 Iowa 674, 112 N. W. 820; Marshall Ice Co. v. La Plant, 136 Iowa 621, 111 N. W. 1016, 12 L. R. A. (N. S.) 1073; Buchanan v. Blackhawk Coal Works, 119 Iowa 118, 93 N. W. 51; Geiser Mfg. Co. v. Krogman, 111 Iowa 503, 82 N. W. 938; Frum v. Keeney, 109 Iowa 393, 80 N. W. 507; Wyland v. Griffith, 96 Iowa 24, 64 N. W. 673. **Me.**—True v. Plumley, 36 Me. 466. **Mich.**—Kern v. Arbeiter Verein, 139 Mich. 233, 102 N. W. 746; Kraats v. Brush Electric Light Co., 82 Mich. 457, 46 N. W. 787; Ashton v. Detroit City Ry. Co., 78 Mich. 587, 44 N. W. 141; Wales v. Lyon, 2 Mich. 276. **Minn.**—Cook v. Kittson, 68 Minn. 474, 71 N. W. 670. **Mo.**—Hubbard v. Slavens, 218 Mo. 598, 117 S. W. 1104; Hanson v. Neal, 215 Mo. 256, 114 S. W. 1073; Hendricks v. Calloway, 211 Mo. 536, 111 S. W. 60; Hudson v. Calhoun, 193 Mo. 547, 91 S. W. 72; Duff v. Duff, 156 Mo. App. 247, 137 S. W. 909; Summers v. Keller, 152 Mo. App. 626, 133 S. W. 1180; Berkbigler v. Cape Girardeau & C. R. Co., 152 Mo. App. 543, 133 S. W. 1170; Wyler v. Ratican, 150 Mo. App. 474, 131 S. W. 155; Hendricks v. Butcher, 144 Mo. App. 671, 129 S. W. 431. **Mont.**—Lynch v. Bechtel, 19 Mont. 548, 48 Pac. 1112; Francisco v. Benepe, 6 Mont. 243, 11 Pac. 637. **Neb.**—Worrall Grain Co. v. Johnson, 83 Neb. 349, 119 N. W. 668; Palmer v. Caywood, 64

Neb. 372, 89 N. W. 1034; Citizens State Bank v. Pence, 59 Neb. 579, 81 N. W. 623; Lederer v. Union Sav. Bank, 52 Neb. 133, 71 N. W. 954; Buck v. Reed, 27 Neb. 67, 42 N. W. 894; Farrar & Wheeler v. Triplett, 7 Neb. 237; Pottinger v. Garrison, 3 Neb. 221. **Nev.**—Hardin v. Elkins, 24 Nev. 329, 53 Pac. 854; Gardner v. Gardner, 23 Nev. 207, 45 Pac. 139; Hammersmith v. Avery, 18 Nev. 225, 2 Pac. 55; Loukey v. Wells, 16 Nev. 271. **N. M.** Butterfield's Overland Dispatch Co. v. Wedeles, 1 N. M. 528; Beall v. Territory, 1 N. M. 507. **N. Y.**—Everett v. Usona Stamping Works, 123 N. Y. Supp. 106. **Ohio.**—Davis v. Hines, 6 Ohio St. 473. **Ore.**—David v. Moore, 46 Ore. 148, 79 Pac. 415; Wells v. Applegate, 12 Ore. 208, 6 Pac. 770. **S. D.**—Pierson v. Minnehaha County, 26 S. D. 462, 128 N. W. 616. **Vt.**—Tarbell v. Rutland R. Co., 73 Vt. 347, 51 Atl. 6, 56 L. R. A. 656. **Wash.**—Silver v. Washington Inv. Co., 118 Pac. 748.

Iowa Code, §3564, providing that the ruling on the demurrer shall not be considered an adjudication of any question raised by the demurrer. Frum v. Keeney, 109 Iowa 393, 80 N. W. 507.

A demurrer on the ground of misjoinder of parties is not waived, where the misjoinder is set up in the answer as a defense. Breimeyer v. Star Bottling Co., 136 Mo. App. 84, 117 S. W. 119.

In equity, where the answer contains no reservation of the demurrer. Southern Pine Lumb. Co. v. Ward, 208 U. S. 126, 28 Sup. Ct. 239, 52 L. ed 420.

16. U. S.—See Graves v. Ashburn, 215 U. S. 331, 30 Sup. Ct. 108, 54 L. ed 217. **Vt.**—German v. Bennington & R. R. Co., 71 Vt. 70, 42 Atl. 972; Town of Grand Isle v. Kinney, 70 Vt. 381, 41 Atl. 130; Houston v. Brush, 66 Vt. 331, 29 Atl. 380. **Wash.**—Johnson v. Johnson, 119 Pac. 22; Clemens v. E. H. Stanton Co., 61 Wash. 419, 112 Pac. 494; Peterson v. Barry, 50 Wash. 361, 97 Pac. 239.

It is immaterial that exceptions are ordered to lie. German v. Bennington & R. R. Co., 71 Vt. 70, 42 Atl. 972.

17. Where defendant does not stand

to trial after the overruling of a demurrer to an answer requiring no reply, and to which none is filed, is not, however, a waiver of the objections raised by the demurrer,¹⁸ nor is a demurrer in equity waived by going to trial on the merits where the court reserves to the defendant the benefit of the demurrer until the final hearing.¹⁹

There is a conflict of authority as to whether a waiver results from asking leave to plead over where such leave is denied, or no pleading is in fact filed.²⁰

The rule does not preclude the consideration of such errors and defects in the pleading as might be available in arrest of judgment,²¹ such as want of jurisdiction,²² and failure to state a cause of action,²³

on his demurrer to the petition or except to the overruling thereof, and the defects in the petition are cured by the answer, the ruling on the demurrer will not be reviewed. *Sanford v. Weeks*, 39 Kan. 649, 18 Pac. 823.

In such case he is not prejudiced. *McClain v. Lewiston Interstate Fair & Racing Assn.*, 17 Idaho 63, 104 Pac. 1015.

18. *Clark v. Gramling*, 54 Ark. 525, 16 S. W. 475.

19. *Town of Westminster v. Willard*, 65 Vt. 266, 26 Atl. 952.

20. Requesting leave to plead over is not a waiver where leave is denied. *Green v. Underwood*, 86 Fed. 427, 30 C. C. A. 162.

Nebraska.—Tendering an answer and asking leave to file it is a waiver of any merely technical error in the petition, and of irregularities in the time and manner of overruling the demurrer, though it is not permitted to be filed. *Bankers' Reserve Life Assn. v. Finn*, 64 Neb. 105, 89 N. W. 672.

Iowa.—Taking leave to answer after excepting to the overruling of a demurrer to the petition is not a waiver of the right to assign error on the ruling, where no answer is, in fact, filed, and judgment by default is entered against the defendant. *Watts v. Everett*, 47 Iowa 269.

21. *Duncan v. Brown*, 15 B. Mon. (Ky.) 186.

22. **Ark.**—*Holland v. Quitman College*, 63 Ark. 510, 39 S. W. 557. **Mo.**—*Hanson v. Neal*, 215 Mo. 256, 114 S. W. 1073; *Hudson v. Cahoon*, 193 Mo. 547, 91 S. W. 72; *Roberts v. Central Lead Co.*, 95 Mo. 581, 69 S. W. 630; *Duff v. Duff*, 156 Mo. App. 247, 137 S. W. 909. **Nev.**—*Hardin v. Elkus*, 24 Nev. 329, 53 Pac. 854; *Gardner v. Gard-*

ner, 23 Nev. 207, 45 Pac. 139; *Hammersmith v. Avery*, 18 Nev. 225, 2 Pac. 55; *Loukey v. Wells*, 16 Nev. 271.

A demurrer for want of jurisdiction is not waived by answering to the merits after such demurrer is overruled. *Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. ed. 942.

That equity has no jurisdiction because there is an adequate remedy at law is not waived by an answer which merely denies the averments of the complaint. *Hodgkin v. Boswell*, 57 Ore. 88, 110 Pac. 487.

23. **U. S.**—*Teal v. Walker*, 111 U. S. 242, 4 Sup. Ct. 420, 28 L. ed. 415. **Ark.**—*White v. Stokes*, 67 Ark. 184, 53 S. W. 1060; *Thompson v. Brazile*, 65 Ark. 495, 47 S. W. 299; *Holland v. Quitman College*, 63 Ark. 510, 39 S. W. 557. **Cal.**—*Hurley v. Ryan*, 119 Cal. 71, 51 Pac. 20. **Ill.**—*McGann v. People*, 194 Ill. 526, 92 N. E. 941, *reversing*, 97 Ill. App. 587; *Stearns v. Cope*, 109 Ill. 340. **Mo.**—*Hubbard v. Slavens*, 218 Mo. 598, 117 S. W. 1104; *Hanson v. Neal*, 215 Mo. 256, 114 S. W. 1073; *Hudson v. Cahoon*, 193 Mo. 547, 91 S. W. 72; *Hoffman v. McCracken*, 168 Mo. 337, 67 S. W. 878; *Duff v. Duff*, 156 Mo. App. 247, 137 S. W. 909; *Roberts v. Central Lead Co.*, 95 Mo. 581, 69 S. W. 630; *Rutledge v. Tarr*, 95 Mo. App. 265, 69 S. W. 22. **Mont.**—*Van Horn v. Holt*, 30 Mont. 69, 75 Pac. 680. **Neb.**—*Hope-well v. McGrew*, 50 Neb. 789, 70 N. W. 397; *Cox v. Peoria Mfg. Co.*, 42 Neb. 660, 60 N. W. 933. **Nev.**—*Hardin v. Elkus*, 24 Nev. 329, 53 Pac. 854; *Gardner v. Gardner*, 23 Nev. 207, 45 Pac. 139; *Hammersmith v. Avery*, 18 Nev. 225, 2 Pac. 55; *Loukey v. Wells*, 16 Nev. 271. **Ore.**—*Friendly v. Olcott*, 123 Pac. 53; *Robinson v.*

or defense,²⁴ or counterclaim,²⁵ or, in equity, where it appears, upon a consideration of all the pleadings and the proof, that complainant is not entitled to the relief sought.²⁶ In some states it is held that a formal election to stand by the demurrer is necessary where the pleading stands denied by operation of law,²⁷ but not otherwise.²⁸

B. BY AMENDING AFTER DEMURRER SUSTAINED.—In the absence of a statutory provision to the contrary,²⁹ by amending after demurrer sustained the pleader abandons his former pleading and cannot assign error on the ruling sustaining the demurrer.³⁰ To prevent a waiver

Holmes, 57 Ore. 5, 109 Pac. 754; David v. Moore, 46 Ore. 148, 79 Pac. 415.

In an equity case triable *de novo* on appeal, the overruling of a demurrer to a cross-petition based on the failure to state a cause of action may be reviewed though plaintiff pleaded over and had a trial on the merits. Hawkeye L. & B. Co. v. Gordon, 115 Iowa 561, 88 N. W. 1081.

24. U. S.—Green v. Underwood, 83 Fed. 427, 30 C. C. A. 162. Neb.—Farrar & Wheeler v. Triplett, 7 Neb. 237. N. M.—Schofield v. Territory, 9 N. M. 526, 56 Pac. 306.

25. Farrar & Wheeler v. Triplett, 7 Neb. 237.

26. Arnold v. Kiel, 252 Ill. 340, 96 N. E. 869.

27. To an answer. Hawkins v. Hawkins, 82 Iowa 718, 47 N. W. 994.

To procure a review of the overruling of a demurrer to the reply, the party must stand on the demurrer and the record must so show. The taking of an exception is not sufficient. Stanbrough v. Daniels, 77 Iowa 561, 42 N. W. 443.

28. A petition in the nature of a bill of review. It is sufficient if it affirmatively appears that the defeated party did not waive the error. Denby v. Fie, 106 Iowa 299, 76 N. W. 702.

An exception to the overruling of the demurrer and a failure or refusal to plead sufficiently indicates an election to stand on the demurrer. Watts v. Everett, 47 Iowa 269.

29. In Florida, amending after demurrer sustained is not a waiver of the right to review. Gen. St., 1906, §1693.

30. U. S.—Clearwater v. Meredith, 1 Wall. 25, 17 L. ed. 604; United States v. Boyd, 5 How. 29, 12 L. ed. 36. Ark. Langley v. Langley, 45 Ark. 392; Walker v. Wills, 5 Ark. 166. Cal.—Kin-

ard v. Jordan, 10 Cal. App. 219, 101 Pac. 969. Colo.—Enright v. Midland Sampling & Ore Co., 33 Colo. 341, 80 Pac. 1041; Hurd v. Smith, 5 Colo. 233; Heaton v. Myers, 4 Colo. 59; Rockwell v. Holcomb, 3 Colo. App. 1, 31 Pac. 944. Conn.—Arnold v. Kutinsky, Adler & Co., 69 Atl. 350; Sidney Novelty Co. v. Hanlon, 79 Conn. 79, 63 Atl. 727; Burke v. Wright, 75 Conn. 641, 55 Atl. 14; Mitchell v. Smith, 74 Conn. 125, 49 Atl. 909. Idaho.—Havlick v. Davidson, 15 Idaho 787, 100 Pac. 90; Andrews v. Moore, 14 Idaho 465, 94 Pac. 759. Ind.—Jay v. Indianapolis, P. & C. R. Co., 17 Ind. 262; Harvey v. Hand (Ind. App.), 95 N. E. 1020; Worl v. Republic Iron & Steel Co., 31 Ind. App. 16, 66 N. E. 1021. Ia.—Long v. Furnas, 130 Iowa 504, 107 N. W. 432; Redhead v. Iowa Nat. Bank, 123 Iowa 336, 98 N. W. 806; Davis & Shangle v. Boyer, 122 Iowa 132, 97 N. W. 1002; Krause v. Lloyd, 100 Iowa 666, 69 N. W. 1062; Barrett v. Northwestern Mut. Life Ins. Co., 99 Iowa 637, 68 N. W. 906; Lane v. B. & S. W. R. Co., 52 Iowa 18, 2 N. W. 531; District Township v. District Township, 44 Iowa 512; Heirs of Klein v. Argenbright, 26 Iowa 493. Kan. Winfrey v. Clapp, 122 Pac. 1055; Rosa v. Missouri, K. & T. R. Co., 18 Kan. 124; Brown v. Case Plow Wks., 9 Kan. App. 685, 59 Pac. 601. Me.—Wells v. Dane, 101 Me. 67, 63 Atl. 324. Minn. Becker v. Sandusky City Bank, 1 Minn. 311. Mo.—Heman v. Glann, 129 Mo. 325, 31 S. W. 589. Mont.—Perkins v. Davis, 2 Mont. 474. Neb.—Papillion Times Printing Co. v. Sarpy County, 85 Neb. 515, 123 N. W. 452, rehearing denied, 86 Neb. 219, 125 N. W. 524; Wheeler v. Barker, 51 Neb. 846, 71 N. W. 750. N. M.—Bremen Min. Co. v. Bremen, 13 N. M. 111, 79 Pac. 806; Cleland v. Hostetter, 13 N. M. 43, 79 Pac. 801. Okla.—Pattee

in such case it is not necessary for him to advise the court that he abides by his pleading or elects to stand thereon,³¹ but it is sufficient if he takes no steps from which a waiver or abandonment may be inferred.³²

The rule has been held not to apply where the amended pleading is a mere repetition of the original one and an exception has been taken to the ruling,³³ nor where it sets up an entirely new defense,³⁴ nor where the amendment relates to a different count than that to which the demurrer was directed.³⁵

There is a conflict of authority as to whether asking leave to amend is a waiver where leave is denied.³⁶ Taking leave to amend has been held to be a waiver though no amendment is in fact filed.³⁷

C. OTHER ACTS OR CONDUCT CONSTITUTING A WAIVER. — By with-

Plow Co. v. Beard, 27 Okla. 239, 110 Pac. 752. **Ore.**—*Wells v. Applegate*, 12 Ore. 208, 6 Pac. 770. **Pa.**—*Davis v. Fleshman*, 232 Pa. 409. **Wash.**—*Hays v. Peavey*, 43 Wash. 163, 86 Pac. 170.

By filing new pleas. *Dunlap v. Chicago, M. & St. P. R. Co.*, 151 Ill. 409, 38 N. E. 89.

Where an amended petition is filed and issues are joined thereon and a trial had. *Parker v. Lynch*, 7 Okla. 631, 56 Pac. 1082; *Kingman & Co. v. Pixley*, 7 Okla. 351, 54 Pac. 494.

No question is presented by an assignment of error complaining of the sustaining of a demurrer to a paragraph of the answer, where it appears that after the ruling the pleading was amended by leave of court, and that a new demurrer was then filed which was not ruled on. *Ginther v. Rochester Improvement Co. (Ind. App.)*, 92 N. E. 698.

Iowa Code, §3564, providing that the ruling on the demurrer shall not be considered an adjudication of any question raised by the demurrer, does not abrogate the rule. *Krause v. Lloyd*, 100 Iowa 666, 69 N. W. 1062.

31. He need not so advise the court either orally or in writing. *Bennett v. Union Central Life Ins. Co.*, 203 Ill. 439, 67 N. E. 971, reversing, 104 Ill. App. 402.

32. "If he takes no steps from which a waiver or abandonment of his pleading is to be presumed, he has abided or 'stood by' his pleading, and may be heard to urge in a court of review that his plea was good in law, and that it was error to hold it insufficient on demurrer." *Bennett v.*

Union Cent. Life Ins. Co., 203 Ill. 439, 67 N. E. 971, reversing, 104 Ill. App. 402.

Where a demurrer was sustained just before adjournment of court for the term, and an exception was then taken, it was held not to be an abuse of discretion to permit the pleader to have until the next term to elect whether to plead further or not. *Nelson v. Hamilton County*, 102 Iowa 229, 71 N. W. 206.

33. *Watkins v. Iowa Cent. R. Co.*, 123 Iowa 390, 98 N. W. 910.

34. The rule applies only where the amendment supplies omissions or cures defects in the pleading pointed out by the demurrer. *Ingham v. Dudley*, 60 Iowa 16, 14 N. W. 82.

35. A ruling sustaining a demurrer to a count of the answer pleading a counterclaim is not waived by amending another count, where the amendment contains no reference to the counterclaim. *Folsom v. Winch*, 63 Iowa 477, 19 N. W. 305.

36. In **Minnesota**, it is not. *Disbrow v. Creamery Package Mfg. Co.*, 110 Minn. 237, 125 N. W. 115.

In **Illinois**, asking leave to amend a plea in abatement is not a waiver under such circumstances. *Galveston City R. Co. v. Hook*, 40 Ill. App. 547, citing, *Midland Pac. R. Co. v. McDermid*, 91 Ill. 170, and *Drake v. Drake*, 82 Ill. 526.

In **Oklahoma**, it has been held to be a waiver. *Board of County Comrs. v. Beauchamp*, 18 Okla. 1, 88 Pac. 1124.

37. *Morrill v. Casper*, 13 Okla. 335, 73 Pac. 1102; *Berry v. Barton*, 12 Okla. 221, 71 Pac. 1074, 66 L. R. A. 513.

drawing a demurrer, demurrant loses his right to insist upon it.³⁸ Consenting that a demurrer may be overruled is equivalent to withdrawing it.³⁹

A party abandons his demurrer by failing to insist on it,⁴⁰ or to call for a ruling thereon,⁴¹ or consenting to,⁴² or participating in,⁴³ a trial on the merits, or by asking for a judgment on the merits of the case.⁴⁴ Failure to ask for a ruling does not, however, waive the objection that no cause of action is stated.⁴⁵

Alleged error in overruling a demurrer to an original pleading will not be reviewed where an amended one is subsequently filed.⁴⁶

Proceeding to trial on the issues made by other pleadings in the case is not an abandonment of the pleading to which the demurrer has been sustained.⁴⁷

38. *Hunter v. Bilyen*, 39 Ill. 367; *Hardin v. Mullin*, 16 Wash. 647, 48 Pac. 349.

By expressly waiving it and taking time to answer. *Healey v. King County*, 37 Wash. 184, 79 Pac. 624.

39. *Santa Rosa Bank v. Paxton*, 149 Cal. 195, 86 Pac. 193.

The case then stands as if no demurrer had ever been filed. *Dunlap v. Chicago, M. & St. P. R. Co.*, 151 Ill. 409, 38 N. E. 89.

40. Where the petition is amended pending a hearing thereon and defendant then files an answer without insisting on the demurrer. *Young v. Stamp*, 7 Ky. L. Rep. (abstract) 303.

41. *Plunkett v. State Nat. Bank*, 90 Ark. 86, 117 S. W. 1079; *Diamond Coal Co. v. Cook*, 129 Cal. xviii, 61 Pac. 578; *Silcox v. Lang*, 78 Cal. 118, 20 Pac. 297.

Going to trial on the merits without calling the court's attention thereto. *Dessart v. Bonyngue*, 10 Ariz. 37, 85 Pac. 723.

Entering upon and proceeding with a trial on the merits without demanding a ruling. *Danielson v. Gude*, 11 Colo. 87, 17 Pac. 283; *Anderson v. Sloan*, 1 Colo. 484.

Where a demurrer in equity is postponed until the final hearing and the court is not requested to dispose of it. *Reichert v. Missouri & Illinois Coal Co.*, 155 Ill. App. 244.

42. *Williams v. Baker*, 67 Ill. 238; *Saltman v. Nesson*, 201 Mass. 534, 88 N. E. 3.

43. *Daugherty v. Bridgman & Partridge, Morris (Ia.)* 295; *Porter v. Lane, Morris (Ia.)* 197.

Participating in a trial on the merits

without answering, after the demurrer is overruled. *Thompson v. Ellenz*, 58 Minn. 301, 59 N. W. 1023.

Sustaining a demurrer to a plea will not be considered, where defendant goes to trial on the merits without objection, offers no evidence in support of it, and introduces evidence on the other issues in the case. *German Alliance Ins. Co. v. Hale*, 219 U. S. 307, 31 Sup. Ct. 246, 55 L. ed. 229.

By replying to an answer to which a demurrer has previously been sustained and going to trial upon the issues so made up, plaintiff waives the demurrer and the ruling thereon and cannot subsequently take advantage of the fact that the demurrer was sustained. *Johnson v. Myers (Okla.)*, 122 Pac. 713.

44. *Plunkett v. State Nat. Bank*, 90 Ark. 86, 117 S. W. 1079.

45. *Miller v. Pine Mining Co.*, 3 Idaho 493, 31 Pac. 803, 35 Am. St. Rep. 289.

46. *Ind.*—*Weaver v. Apple*, 147 Ind. 304, 46 N. E. 642; *Wabash & W. R. Co. v. Morgan*, 132 Ind. 430, 31 N. E. 661, 32 N. E. 85; *Tague v. Owens*, 11 Ind. App. 200, 38 N. E. 541. *Kan.* *Union Pac. R. Co. v. Estes*, 37 Kan. 229, 15 Pac. 157; *Moore v. Wade*, 8 Kan. 380. *E. I.*—*Sweeney v. McKendall*, 32 R. I. 347, 79 Atl. 940.

Where, after the overruling of a demurrer to the original declaration, plaintiff subsequently files an amended declaration, and defendant pleads to it and a trial is had on the merits. *Railroad v. House*, 104 Tenn. 110, 56 S. W. 836.

47. Going to trial on the general issue after a demurrer to a special de-

Pleading over after the sustaining of a demurrer to a plea in abatement has been held not to be a waiver.⁴⁸

Error in sustaining a demurrer to the complaint is waived where plaintiff voluntarily moves to dismiss.⁴⁹

Error in sustaining a demurrer is waived where leave to withdraw it is subsequently asked and is denied on the objection of the pleader.⁵⁰

D. EFFECT OF WAIVER. — A waiver or abandonment of the demurrer precludes demurrant from again raising any of the objections sought to be raised thereby,⁵¹ except such as go to the substance of the right of recovery.⁵² In some states it is even held that if a demurrer for want of facts is waived, the party interposing it cannot again question the sufficiency of the complaint in either the lower or appellate court.⁵³

In some jurisdictions amending after demurrer sustained does not make the ruling the law of the case so as to prevent the questions involved from being again raised in another way.⁵⁴

XX. HARMLESS ERROR. — A ruling on a demurrer to a count will not be reviewed where a verdict was subsequently directed for appellant as to it.⁵⁵ The refusal to entertain a demurrer or exception which is not well taken is harmless.⁵⁶

fense has been sustained. *Powell v. Palmer*, 45 Mo. App. 236; *State v. Finn*, 19 Mo. App. 560.

Going to trial on the issues made by two replications to which demurrers have been overruled does not prevent plaintiff from urging that demurrers to his other replications were improperly sustained. *Bennett v. Union Central Life Ins. Co.*, 203 Ill. 439, 67 N. E. 971, reversing, 104 Ill. App. 402.

48. Since in such case the judgment is *quod respondeat ouster*. *Weld v. Hubbard*, 11 Ill. 573; *Delahay v. Clement*, 4 Ill. 200; *Galveston City R. Co. v. Hook*, 40 Ill. App. 547.

49. *Lowman v. West*, 7 Wash. 407, 35 Pac. 130.

50. *Anson v. Dwight*, 18 Iowa 241.

51. By withdrawing a demurrer and pleading to the merits defendant waives all objections to the declaration not going to the substance of the right of recovery. *Supreme Lodge K. of P. v. McLennan*, 171 Ill. 417, 49 N. E. 530, affirming, 69 Ill. App. 599.

52. *Supreme Lodge K. of P. v. McLennan*, 171 Ill. 417, 49 N. E. 530, affirming, 69 Ill. App. 599.

Consenting that it may be overruled

does not waive the objection that the complaint does not state a cause of action. *Morris v. Courtney*, 120 Cal. 63, 52 Pac. 129; *Evans v. Gerken*, 105 Cal. 311, 38 Pac. 725; *Hitchcock v. Caruthers*, 82 Cal. 523, 23 Pac. 48.

53. *Healey v. King County*, 37 Wash. 784, 79 Pac. 624.

The statute permitting the objection that the complaint fails to state a cause of action to be raised at any time does not apply under such circumstances. *Watson v. Town of Kent*, 35 Wash. 21, 76 Pac. 297; *Hardin v. Mullen*, 16 Wash. 647, 48 Pac. 349; *Mosher v. Bruhn*, 15 Wash. 332, 46 Pac. 397. See also, *Budlong v. Budlong*, 48 Wash. 645, 94 Pac. 478.

54. Iowa Code, §3564; *Marshall Ice Co. v. La Plant*, 136 Iowa 621, 111 N. W. 1016, 12 L. R. A. (N. S.) 1073.

The same question may be subsequently presented by motion in arrest, or to direct a verdict, or by objections to evidence, or in any other recognized mode. *Watkins v. Iowa Cent. R. Co.*, 123 Iowa 390, 98 N. W. 910.

55. *Atlanta & B. A. L. R. v. Wood*, 160 Ala. 657, 49 So. 426.

56. *Oliver v. Chapman*, 15 Tex. 400; *Hubbell v. Lord*, 9 Tex. 472.

Proceeding to trial without disposing of a demurrer is harmless to the party against whose pleading the demurrer is directed.⁵⁷

Wrong Remedy.—Sustaining a demurrer when a motion to strike is the proper remedy is harmless, where the pleading is so faulty that the court would have been justified in striking it out of its own motion,⁵⁸ or where a correct result is reached.⁵⁹ Striking out parts of a pleading when demurrer is the proper remedy is harmless, where the parts stricken are wholly insufficient.⁶⁰

Right Ruling for Wrong Reason.—A right ruling will be sustained though based on a wrong reason.⁶¹

Sustaining a defective demurrer to a defective pleading is harmless.⁶²

Error in sustaining a demurrer to a special plea or to a separate defense is harmless where the matter therein set up is provable under other special pleas or defenses,⁶³ or under the general issue pleaded in the

57. *Adams v. Adams*, 64 N. H. 224, 9 Atl. 100.

58. *Hartford Fire Ins. Co. v. Hollis*, 58 Fla. 268, 50 So. 985; *Southern Home Ins. Co. v. Putnal*, 57 Fla. 199, 49 So. 922; *McKinnon v. Johnson*, 57 Fla. 120, 48 So. 910.

59. *Harris v. Randolph County Bank*, 157 Ind. 120, 60 N. E. 1025.

Sustaining a demurrer to a plea that might have been stricken out on motion is not available error, the result being the same. *Dwiggins v. Clark*, 94 Ind. 49, 48 Am. Rep. 140; *Town of Knox v. Golding*, 46 Ind. App. 634, 91 N. E. 857, 92 N. E. 986.

60. Striking parts of an answer pleading a defense which is not good. *Chase v. Kaynor*, 78 Iowa 449, 43 N. W. 269.

61. *Conn.*—*British American Ins. Co. v. Wilson*, 77 Conn. 559. *Fla.* *Hartford Fire Ins. Co. v. Hollis*, 58 Fla. 268, 50 So. 985; *Murrell v. Peterson*, 57 Fla. 480, 49 So. 31; *Hoopes v. Crane*, 56 Fla. 395, 47 So. 992. *Ia.* *Jeure v. Perkins*, 29 Iowa 262.

Where a demurrer is properly overruled, the reasons for the ruling are immaterial. *Jeffries v. Fraternal Bankers' Reserve Society*, 135 Iowa 284, 112 N. W. 786.

A judgment based on a ruling sustaining only some of the points taken by a demurrer, and not assuming to deal with any other points, should stand if in any point whatever the pleading was incurably defective, whether the particular reasons which led the trial court to its conclusions were or were not sufficient. *Lewisohn*

v. Stoddard, 78 Conn. 575, 63 Atl. 621.

But where a cross-complaint is demurred to on the ground that several causes of action are improperly joined and that it does not state facts sufficient to constitute a cause of action, and is erroneously sustained on the first ground, and the second is not ruled on, the supreme court cannot affirm the judgment on the theory that the demurrer should have been sustained on the second ground, the first ground being in abatement and the second going to the merits. *Northwestern Railroader v. Prior*, 68 Minn. 95, 70 N. W. 869.

62. *Duffy v. England* (Ind.), 96 N. E. 704; *Garrett v. Bissell Chilled Plow Works*, 154 Ind. 319, 56 N. E. 667; *Goldsmith v. Chipps*, 154 Ind. 28, 55 N. E. 855; *Blue v. Capital Nat. Bank*, 145 Ind. 518, 43 N. E. 655; *Ginther v. Rochester Improvement Co.*, 46 Ind. App. 378, 92 N. E. 698; *Town of Knox v. Golding*, 46 Ind. App. 634, 91 N. E. 857, 92 N. E. 986; *Bell v. Hiner*, 16 Ind. App. 184, 44 N. E. 576.

63. *U. S.*—*Junction R. Co. v. Bank of Ashland*, 12 Wall. 226, 20 L. ed. 385. *Ala.*—*Mobile, J. & K. C. R. Co. v. Hawkins*, 163 Ala. 565, 51 So. 37. *Conn.*—*Boyle v. McWilliams*, 69 Conn. 201, 37 Atl. 501. *Fla.*—*Atlantic C. L. R. Co. v. Crosby*, 53 Fla. 400, 42 So. 318. *Ill.*—*Sturm v. Central Oil Co.*, 156 Ill. App. 165. *Miss.*—*Alabama & V. R. Co. v. Brooks*, 69 Miss. 168, 13 So. 847.

Where defendant has the benefit of a trial on such other pleas. *Zavelo v.*

cause,⁶⁴ or where all matters set up therein were gone over in the evidence,⁶⁵ and the same is true of error in sustaining a demurrer to a paragraph of the complaint,⁶⁶ or answer,⁶⁷ or reply,⁶⁸ where the facts therein alleged are provable under another paragraph allowed to stand. But error in sustaining a demurrer to a cross-complaint is prejudicial though the facts therein alleged are provable under the general denial also pleaded, since defendant is entitled to have the issues in such shape that he may recover affirmatively.⁶⁹

Error in sustaining a demurrer is not cured by admitting evidence covering the matters therein alleged unless it affirmatively appears that the pleader has prepared himself on such matters and fully covered them.⁷⁰

Sustaining a demurrer is harmless where the pleading is one that could not be supported by proof,⁷¹ or where an amended pleading setting up a different and repugnant cause of action is subsequently filed.⁷² Sustaining a demurrer to a pleading under which only nominal damages are recoverable has been held not to be ground for reversal.⁷³

Error in overruling a demurrer is harmless where the defects at which it is directed are subsequently cured by amendment,⁷⁴ or where the pleading to which it is directed is subsequently abandoned,⁷⁵ or where

Leichtman, Goodman & Co. (Ala.), 54 So. 537; *De Leon v. Walters*, 163 Ala. 499, 50 So. 934; *Tallassee Falls Mfg. Co. v. Moore*, 158 Ala. 356, 48 So. 593.

64. *Louisville & N. R. Co. v. McCool*, 167 Ala. 644, 52 So. 656; *Mobile, J. & K. C. R. Co. v. Hawkins*, 163 Ala. 565, 51 So. 37; *Tallassee Falls Mfg. Co. v. Moore*, 158 Ala. 356, 48 So. 593; *Selma St. & S. R. Co. v. Campbell* (Ala.), 48 So. 378; *Mosher v. Rogers*, 117 Ill. 446, 5 N. E. 583.

Is not error. *Sturm v. Central Oil Co.*, 156 Ill. App. 165.

Where all matters therein alleged are admissible in evidence without being specially pleaded. *Miller v. Citizens' Bldg. & Loan Assn.* (Ind. App.), 93 N. E. 70.

65. *Alabama G. S. R. Co. v. Hanbury*, 161 Ala. 358, 49 So. 467.

66. *McFadden v. Schroeder*, 4 Ind. App. 305, 29 N. E. 491, 30 N. E. 711.

67. *Cannon v. Kreipe*, 14 Kan. 324. Sustaining a defective demurrer. *Malon v. Scholler* (Ind. App.), 96 N. E. 499.

Provable under the general denial. *Harris v. Randolph County Bank*, 157 Ind. 120, 60 N. E. 1025; *Board of Election Comrs. v. State*, 148 Ind. 675,

48 N. E. 226; *Kidwell v. Kidwell*, 84 Ind. 224; *Leonard v. City of Terre Haute* (Ind. App.), 93 N. E. 872; *Lemmon v. Reed*, 14 Ind. App. 655, 43 N. E. 454; *McCloskey v. Davis*, 8 Ind. App. 190, 35 N. E. 187.

68. *Adams v. Pittsburgh, C., C. & St. L. R. Co.*, 165 Ind. 648, 74 N. E. 991; *Arnold v. Smith*, 80 Ind. 417; *Miller v. Taggart*, 36 Ind. App. 595, 76 N. E. 321.

Where every fact therein alleged is provable under a general denial also pleaded. *Cincinnati, I., St. L. & C. R. Co. v. Smith*, 127 Ind. 461, 26 N. E. 1009.

69. *Davis v. Brown*, 159 Ind. 644, 65 N. E. 908.

70. *Rocky Mountain News Printing Co. v. Fridborn*, 46 Colo. 440, 104 Pac. 956, 24 L. R. A. (N. S.) 891.

71. *McNamara v. McDonald*, 69 Conn. 484, 38 Atl. 54.

72. *Shamokin Bank v. Street*, 16 Ohio St. 1.

73. *Reid v. Johnson*, 132 Ind. 416, 31 N. E. 1107.

74. *Harris v. Lumpkin*, 136 Ga. 47, 70 S. E. 869.

75. Overruling a demurrer to the answer, where the defense set up therein is subsequently abandoned and a new and totally different one is in-

no evidence is offered in support of the pleading demurred to,⁷⁶ or where the defects are cured by the subsequent pleadings,⁷⁷ or where the facts alleged in the paragraph demurred to are provable under another paragraph of the pleading,⁷⁸ or where, under the facts alleged in another paragraph and proved, the pleader is not entitled to recover,⁷⁹ or where the questions raised by the pleading to which it is directed are not submitted to the jury.⁸⁰

Error in overruling a demurrer to a bad paragraph of answer is harmless where plaintiff's failure to recover was not due to anything alleged therein.⁸¹ Error in overruling a demurrer based on the omission of facts is not ground for reversal where demurrant subsequently admits them to be true.⁸²

Overruling a demurrer for misjoinder of defendants is not ground for reversal where the action is subsequently dismissed as to the one claimed to have been improperly joined,⁸³ nor is the overruling of a demurrer for defect of parties, where the omitted parties are subsequently brought in by consent.⁸⁴

Error in overruling a demurrer is harmless where the case is tried and the finding and judgment based on a paragraph of the pleading other than that to which the demurrer was directed.⁸⁵ A special find-

terposed. *Shamokin Bank v. Street*, 16 Ohio St. 1.

76. *Leonard v. City of Terre Haute* (Ind. App.), 93 N. E. 872.

77. *Yocum v. Allen*, 58 Ohio St. 280, 50 N. E. 909; *Northwester Nat. Life Ins. Co. v. Hare*, 16 Ohio C. C. 197.

Overruling a demurrer to the petition based on the absence of averments of a proper purpose for the suit is harmless to defendant where he obtains a full hearing on the charges of an improper purpose contained in his answer subsequently filed. *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 56 N. E. 1033, 48 L. R. A. 732.

78. *Pollard v. Pittman*, 37 Ind. App. 475, 77 N. E. 293; *Sears v. Shrout*, 24 Ind. App. 313, 56 N. E. 723. But see, *Long v. Johnson*, 15 Ind. App. 498, 44 N. E. 552.

79. *Pollard v. Pitman*, 37 Ind. App. 475, 77 N. E. 293.

80. *Campbell v. San Antonio Machine & Supply Co.* (Tex. Civ. App.), 133 S. W. 750; *Texas & G. R. Co. v. Pate* (Tex. Civ. App.), 113 S. W. 994.

81. Where plaintiff's failure to recover was not due to the defense set up in such paragraph, but to his failure to prove his complaint. *Haas v.*

City of Evansville, 20 Ind. App. 482, 50 N. E. 46, 51 N. E. 105.

82. *Cleveland, C., C. & St. L. R. Co. v. Heineman*, 46 Ind. App. 388, 90 N. E. 899.

83. *Jackson v. McAuley*, 13 Wash. 298, 43 Pac. 41.

84. *Steele v. Korn*, 137 Wis. 51, 118 N. W. 207, 120 N. W. 261.

85. *Robinson v. Dickey*, 143 Ind. 205, 42 N. E. 679; *Chicago, St. L. & P. R. Co. v. Fenn*, 3 Ind. App. 250, 29 N. E. 790.

To an insufficient paragraph of the answer, where the facts found entitle defendant to judgment, and such facts could be proved under the general denial. *Watson v. Tindall*, 150 Ind. 488, 50 N. E. 468.

To a paragraph of the answer, where the findings and judgment were based on the cross-complaint. *Miller v. Rapp*, 135 Ind. 614, 34 N. E. 981, 35 N. E. 693.

Where it is apparent that the trial was had upon the case made by a good count. *Virginia Cedar Works v. Dalea*, 109 Va. 333, 64 S. E. 41.

The record must affirmatively show that the judgment was based on the good paragraph. *Terre Haute & L. R. Co. v. Sherwood*, 132 Ind. 129, 31 N. E. 781, 17 L. R. A. 339; *Ohio*

ing, special verdict, or answers to interrogatories may show that an erroneous ruling was harmless,⁸⁶ and the court may look to them for that purpose,⁸⁷ but they can in no case supply essential averments omitted from a pleading,⁸⁸ nor cure error in overruling a demurrer to a reply on the ground that it is a departure from the complaint.⁸⁹

Where the ruling is harmless when made, it cannot be rendered reversible error by the subsequent acts of the pleader.⁹⁰

XXI. APPEAL AND REVIEW.—A. RIGHT TO REVIEW AND METHOD OF OBTAINING IT.—In the absence of a statutory provision to the contrary,⁹¹ an order sustaining or overruling a demurrer is not

Farmers' Ins. Co. v. Vogel, 30 Ind. App. 281, 65 N. E. 1056.

"The overruling of a demurrer to a bad paragraph of complaint will not be harmless error unless it clearly appears from the record that the decision of the court or verdict of the jury rests upon a paragraph that is sufficient." *Chicago & E. R. Co. v. Chaney* (Ind. App.), 97 N. E. 181. See also, *Daly v. Gubbins*, 35 Ind. App. 86, 73 N. E. 833.

Overruling a demurrer to a bad answer is not presumed to be harmless and will not be held to be so unless the record affirmatively shows that the case was properly tried and determined on its merits. *Pyle v. Peyton*, 146 Ind. 90, 44 N. E. 925; *Bradshaw v. Van Winkle*, 133 Ind. 134, 32 N. E. 877.

"If a declaration in tort contains two or more counts, some of which are good and others bad and there is a demurrer to the whole declaration and each count thereof, it should be sustained as to the bad counts, else a general verdict and judgment for the plaintiff will, as a rule, be set aside." *Virginia Cedar Works v. Delea*, 109 Va. 333, 64 S. E. 41; *Norfolk & W. R. Co. v. Stegall*, 105 Va. 538, 54 S. E. 19.

86. *Lake Erie & W. R. Co. v. Hoff*, 25 Ind. App. 239, 56 N. E. 925.

Sustaining demurrers to paragraphs of the reply will not be reviewed where all the facts therein relied on are fully set forth in the finding of facts, upon which finding conclusions of law were stated and excepted to, and it thus affirmatively appears that plaintiff has not been deprived of the privilege of putting his whole case into the record for review on appeal. *Miller v. Hardy*, 131 Ind. 13, 29 N. E. 776.

87. On appeal. *Gilliand v. Jones*, 144 Ind. 662, 43 N. E. 939; *Beasley v. Phillips*, 20 Ind. App. 182, 50 N. E. 488.

88. *Cleveland, C., C. & St. L. R. Co. v. Parker*, 154 Ind. 153, 56 N. E. 86.

A special finding of material facts omitted from a pleading will not cure the error in overruling a demurrer to such pleading based on their omission, since such finding is outside the issues. *Lake Erie & W. R. Co. v. Hoff*, 25 Ind. App. 239, 56 N. E. 925.

89. *Midland Steel Co. v. Citizens Nat. Bank*, 26 Ind. App. 71, 59 N. E. 211.

90. Sustaining a demurrer to a paragraph of answer provable under the general denial is not rendered available error by the subsequent withdrawal of said denial. *Board of Election Comrs. v. State*, 148 Ind. 675, 48 N. E. 226; *Baltes v. Bass Foundry & Mach. Works*, 129 Ind. 185, 28 N. E. 319; *Cincinnati, I., St. L. & C. R. Co. v. Smith*, 127 Ind. 461, 26 N. E. 1009; *Kidwell v. Kidwell*, 84 Ind. 224.

91. *Iowa*.—An appeal may be taken from an order sustaining or overruling a demurrer. Code, §4101.

To render an order sustaining or overruling a demurrer appealable the record must show that the ruling is final and not in any manner waived. An appeal from an order sustaining a demurrer with leave to amend will be dismissed where the record fails to show whether there was any further proceeding. *Thorpe Bros. & Co. v. Smith*, 86 Iowa 410, 53 N. W. 274.

To sustain an appeal from an order overruling a demurrer the record must show that demurrant rested on the demurrer. *Seippel v. Blake*, 80 Iowa 142, 41 N. W. 199, 45 N. W. 728.

Kansas.—An order sustaining or ov-

appealable,⁹² but such an order is reviewable on appeal from the final

erruling a demurrer is appealable. *Gen. St.*, 1909, §6160; *Corum v. Hubbard*, 69 Kan. 608, 77 Pac. 530; *Blackwood v. Shaffer*, 44 Kan. 273, 24 Pac. 423.

An order overruling a demurrer is reviewable where demurrant stands on his demurrer though no judgment is entered against him. *Bartholomew v. Guthrie*, 71 Kan. 705, 81 Pac. 491.

Massachusetts.—A judgment on demurrer for want of facts is appealable. *Rev. Laws*, 1902, c. 173, §96, p. 1565; *Amherst & B. R. Co. v. Watson*, 4 Gray 61.

Plaintiff's right to appeal from an order sustaining a demurrer to the declaration is in abeyance until judgment thereon is entered for defendant. *Cummings v. Ayer*, 188 Mass. 292, 74 N. E. 336.

In Michigan.—In chancery an order overruling a general demurrer is appealable. *Comp. Laws*, 1897, §549; *Ideal Clothing Co. v. Hazle*, 126 Mich. 262, 85 N. W. 735; *Daschke v. Schellenberg*, 124 Mich. 16, 82 N. W. 665.

An order overruling a special demurrer is not. *People v. Detroit*, G. H. & M. R. Co. (Mich.), 135 N. W. 87; *Case v. Longyear* (Mich.), 134 N. W. 459; *Kerr v. Rupp*, 144 Mich. 269, 107 N. W. 1059.

Chancery rule 9 requiring that the causes of demurrer be, in all cases, plainly specified does not enlarge the statute. *Kerr v. Rupp*, 144 Mich. 269, 107 N. W. 1059; *Daschke v. Schellenberg*, 124 Mich. 16, 82 N. W. 665; *Greenley v. Hovey*, 115 Mich. 504, 73 N. W. 808.

Appeals may still be taken from orders overruling demurrers which prior to the rule might have been general. *Daschke v. Schellenberg*, 124 Mich. 16, 82 N. W. 665, and cases cited.

Where the demurrer is both general and special the case may be considered upon the alleged want of equity. *Ideal Clothing Co. v. Hazle*, 126 Mich. 262, 85 N. W. 735, *citing*, *Shaw v. Chase*, 77 Mich. 436, 43 N. W. 883.

Minnesota.—An order sustaining or overruling a demurrer is appealable. *Rev. Laws*, 1905, §4365, subd. 4; *Potter v. Holmes*, 72 Minn. 153, 75 N. W. 591; *Sons of Temperance v. Brown*, 9 Minn. 151.

Oklahoma.—An order sustaining or

overruling a demurrer is appealable. *Comp. Laws*, 1909, §6067.

South Carolina.—An order on demurrer which in effect strikes out a portion of the complaint is appealable as affecting a substantial right. *Miles v. Charleston Light & Water Co.*, 87 S. C. 254, 69 S. E. 292.

Tennessee.—Defendant may appeal from an order overruling a demurrer in equity in the discretion of the chancellor. *Simmons v. Taylor*, 106 Tenn. 729, 63 S. W. 1123.

Wisconsin.—An order sustaining or overruling a demurrer is appealable. *St.*, 1898, §3069.

92. Ark.—*Adams v. Primmer*, 144 S. W. 522; *Moody v. Jonesboro, etc.*, Ry. Co., 83 Ark. 371, 103 S. W. 1134. **Cal.** *Ashley v. Olmstead*, 54 Cal. 616; *Agard v. Valencia*, 39 Cal. 292; *Kinard v. Jordan*, 10 Cal. App. 219, 101 Pac. 696; *Hadsall v. Case*, 15 Cal. App. 541, 115 Pac. 330. **Conn.**—*Martin v. Sherwood*, 74 Conn. 202, 50 Atl. 564. **N. Y.**—*Taylor v. McLea*, 11 N. Y. Supp. 640. In the municipal court. *Weiner v. Yale Knitting Mills*, 123 N. Y. Supp. 327; *Pratt v. Pennsylvania R. Co.*, 66 Misc. 183, 121 N. Y. Supp. 357. **Ore.** *Giant Powder Co. v. Oregon Western R. Co.*, 54 Ore. 325, 101 Pac. 209, *rehearing denied*, 103 Pac. 501. **Pa.**—*Stegmaier v. Keystone Coal Co.*, 232 Pa. 140; *Arnold v. Russell Car & Snow Plow Co.*, 212 Pa. 303, 61 Atl. 914. **Wyo.**—*Turner v. Hamilton*, 10 Wyo. 177, 67 Pac. 1117; *Menardi v. O'Malley*, 3 Wyo. 327, 23 Pac. 68.

"Where a complainant is willing to rest his case upon a demurrer, he must move the court to dismiss the bill. An order dismissing the bill is final, and from it appeal or error will lie, but a decision on the demurrer is merely interlocutory." *Williams v. Chicago Exhibition Co.*, 188 Ill. 19, 58 N. E. 611; quoted with approval in *Livingston County Bldg. & Loan Assn. v. Keach*, 213 Ill. 59, 72 N. E. 769.

A decree sustaining a demurrer and granting sixty days within which to amend, and allowing an appeal to "settle the principles of the case" is not appealable. *Barrier v. Kelly*, 81 Miss. 266, 32 So. 999.

An order overruling a demurrer to a plea in abatement, though not in

judgment.⁹³ A final judgment rendered against a party on sustaining a demurrer to his pleading is, of course, reviewable in the same way and to the same extent as any other final judgment.⁹⁴ Statutes in some states provide for review by certiorari.⁹⁵

B. PRESUMPTIONS AND QUESTIONS CONSIDERED.—In support of the judgment below it will be presumed on appeal that a demurrer not shown to have been ruled on was abandoned.⁹⁶

An order sustaining a demurrer generally will be affirmed if any one ground of the demurrer was well taken,⁹⁷ and in some states this

form final, is in substance and effect a final determination and appealable. *Campbell v. Hudson*, 106 Mich. 523, 64 N. W. 483.

A judgment sustaining a demurrer cannot be brought to the supreme court by "a fast writ of error." *Stewart v. Stewart*, 89 Ga. 138, 15 S. E. 23; *Jordan v. Kelly & Bros.*, 63 Ga. 437.

In Massachusetts, decisions of one justice upon demurrers for want of facts are final. Rev. Laws, 1902, c. 173, §76, p. 1562; *Kellogg v. Kimball*, 122 Mass. 163.

93. Cal.—*Ashley v. Olmstead*, 54 Cal. 616; *Agard v. Valencia*, 39 Cal. 292; *Hadsall v. Case*, 15 Cal. App. 541, 115 Pac. 330. Mo.—*Spears v. Bond*, 79 Mo. 467. Ore.—*State v. Portland Gen. Elec. Co.*, 52 Ore. 502, 95 Pac. 722, 98 Pac. 160. S. C.—*Mobley v. Cureton*, 6 S. C. 49. Utah.—*Thomas v. Glendinning*, 13 Utah 47, 44 Pac. 652.

May be reviewed on appeal from a decree *pro confesso* in an equity case. *Turpin v. Derickson*, 105 Md. 620, 66 Atl. 276.

An order sustaining a demurrer is reviewable on appeal from the final judgment though it is appealable. *Parker v. Flag*, 127 Mass. 28.

94. *Hadsall v. Case*, 15 Cal. App. 541, 115 Pac. 330.

An order merely sustaining a demurrer to the declaration, without more, and though not in terms dismissing the suit, is, in effect, a judgment "that the plaintiff take nothing and that defendant go hence without day," and is final and appealable where leave to amend is not asked during the term. *Jacobs v. New York Life Ins. Co.*, 71 Miss. 656, 15 So. 639.

Judgment of dismissal on plaintiff's election to stand on his complaint.

Continental Life Ins. & Inv. Co. v. Jones, 31 Utah 403, 88 Pac. 229.

95. In Michigan, whenever, in an action at law in the circuit court, the issues raised on a demurrer are decided adversely to the party filing it, such decision may be reviewed by certiorari forthwith. Pub. Acts, 1905, No. 310, p. 484.

In Washington, an order sustaining a demurrer is reviewable by writ of review. *State v. Superior Court*, 62 Wash. 556, 114 Pac. 427.

96. U. S.—*Townsend v. Jemison*, 7 How. 706, 12 L. ed. 880. Ala.—*Central of Georgia R. Co. v. Ashley*, 159 Ala. 145, 48 So. 981. Ark.—*Pratt v. Frazer*, 95 Ark. 405, 129 S. W. 1088; *Kierman v. Blackwell*, 27 Ark. 235. Cal.—*McCarthy v. Yale*, 39 Cal. 585; *Brooks v. Douglass*, 32 Cal. 208. Ind.—*Hollis v. Roberts*, 25 Ind. App. 426, 58 N. E. 502. Ky.—*Caledonian Ins. Co. v. Cooke*, 101 Ky. 412, 41 S. W. 279. Tex.—*Houston, E. & W. T. R. Co. v. Waltman* (Tex. Civ. App.), 132 S. W. 518; *Bonner v. Glenn*, 79 Tex. 531, 15 S. W. 572. Utah.—See, *Darke v. Smith*, 14 Utah 35, 45 Pac. 1006.

A demurrer filed with the answer in an equity case will be treated as abandoned where it is not acted on. *Stephens v. Martin*, 85 Tenn. 278, 2 S. W. 206.

Where a demurrer is incorporated in a bill, but no order entered filing the same is in the record, and it does not appear to have been called to the attention of the court, by any order in the cause, it will, on appeal, be treated as a fugitive paper. *Cross v. Gall*, 65 W. Va. 276, 64 S. E. 533; *McGraw v. Traders' Nat. Bank*, 64 W. Va. 509, 63 S. E. 398; *Pheasant v. Hanna*, 63 W. Va. 613, 60 S. E. 618.

97. Ala.—*Louisville & N. R. Co. v. Wilson*, 162 Ala. 588, 50 So. 188. Fla.

is true even though the order is specifically based on an improper ground.⁹⁸ So, too, an order overruling a demurrer generally will be regarded as a holding that all the objections covered by the demurrer are untenable.⁹⁹

Where the demurrer is general, and the record does not show the particular points raised below the court will hear any question within reach of the demurrer.¹ Grounds of demurrer disregarded by the trial court and not discussed in the brief will not be considered.²

XXII. COSTS.—The allowance of costs on sustaining or overruling a demurrer is regulated by the statutes and rules of court of the various states.³ The imposition of costs as a condition of granting leave to amend after demurrer sustained,⁴ or to plead over after demurrer overruled,⁵ has been treated in previous sections.

Tice v. Dickerson, 60 Fla. 380, 53 So. 645. **Ga.**—*McClaren v. Williams*, 132 Ga. 352, 64 S. E. 65; *Old Hickory Distilling Co. v. Bleyer*, 74 Ga. 201. **Ia.** *E. H. Martin Tel. Co. v. Stratford Tel. Co.*, 123 N. W. 951; *Krause v. Lloyd*, 100 Iowa 666, 69 N. W. 1062.

Though the bill of exceptions recites that the demurrer was sustained for a particular reason. *Huggins v. Southeastern Lime & Cement Co.*, 121 Ga. 311, 48 S. E. 933.

98. *People v. Central Pac. R. Co.*, 76 Cal. 29, 18 Pac. 90; *Perkins v. Coffin*, 84 Conn. 275, 79 Atl. 1070.

"If the complaint is insufficient upon any ground properly specified in the demurrer, the order must be sustained, although the lower court may have considered it sufficient in that respect and may in its order have declared it defective only in some particular in which we hold it to be good. The defendant is entitled to the decision of this court on all questions presented by the demurrer and necessary to the decision made." *Burke v. Maguire*, 154 Cal. 456, 98 Pac. 21.

99. It must be deemed to have been intended to cover all defects in the pleading, notwithstanding a statement in the memorandum of the trial court that he did not decide some of the questions within the scope of the demurrer. *Myers v. Chicago, St. P. & O. R. Co.*, 69 Minn. 476, 72 N. W. 694.

1. *Cushman & Rankin v. Boston & M. R.*, 82 Vt. 390, 73 Atl. 1073.

2. *Nelden-Judson Drug Co. v. Commercial Nat. Bank*, 27 Utah 59, 74 Pac. 195.

3. **Illinois.**—"If, in any action, judgment upon any demurrer, by either party to the action, shall be given against the plaintiff or defendant, the defendant shall recover costs against the plaintiff or defendant. If such judgment be given for the plaintiff or defendant, he shall recover costs against the defendant; and the person so recovering costs, shall have execution for the same." Rev. St., 1909, c. 33, §10, p. 526.

Louisiana.—Plaintiff must be decreed to pay costs, on sustaining a declinatory exception. Code Pr., art. 335.

Maine.—See, *Hare v. Dean*, 90 Me. 308, 38 Atl. 227.

Missouri.—Where a demurrer is sustained the adverse party shall pay costs, and where it is overruled the party filing it shall pay costs. Rev. St., 1909, §1819.

New Jersey.—In equity if defendant's demurrer to the bill is allowed, complainant shall pay costs, and if overruled, defendant shall pay them. Comp. St., 1910, p. 419, §24; *Brown v. Tallman* (N. J. Ch.), 54 Atl. 457.

Tennessee.—Costs on demurrer. Shannon's Code, §4659.

In equity. Shannon's Code, §6207. See also the title "Costs."

4. See XVIII, A, *supra*.

5. See XVIII, B, *supra*.

XXIII. FORMS.—Forms of demurrer⁶ and joinder therein⁷ are prescribed by statute in some states. Forms approved by textbook writers and the courts will be found in the note.⁸

6. Florida.—"The form of a demurrer shall be as follows, or to the like effect: 'The defendant (or plaintiff), says that the declaration (or plea) is bad in substance.'" Gen. St., 1906, §1444; *Benedict Pineapple Co. v. Atlantic Coast Line R. Co.*, 55 Fla. 514, 46 So. 732, 20 L. R. A. (N. S.) 92.

Maryland.—In equity "the form of demurrers shall be substantially as follows: 'The defendant demurs to the whole bill,' or 'to so much of the bill, or discovery or relief,' stating the particular part or parts demurred to, and the special grounds of the demurrer.'" Pub. Gen. Laws, art. 16, §149, p. 424.

Miss.—In Chancery. Code, 1906, §581. **N. J.**—Comp. St., 1910, p. 4094, §131. **N. C.**—In justices' courts. Rev., 1905, §1496, forms 35, 36. **Va.**—Code, §3271; *Dunn v. Dunn*, 26 Gratt. 291; *Jones' Exrs v. Clark*, 25 Gratt. 642. **W. Va.**—Code, §3848.

7. Florida.—"The form of a rejoinder in demurrer shall be as follows, or to the like effect: 'The plaintiff (or defendant) says that the declaration (or plea) is good in substance.'" Gen. St., 1906, §1444.

Va. Code, §3271; **W. Va. Code**, §3848.

8. For forms of general and special demurrers see, *Andrews Steph. Pl.* (2nd ed.), §103, p. 190; *Chit. Pl.*, 666, 667; *Daniell's Ch. Pr.*, 2485, *et seq.*

General demurrer. *Bliss Code Pl.*, §416, note. **Form of joinder.** *Chit. Pl.* 667.

California.—A demurrer "that it appears by the complaint that the cause of action is barred by the statute of limitations" is sufficient in form. *Brennan v. Ford*, 46 Cal. 7.

Florida.—In *Shalley v. Spillman*, 19 Fla. 500, the following demurrer embodied in an answer in an equity suit

was sustained: "And these defendants submit to this honorable court that all and every of the matters in said complainants' bill mentioned and complained of are matters which may be tried and determined at law, and with respect to which the said complainants are not entitled to any relief from a court of equity, and these defendants hope that they shall have the same benefit of this defense as if they had demurred to the complainants' bill."

Georgia.—In *Martin v. Bartow Iron Works*, 35 Ga. 320, it was held that a general demurrer in the following form is sufficient, "and the plaintiff, by her attorneys, Hammond, Mynatt and Welborn, says that the second, third, fourth, seventh, eighth and ninth pleas are not sufficient in law."

Indiana.—"The approved form of a demurrer to a plea in abatement is that the plea does not state facts sufficient to quash the complaint or writ. In a criminal case the proper form would be that the plea did not state facts sufficient to quash the indictment, information, or writ, or to abate the action. 1 Chitty, Pleading (16th Am. ed.), *698." *State v. Katzman*, 161 Ind. 504, 69 N. E. 157.

A demurrer in the following form: "The plaintiffs demur separately to each, the second, third and fourth paragraphs of the answer of the defendant, and for cause of demur say that neither of said paragraphs states facts sufficient," is sufficient to call in question the sufficiency of such paragraphs as a defense. *Ross v. Menefee*, 125 Ind. 432, 25 N. E. 545.

New York.—A demurrer to a counterclaim on the ground "that said counterclaim is not of the character specified in section 501 of the Code of Civil Procedure," is sufficient. *Eckert v. Gallien*, 41 App. Div. 83, 58 N. Y. Supp. 83.

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